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PRIVATE PROPERTY RIGHTS AND THE ENVIRONMENT AFTER PALAZZOLO

JAMES S. BURLING*

Abstract: With the ascendancy of environmentalism in American law has come a renewed focus on private property rights. That in turn has rekindled the debate over whether our ability to use private property is a fundamental right rather than an essentially revocable right that derives from the government. This debate was recently played out in Palazzolo v. Rhode Island where the United States Supreme Court addressed several elements of regulatory takings doctrine: When is a claim against government ripe? Does an acquirer of already regulated property have the same rights to challenge the regulation and bring a takings claims as the owner at the time the regulations were adopted? Whether there can be a regulatory taking if some use and value remains in the property, albeit a greatly diminished use and value, or if use and value is diminished on only a portion of a property.

This Article focuses on these questions in light of the Supreme Court’s holdings in Palazzolo, as potentially modified in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency. Attention will be focused on the role that environmental protection concerns play in determining whether a regulation constitutes a regulatory taking, including a discussion of wetlands and the public trust doctrine.

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And it is not without reason that [man] seeks out and is willing to join in society with others who are already united, or have a mind to unite for others who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name "property."¹

[It] is annexed to the Soveraigntie, the whole power of prescribing the Rules whereby every man may know, what Goods he may enjoy and what Actions he may doe, without being molested by any of his fellow Subjects: And this is it men call Propriety.²

The State may not put so potent a Hobbesian stick into the Lockean bundle.³

INTRODUCTION

The battle over property rights in America has rekindled an age-old debate: whether our legal system is based upon the assumption that man uses and has dominion over property for his own benefit, limited only by the proviso that no harm is done to the public, or whether property can be put to private beneficial use only with the consent of the sovereign, and that "private" property is held subject to an inchoate trust for larger societal interests. In the traditional American view, the former philosophy has held sway over the latter: property is seen to be not only an economic boon, but a key ingredient of American liberty—where individual rights are sacrosanct over the needs of the group. But there are those who are uncomfortable with this view and who suggest it is an anachronism in this Age of the Environment.⁴ Because any use of any property has some measurable, or at least some spiritual, environmental effect, critics advocate the adoption of a legal philosophy that would make the use and ownership of property subject to common consent. These advocates point to riparian property as a model. Aquatic resources such as riparian land and wetlands are already to some degree imbued with public concerns, and may arguably be subject to navigational servitudes, the public trust doctrine, and even, some suggest, the law of custom. Those in favor of greater state intervention in the use of property wish

to strengthen such public rights in aquatic resources and expand their application to dry land. Those who argue in favor of greater respect for individual property rights emphasize the limitations on such public rights in aquatic resources, and emphasize that whatever public rights may exist should be strictly confined to riparian lands. Thus, it is often over aquatic resources that the battle between the competing visions of property is most keenly fought. The case of Palazzolo v. Rhode Island\textsuperscript{6} may be the most significant skirmish in this war in many years—and one that firmly rejects the vision of property as a state derived benefit that can be altered at will by the State.\textsuperscript{5}

When John Locke first described the fundamental nature of property as being those rights and liberties that predate sovereign power, he pointedly noted that the sovereign’s primary duty is to protect the property of the people. When the sovereign fails in this duty, the legitimacy of the sovereign is called into question.\textsuperscript{7} This view stands in marked contrast to the competing absolutist philosophy of government of his day, best known today through the work of Thomas Hobbes. Hobbes believed that because no man had security in property before such rights were surrendered to a powerful sovereign, all claims to liberty and property can be fulfilled only at the sufferance of that sovereign.\textsuperscript{8}

Indisputably, having had their fill with one absolute sovereign, the Framers of the Constitution were firmly predisposed to the philosophy of Locke and were very much aware of the need to preserve

\textsuperscript{5} 533 U.S. 606 (2001).

\textsuperscript{6} Subsequent to the writing of this Article, the Supreme Court issued an opinion in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002), which held in a self-described “narrow” decision that a development moratorium that temporarily deprives an owner of all use of property does not constitute a categorical temporary regulatory taking because some value remained and because there was no physical invasion. See Id. at 1470 (noting that the opinion is of “narrow scope”); id. at 1484 (rejecting categorical rule).

\textsuperscript{7} LOCKE, supra note 1, § 201, at 224, § 222, at 233–34. Lock explained: “Whenever the legislators endeavor to take away and destroy the property of the people, . . . they put themselves into a state of war with the people who are thereupon absolved from any further obedience . . . .” Id. § 222, at 233 (emphasis added).

\textsuperscript{8} See generally HOBES, supra note 2, at ch. 13–19, at 183–239. In contrast to Locke’s “war with the people,” Hobbes wrote: “[W]ithout a common Power to keep them all in awe [i.e. government], they are in that condition which is called Warre; and such a warre, as is of every man against every man. . . . And the life of man, solitary, poore, nasty, brutish, and short.” Id. ch. 13, at 185–86. Thus, it is “necessary[] to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.” Id. ch. 14, at 190 (emphasis omitted).
rights in property.\textsuperscript{9} Indeed, our Constitution was but the latest manifestation of the long-standing natural law understanding that an individual’s property should not be taken without compensation.\textsuperscript{10} Thus, under the Lockean theory of government, which underpins our Constitution, property is an individual right derived from the labor of individuals.\textsuperscript{11} It is inherently possessed by the people, and not born of government largesse—whether the property be money, real estate, or another manifestation.

Prodded by the United States Supreme Court, the lower federal and state courts have become increasingly attentive to the plight of property owners as they are confronted with increasing governmental regulation. These courts have begun to award significant monetary damages for “regulatory takings” of property.\textsuperscript{12} Nevertheless, the

\begin{footnotesize}
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\item See, e.g., Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 315 (1996) (stating that Madison “regarded all decisions of economic policy as implicating questions of justice and thus of private rights”).
\item See id. at 314 (asserting that Madison's "concern about the security of private rights was rooted in a palpable fear that economic legislation was jeopardizing fundamental rights of property"). See, e.g., 2 H. Grotius, De Jure Belli Et Pacis, ch. XIV, § VII (William Whewell trans., Cambridge Univ. Press. 1853) ("When ownership, or any other right, has been legitimately acquired by any one, that it may not be taken away from him without cause, is a matter of Natural Law."). See generally, e.g., Bernard H. Siegan, Property Rights: From Magna Carta to the Fourteenth Amendment (2001); This natural law tradition of preserving property against the sovereign is reflected throughout the Continental and British legal tradition. Furthermore, when property is taken “by the Force of Eminent Dominion, there is required ... public utility ... and ... if possible, compensation ... at the common expense.” Id. See also William Blackstone, Commentaries, The Rights of Persons, ch. 1, § III, at 135 (Wayne Morrison ed., 2001) (1783) ("So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community ... [unless] by giving him a full indemnification and equivalent for the injury thereby sustained.").
\item Locke, supra note 1, §§ 28–51, at 134–46. While this description is admittedly a simplistic gloss of a theory of property rights, it is important for anyone dealing with a property rights argument to have a basic understanding of the fundamentals of that right. This could be especially relevant when arguing that something on the outer limits of property rights theory is or is not a protected property right.

From Hobbes to Locke to Marx to Nozick, many individuals have proposed new theories on the relationships between property and society. There are more recent writings on property theory available to the interested reader. See generally, e.g., Robert Nozick, Anarchy, State, and Utopia (1974) (providing a libertarian approach that augments Locke's labor theory with a historical expectations theory); Richard Pipes, Property and Freedom (1999); Siegan, supra note 10 (tracing the history of property rights in the law); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).
\item See generally, e.g., City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) (upholding award of $1.45 million for the temporary taking of 37.5 acres of oceanfront property); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) (upholding $2.6 million damage award for wetlands takings); Whitney Benefits, Inc. v. United States, 926
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trend toward increased government regulation of property shows little sign of abating. Government regulators continually question the existence of a vibrant Lockean tradition in defining property rights, often arguing that rights do not become actualized until the government grants an irrevocable permit. Among government regulators and allied environmental groups, substantial efforts are underway to distinguish, diminish, and otherwise divert the takings “threat.” The doctrine of regulatory takings is also evolving; with each major decision from the United States Supreme Court, landowners, government agencies, and the lower courts attempt to understand the implications and apply that decision to regulatory actions. Also, with each new decision, a host of additional questions is raised.

On June 28, 2001, the Court issued a significant chapter in the saga of regulatory takings with Palazzolo v. Rhode Island. Palazzolo addressed three issues that have been bedeviling the litigation of regulatory takings: When is a takings claim ripe? When does notice of a pre-existing regulation destroy the right to challenge the application of that regulation? And how much use and value may a regulation destroy before compensation is due. This Article shall address each of these issues in light of the decision in Palazzolo.

13 This is reflected, for example, in modern due process jurisprudence where some courts hold that no due process protection attaches until a permit is vested. See, e.g., Triomphe Investors v. City of Northwood, 49 F.3d 198, 203 (6th Cir. 1995) (stating that the right must be vested for due process to attach); RRI Realty Corp., v. Inc. Vill. of Southampton, 870 F.2d 911 (2d Cir. 1989). But see DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592 (3d Cir. 1995) (concluding that ownership of property gives rise to due process protection).


17 Id. at 607–09.
I. Palazzolo: Background of Lower State Court Opinion and Grant of Certiorari

For over forty years, Anthony Palazzolo owned, directly or indirectly, a valuable parcel of property in the ocean resort town of Westerly, Rhode Island. Shore Gardens, Inc. (Shore Gardens), acquired the property in 1959 and 1960. Mr. Palazzolo became the sole owner of Shore Gardens in 1960. The property consists of roughly eighteen acres of wetlands and a small indeterminate amount of uplands. The land was divided into seventy-four parcels in two subdivision map filings that occurred in 1936 and 1959. Just north of the property is Winnapaug Pond, an intertidal pond with an outlet to the Atlantic Ocean. According to the state's biologist, "[I]and uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings." At the time of his application, the vicinity of Mr. Palazzolo's property was developed with vacation homes, mostly on the northern, western, and eastern boundaries of the pond and along the neighboring ocean beach. Mr. Palazzolo's property is bisected by a gravel road and there are several homes in the immediate vicinity; the road and homes were built on fill prior to the 1970s. Like the neighboring homes, the only way to develop Mr. Palazzolo's land is to raise the grade with fill.

In 1971, the Rhode Island Legislature authorized the Coastal Resources Management Council (CRMC) to regulate the filling of coastal wetlands. The CRMC promulgated regulations requiring that any filling of coastal salt marsh, such as that found on Mr. Palazzolo's property, meet certain public interest requirements. For example, Section 130(A) of the Coastal Resources Management Plan (CRMP) states:

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18 For a more complete rendition of the facts with citations to the record, the reader is invited to examine the briefs. These facts are derived from Petitioner's Brief on the Merits, 2000 WL 1742033, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047) [hereinafter Petitioner's Brief on the Merits].


20 Palazzolo, 533 U.S. at 613.

21 See id.

22 Id. at 606.

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

(1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.24

Tellingly, the CRMC has ruled that private housing, and even low-income public housing, does not meet this public interest requirement.25

Prior to the adoption of this regulatory regime, Mr. Palazzolo applied twice to utilize the property, in 1963 and in 1966, to the Department of Natural Resources (DNR) seeking permission to dredge Winnapaug Pond in order to develop the property. The State approved both applications in April of 1971, finding that neither application would "have any significant effect on wildlife."26 Shortly thereafter, however, the State withdrew the approval, and Mr. Palazzolo did not appeal.27

Mr. Palazzolo had an interest in the property through the 1960s and early 1970s as the sole shareholder of Shore Gardens. Eventually, Mr. Palazzolo let the corporation lapse, and its charter was revoked in 1978. At this point, the property "pass[ed] by operation of law to Palazzolo, its sole shareholder."28

After that time, Mr. Palazzolo, now as the owner of the property in his individual capacity, twice more applied for permits to CRMC to fill the property. The first application, filed in 1983, like the one filed in 1963, was to fill approximately eighteen acres of the property.29 Unlike the original applications, this involved no dredging. Mr. Palazzolo

24 See id. (emphasis added).
25 See Petitioner’s Brief on the Merits, supra note 18, at *5.
29 Id. at 711.
expected that approval of this application would allow him to proceed with the development of homes on the seventy-four lots that had been previously subdivided, although the 1983 application was only for the preliminary step of filling the wetlands, not the development of homes. CRMC denied this application on July 12, 1984, and Mr. Palazzolo did not appeal the denial.

In 1985 Mr. Palazzolo applied to fill 11.4 acres; like his 1966 application to DNR, he intended to prepare the site to make it suitable for a family beach recreational area. The plan called for the construction of a fifty-car parking lot with room for boat trailers and the provision of picnic tables, concrete barbecue pits, and portable toilets. This plan was rejected in 1986. CRMC found that, in its natural state, Mr. Palazzolo’s property provided the public benefits of “refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds,” “access of [fauna . . . to cover areas,” and that the property facilitates “the exchange of nutrient/waste products,” and allows “sediment trapping,” “flood storage,” and “nutrient retention.”

Furthermore, the proposal failed to meet various regulatory criteria outlined in CRMC’s CRMP regulations. For example, it found that Mr. Palazzolo’s beach club was in “conflict” with CRMP Section 130(A)(1) because the proposed beach club did not serve “a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests.” Mr. Palazzolo unsuccessfully appealed the denial of the permit.

Based on the four denials over the span of twenty-three years, Mr. Palazzolo sued in 1988 for inverse condemnation, alleging that the property had a net value of $3,150,000. The trial court ruled against Mr. Palazzolo and the Rhode Island Supreme Court upheld the trial court’s decision. The court’s first ground for affirming the trial court’s decision was that Mr. Palazzolo’s claim was not ripe because he failed to apply for “less ambitious development plans.” It found that

30 Id. at 714.
31 Palazzolo, 533 U.S. at 614–15; Tavares, 746 A.2d at 711.
32 Tavares, 746 A.2d at 711.
34 Palazzolo, 533 U.S. at 615 (quoting CRMP § 130(A)(1)).
35 Id. at 616.
36 Id.
37 Tavares, 746 A.2d at 714.
the 1963 and 1983 applications sought to fill the entire eighteen acres of wetlands and (mistakenly) that the beach club applications sought to "fill all of the wetlands except for a fifty-foot strip." The court concluded that Mr. Palazzolo should have filed another application to fill fewer acres of wetlands or to utilize just the upland area of the property.

The court also provided two other alternative bases for affirming the trial court decision. It held that because Mr. Palazzolo acquired the property in 1978 by virtue of the dissolution of Shore Gardens, he had acquired the property after the adoption of the regulations restricting the filling of wetlands and thus "had no reasonable investment-backed expectations." Put another way, "the right to fill wetlands was not part of the title he acquired." The court also found that Mr. Palazzolo "had not been deprived of all beneficial use of his property" because had he developed the upland portion of the land he could have realized some value from the property (approximately $200,000 compared to Palazzolo's estimate of a $3.1 million net value). Alternatively, he could have realized "value in the amount of $157,000 as an open-space gift."

On October 10, 2000, the United States Supreme Court granted certiorari on three questions:

1. Whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.
2. Where a land-use agency has authoritatively denied a particular use of the property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "less ambitious uses" in order to ripen the takings claim.

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58 Id. In fact, the beach club application sought to fill 11.4 acres.
59 Id.
60 Id. at 714–18.
61 Id. at 716.
62 Id. at 717.
63 Tavares, 746 A.2d at 716.
64 Id. at 711, 715.
65 Id. at 715.
3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.\(^{46}\)

On June 28, 2001, the Court ruled in Mr. Palazzolo's favor on the first two issues and rejected his proposed formulation on the third; however it also did not accept the State's contention that the remaining use was enough to avoid a taking.\(^{47}\) Instead the Court remanded the case back to the Rhode Island courts for further analysis on whether the economic impacts on Mr. Palazzolo's property, when weighed against the State's interests, constituted a taking.\(^{48}\) To put these questions into proper context, however, it is necessary to first address the general parameters of regulatory takings.

**II. The Regulatory Takings Doctrine**

The United States Supreme Court has described the basic purpose of the Fifth Amendment's Takings Clause: 49 "The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."\(^{50}\) The Court stated in *Agins v. City of Tiburon*: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."\(^{51}\)

The first prong of this test is *the takings law analog of a due process inquiry*—a determination of whether the regulation advances a legitimate governmental interest.\(^{52}\) Most regulations do advance a legi-
mate governmental interest, although there have been some exceptions. The parallel between the language of due process and the first part of the *Agins* takings formulation should not be taken as a sign that the *Agins* test is anything but a takings test that, when placed before a court, deserves the heightened scrutiny that is appropriate in a takings analysis. More often than not, the legitimacy of the state interests is not in question; regulatory goals in a takings case usually fall

 lan made it clear that a heightened level of scrutiny would apply in the context of a takings analysis. See 483 U.S. at 834 n.3. Although the Court has not generally characterized it as such, this test creates a categorical rule: if a regulation which injures a property right does not advance a legitimate governmental interest there will always be a taking. See Joint Ventures, Inc. v. Dep't of Transp., 563 So. 2d 622, 625 (Fla. 1990). But see Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54 (Fla. 1994) (stating that the first prong is really a due process issue); but see also Villas of Lake Jackson, Ltd. v. Leon County, 121 F.3d 610, 614 (11th Cir. 1997) (harmonizing the Eleventh Circuit's previous and somewhat tortured categorization of takings claims including what it called "due process takings claim"). In Villas we now learn that the "Court in recent decisions has likewise abandoned the distinction between takings claims and a due process takings theory." But see City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (rejecting federal amici attempt to revisit this takings test and finding that certain jury instructions were consistent with "the requirement that a regulation substantially advance legitimate public interests").

53 *Nollan*, 483 U.S. at 834, 837. *Nollan* struck down a regulatory fiat which required a property owner to give up beach front property in exchange for a building permit. The Court found that the requirement was an "out-and-out plan of extortion" and did not advance a legitimate regulatory goal. *Accord* Dolan v. City of Tigard, 512 U.S. 374, 398 (1994) (finding that Fifth Amendment's nexus requirement calls for "individualized" determination of "rough proportionality" between condition and impact from land use). There are examples of courts striking down a regulation because it did not substantially advance a legitimate interest. See Del., Lackawanna & W. R.R. Co. v. Town of Morristown, 276 U.S. 182, 195 (1928) (concluding that the taking of railroad property for a taxi stand failed to advance a legitimate governmental interest); Richmond v. City of Honolulu, 124 F.3d 1150, 1164 (9th Cir. 1997) (striking down a condominium land rent control ordinance because it failed to substantially advance a legitimate governmental interest); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1065 (N.Y. 1989) (overturning restrictions against converting single-room occupancy hotel rooms). See generally Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) (reviewing each reason given for a permit denial and finding inadequate justification for the permit denial, leading to the conclusion that there had been a taking), aff'd, 526 U.S. 687 (1999); Manocherian v. Lenox Hill Hosp., 479 N.E.2d 479 (N.Y. 1994) (striking down housing regulation on alternate "substantially advance" and "economic impact" prongs). But see Armendariz v. Penman, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (finding that no due process remedy exists if takings remedy available); Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999); Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971, 974-76 (N.Y. 1999) (equating "substantially advance" standard with more deferential due process standard). But see generally Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997) (finding that allegations that rent control law failed to substantially advance any legitimate governmental interests does not create a cause of action under takings doctrine so long as a due process remedy might exist).
within the "otherwise proper" rubric of First English Evangelical Lutheran Church v. County of Los Angeles, that the Takings Clause "is designed . . . to secure compensation in the event of otherwise proper interference amounting to a taking."\textsuperscript{54}

The point of the first part of the \textit{Agins} test is that when government interferes with the use and enjoyment of property in a way that does not achieve any legitimate governmental goals then the government has usurped, for all practical purposes, the incidents of ownership.\textsuperscript{55} A property owner, for example, is not required to provide a reason, legitimate or otherwise, to justify the owner's decision to put private property to a particular lawful use. Nor does the owner have to provide a reason for \textit{not} putting property to a particular use. And so when government prohibits a landowner from putting property to a particular use, and when government cannot provide a legitimate reason for the prohibition—that is when it fails to substantially advance a legitimate governmental interest—then the government is acting in the manner of an owner. By restricting or prohibiting the use of private property without a valid justification, the government assumes the mantle of an owner. Thus, it is appropriate to recognize that the first prong of the \textit{Agins} test as a \textit{takings} standard.

By and large, however, the second prong, known as the \textit{economic impact test}, has proven most effective for property owners in bringing takings claims. In \textit{Penn Central Transportation Co. v. City of New York},\textsuperscript{56} the Court found three factors relevant to the inquiry of whether a regulation effects a taking: (1) the economic impact of the regulation; (2) its interference with distinct investment-backed expectations; and (3) the character of the governmental action.\textsuperscript{57} The interplay of these three factors will determine whether a regulation has violated the "economically viable use" test of \textit{Agins}. In addition, \textit{Lucas v. South Carolina Coastal Council} amplified our understanding of this second prong of the \textit{Agins} takings inquiry by expanding the terminology to include such formulations as "economically beneficial or productive use of land."\textsuperscript{58}

There are also special categorical circumstances where a regulation will almost certainly be a taking, as when there is an actual per-

\textsuperscript{54} 482 U.S. 304, 315 (1987).
\textsuperscript{55} \textit{Agins}, 447 U.S. at 260–61.
\textsuperscript{57} \textit{Penn Cent.}, 438 U.S. at 124.
\textsuperscript{58} 505 U.S. 1003, 1015, 1017, 1019 (1992).
manent "physical invasion" of the property or when 100 percent of the economically beneficial or productive use of the property is taken.60

In one of the most significant takings decisions, the Supreme Court in _Lucas_ refuted the notion that a regulation designed to protect the public interest by preventing harm is automatically immune from takings liability.61 In other words, the theory held that even if a regulation totally destroyed the value of property, no damages could be awarded if the regulation prevented harm.62 The Supreme Court disagreed.63 Instead, it first noted that it is of course true that no one has the right to develop property in a way that will injure a neighbor or cause a nuisance.64 However, the Court continued, a regulation that destroys the use and value of private property is always subject to scrutiny in accordance with the Fifth Amendment—unless the regulation merely codifies the existing "common law nuisance" limitations on property.65 Thus, if a landowner never had the right to build a dam that would flood a neighbor’s property in the first place, a regulation that also prevented that same dam building activity would not give rise to a taking. However, a regulation that restricted an otherwise permissible use, for instance a regulation designed to preserve open space or

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59 See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982) (finding a taking where a cable television wire was placed on an apartment building); _Kaiser Aetna_, 444 U.S. at 179–80 (finding a taking where regulation allowed trespasses onto property); _Pumpelly v. Green Bay & Miss. Canal Co._, 80 U.S. (13 Wall.) 166 (1871) (finding a taking where water from government dam backs upon private property). The existence of a "physical invasion" relates to the "character" prong of the _Penn Central_ test. See 438 U.S. at 124.

60 A 100 percent loss of the beneficial or productive use is a classic example of a regulation that deprives an owner of economically viable use. See _Lucas_, 505 U.S. at 1015. By "categorical taking" the Supreme Court meant that the other _Penn Central_ balancing factors need not be considered. _Id. But see Good v. United States_, 189 F.3d 1355 (Fed. Cir. 1999) (holding that an alleged loss of all economically viable use did not obviate a need to consider "investment-backed expectations").

61 505 U.S. at 1028.

62 Not only did the state court in South Carolina follow this theory in _Lucas v. South Carolina Coastal Council_, but up until the time of the Supreme Court’s decision, it was becoming the standard in other states as well. See 404 S.E.2d 895, 900 (S.C. 1991), rev'd 505 U.S. 1003 (1992). For example, in _Presbytery of Seattle v. King County_, 787 P.2d 907, 912–14 (Wash. 1990), the Washington Supreme Court held that there could be no taking if a regulation "prevented harm" because only regulations that "enhance a publicly owned right in property" could give rise to a taking. This analysis could not have survived _Lucas_, although it was repeated in _Margola Associates v. City of Seattle_, 854 P.2d 23, 34 n.7 (Wash. 1993). See also Guimont v. Clarke, 854 P.2d 1, 11 n.5 (Wash. 1993).

63 _Lucas_, 505 U.S. at 1028.

64 _Id._ at 1022.

65 _Id._ at 1029–30.
to protect fisheries from natural erosion, may well give rise to a taking, especially if the regulation destroys 100 percent of the economically beneficial or productive use of the property.\textsuperscript{66}

In accordance with \textit{Lucas}, the first step is to define the property right and analyze the extent of the allowable uses under traditional common law. As in \textit{Lucas}, building homes in an existing subdivision is very likely to be an allowable use, but building a nuclear reactor on a fault zone would not be.\textsuperscript{67}

Next, the regulation itself should be analyzed. If it does not substantially advance a legitimate governmental interest, there is a taking.\textsuperscript{68} Compensation must be paid for the time during which the regulation took the property.\textsuperscript{69} If the regulation is not rescinded, the government agency may be responsible for the full fair-market value of the affected property, meaning the value as if there were no regulatory restrictions in place.\textsuperscript{70}

\textsuperscript{66} \textit{Agins v. City of Tiberon}, 447 U.S. 255, 260 (1980).

\textsuperscript{67} \textit{First English Evangelical Lutheran Church v. County of Los Angeles}, 482 U.S. 304, 319 (1987). Such compensation may be, for example, the rental value of the property during the time in which the regulation denied use of the property. See, e.g., \textit{Yuba Natural Res., Inc. v. United States}, 904 F.2d 1577 (Fed. Cir. 1990); \textit{Yuba Natural Res., Inc. v. United States}, 821 F.2d 638 (Fed. Cir. 1987); \textit{see also Wheeler v. City of Pleasant Grove}, 833 F.2d 267 (11th Cir. 1987) (valuation in temporary taking found by comparing before and after fair market value and multiplying by fair rate of return), \textit{on appeal after remand}, 896 F.2d 1347 (11th Cir. 1990) (calculation of temporary takings damages). In \textit{Del Monte Dunes}, the Court upheld an award of damages for a temporary taking. The state had purchased the property while the legal dispute was ongoing; the purchase merely converted the permanent take into a temporary one. \textit{See generally} 526 U.S. 687 (1999). For a useful discussion of temporary regulatory takings, see \textit{Hendler v. United States}, 952 F.2d 1364 (Fed. Cir. 1991), which analogizes the length of time a vehicle is parked on property to the significance of a temporary taking finding \textit{de minimis} intrusions not to be takings, but long-term, indefinite invasions to be takings. \textit{But see} \textit{Hendler v. United States}, 36 Fed. Cl. 574 (1996) (finding only nominal damages on remand), \textit{aff'd}, 175 F.3d 1374 (Fed. Cir. 1999); \textit{Bass Enterprises Production Co. v. United States}, 133 F.3d 893 (Fed. Cir. 1998) (denial of drilling permits on leases slated for possible condemnation at some indefinite time in future may be a temporary taking; court notes that "limited duration" of taking relevant to damages but not liability).

No taking was found on remand in \textit{Bass Enterprises Production Co. v. United States}, 48 Fed. Cl. 621 (2001), because drilling permits could not have been profitable. See \textit{also} \textit{Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency}, 216 F.3d 764 (9th Cir. 2000) (rejecting the idea that moratoria can lead to temporary taking), \textit{reh'g denied, reh'g en banc denied}, 228 F.3d 998 (9th Cir. 2000) (The five judges who joined dissenting in the denial of the rehearing \textit{en banc} stated that "[t]he panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses First English . . . and adopts Justice Stevens's First English dissent."), \textit{aff'd}, 122 S. Ct. 1465 (2002).

\textsuperscript{70} Other courts have offered extensive discussions of valuation in the context of regulatory takings. \textit{See generally} \textit{E. Minerals Int'l, Inc. v. United States}, 39 Fed. Cl. 621 (1997).
Next, the impact of the regulation on the affected property should be analyzed. If the regulation “denies all economically beneficial or productive use of land”\(^{71}\) or if it leaves 100 percent of the property “economically idle”\(^{72}\) contrary to the owner’s “reasonable investment-backed expectations,”\(^{73}\) then the *Lucas* categorical test is invoked and compensation must be paid.\(^{74}\) If only a portion of the beneficial or productive use of the parcel of property is completely destroyed, or if only a distinct severable property interest (such as a mineral right) is completely destroyed, then a court may find that there is a “partial taking.”\(^{75}\)

If less than 100 percent of the productive or beneficial use is destroyed, the court will weigh various factors (including the economic

\(^{71}\) See *Lucas*, 505 U.S. at 1015.

\(^{72}\) Id. at 1019.

\(^{73}\) See id. at 1034 (Kennedy, J., concurring).

\(^{74}\) Id. at 1015.

\(^{75}\) The Court in *Lucas* expressly deferred consideration of the issue of awarding compensation for partial takings. *Id.* at 1016 n.7; see Part VIII.C infra. However, in *Hodel v. Irving*, 481 U.S. 704 (1987), a statute which purported to extinguish certain inheritance rights in Native American allotments was found to be a taking of that particular property right. *Accord* Youpee v. Babbitt, 519 U.S. 234 (1997) (similar statute struck down). Similarly, *First English* may be considered as affirmation of a partial taking in time, that is a taking of the property for the period in which a regulation is in effect. 482 U.S. 304, 319 (1987). *But see Tahoe-Sierra*, 122 S. Ct. at 1483 (rejecting “disaggregating” property into temporal segments”). The *Tahoe-Sierra* Court did not dispute that damages must be paid for temporary takings, but it did cast doubt on whether a temporary regulation could effect a taking. Lastly, in “physical invasion” cases, even where only a small portion of property is destroyed, the state’s action has always been considered to be a taking. *See*, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
impact, interference with investment-backed expectations, and the character of the regulation) in what has been called an "ad hoc" and "case-by-case" analysis to sort out whether "justice and fairness" call for a taking. The fact intensive nature of the inquiry necessitates an active role for the courts in regulatory takings litigation.

III. THE COURT AND REGULATORY TAKINGS

As with all legislative incursions on constitutional rights, the courts have a duty to correct the deprivation of property rights:

In taking claims the judge does not sit as super legislator or executive, intent on preventing regulation that "goes too far," as a facile reading of Justice Holmes might imply. The job of the court is to deal with a concrete claim, by an aggrieved person or persons, that their constitutional rights under the Fifth Amendment have been violated by some governmental action.

In an action against the United States that alleges a taking, the proper remedy is not to find that a regulation is unconstitutional because it takes without payment of just compensation, but, instead, is to require the payment of just compensation in accordance with any applicable statutory mechanism for providing such just compensation.

Under federal law, the Tucker Act provides such a remedy. So long as the Tucker Act is an available remedy, the Supreme Court has found that federal courts should not attempt to invalidate a federal

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76 Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). For an example of a case where a wetland regulation did not destroy all value of property, but a taking was found nevertheless, see Formanek v. United States, 26 Cl. Ct. 332 (1992). See also Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21 (1999) (finding a 73 percent diminution a taking and awarding $752,000, plus interest, from 1980); infra notes 274, 278.

77 Hage v. United States, 35 Fed. Cl. 147, 150 (1996) (citation omitted). For an extended treatment of the role of the courts in regulatory takings litigation, see Bernhard H. Siegan, Property and Freedom, the Constitution, the Courts, and Land-Use Regulation 47-74 (1997).

78 See generally Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (finding a taking under the Tucker Act).

action that takes property.80 When money damages are not available, then an action for declaratory relief may be appropriate.81 The Tucker Act provides no right to a jury trial on the question of liability in a federal takings claim.82

For an alleged regulatory taking by a state government, a claimant must first pursue state takings remedies before utilizing a federal court remedy.83 In order for a court to know whether a governmental

80 This rule may be observed more in the breach than reality. See, e.g., Bay View, Inc. ex rel. Alaska Native Vill. Corps. v. Ahtna, Inc., 105 F.3d 1281 (9th Cir. 1997):

The Supreme Court is partly to blame for this confusion, as it has sometimes reached the merits of takings claims against the United States and at other times refused . . . . Adding to the confusion, many courts have viewed the Tucker Act as a jurisdictional hurdle against the payment of damages but not as an impediment to equitable relief . . . . This, of course, is totally wrong. Id. at 1285–86 (citations omitted); see also Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670, 672 (7th Cir. 1992) (proper remedy to requirement to destroy salmonella infected birds that allegedly takes the birds is suit in the Court of Federal Claims, not having the regulation overturned in district court). In an unusual turn of events, in Cooley v. United States, the government granted the landowner a scaled back development permit, after it had categorically rejected the landowner’s original application, and after the landowner had filed a claim for inverse condemnation. 46 Fed. Cl. 538, 539–41 (2000). The Court of Federal Claims was unimpressed by the government’s attempt to avoid liability, finding that it lacked the authority to grant the permit that had never been sought. Id. at 547–49.


For articles discussing the practical difficulties of ripeness in federal court, see generally Michael M. Berger, Supreme Bait and Switch: The Ripeness Ruse in Regulatory Takings, 3 WASH. U. J.L. & POL’y 99 (2000); Timothy V. Kassouni, The Ripeness Doctrine and the Judicial
action has actually taken property, a prospective claimant must obtain a final administrative decision before filing a takings claim. This ripeness requirement has proven to be an ineluctable burden for property owners asserting takings claims. Indeed, this issue is at the heart of *Palazzolo v. Rhode Island*, discussed in Part IV infra. Once past this procedural hurdle, a claimant is entitled to a jury trial in trying a due process or takings claim against a state or local government in federal court under 42 U.S.C. § 1983.

As a result of development of takings law, landowners who employ the proper regulatory procedures are beginning to reap substantial judgments in their favor from the courts. Prior to 1990, there were no significant cases where the federal government was found liable for a taking. That all changed with *Whitney Benefits Inc. v. United States*, where the United States was found responsible for $60 million in takings damages, plus interest, that ultimately exceeded $200 million. In that case, the Office of Surface Mining refused to grant a permit to the owner of a valuable coal deposit in the Powder River Basin as a result of the Surface Mining Control and Reclamation Act of 1977. The case was settled in early 1995, when the government agreed to pay plaintiffs $200 million for the taking.

The *Whitney Benefits* precedent was bolstered by the holdings in a number of wetlands takings cases. For example, in *Beuré-Co. v. United States*, the property owner survived a summary judgment motion on a takings claim that arose when the Army Corps of Engineers denied a

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87 926 F.2d 1169, 1178 (Fed. Cir. 1991).
permit to fill a calcareous fen bog\textsuperscript{91} in Minnesota. In early 1992, the federal government settled and paid $761,818 for the wetland.\textsuperscript{92} And in \textit{Bowles v. United States},\textsuperscript{93} a taking was found after the Army Corps of Engineers denied a wetlands dredge and fill permit in 1984 to the owner of a residential lot. The permit was necessary for a septic system installation which was necessary to build a single-family home.\textsuperscript{94} Fifty-five thousand dollars, plus interest, was awarded to the owner of the lot.\textsuperscript{95} In \textit{Loveladies Harbor, Inc. v. United States},\textsuperscript{96} the Federal Circuit upheld a $2.6 million takings award arising out of a dredge and fill permit denial. In the fifth iteration of \textit{Florida Rock},\textsuperscript{97} the Court of Federal Claims awarded $752,444, plus interest, from the date of taking for the taking of ninety-eight acres of a wetland limestone quarry. In \textit{Cooley v. United States},\textsuperscript{98} the same court awarded $2,065,200.42, plus interest, for taking of thirty-three acres of wetlands. Finally, in one of the very few cases finding a taking as a result of the impact from the Endangered Species Act,\textsuperscript{99} the Court of Federal Claims found a taking as a result of the protection of two species of fish.\textsuperscript{100} As the following sections will show, however, there have been numerous cases where landowners have not prevailed because of a variety of procedural and substantive barriers erected by the courts.

\section*{IV. The Ripeness of the Problem: The United States Supreme Court Requires a Takings Claim to Be Ripe}

In \textit{Palazzolo}, the Rhode Island Supreme Court began by holding that Mr. Palazzolo’s “claim for [just] compensation was not ripe for review.”\textsuperscript{101} Traditionally, courts have required litigants to utilize administrative procedures in order to determine exactly what can, and

\textsuperscript{91} In geologic terms, a calcareous fen bog is a wetland in limestone topography. \textit{See id.} at 43 n.2.


\textsuperscript{93} 31 Fed. Cl. 37 (1994).

\textsuperscript{94} \textit{Id.} at 43–4.

\textsuperscript{95} \textit{Id.} at 53.

\textsuperscript{96} 28 F.3d 1171 (Fed. Cir. 1994).

\textsuperscript{97} 45 Fed. Cl. 21 (1999).

\textsuperscript{98} 46 Fed. Cl. 538 (2000).


what cannot, be done with a disputed parcel of property. After all, until the parties know what uses have been denied, how can the court know whether there has been a taking? The United States Supreme Court held in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*\(^\text{102}\) that a takings litigant must obtain a final administrative decision from the permitting agency before bringing a takings action. The Court further held that if the alleged regulatory taking was done by a state or local governmental agency, then a landowner must utilize the state courts before going to federal court.\(^\text{103}\) In *Palazzolo*, the state supreme court believed that Mr. Palazzolo had not met the first test of *Williamson County*, finding that Mr. Palazzolo should have sought additional permits.\(^\text{104}\)

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,\(^\text{105}\) the Supreme Court seemed to be influenced at oral argument by the fact that the landowner had applied for at least five permits, with the parameters of each subsequent application tailored to the city’s concerns and suggestions that it provided on each previous denial.\(^\text{106}\) There is no set rule governing how many applications is enough for a claim to be ripe. Rather, the Court has stressed that there must be certainty regarding what uses are available for the property.\(^\text{107}\) As articulated in *Williamson County*, the question is whether “the administrative agency has arrived at a final, definitive position regarding how it will


\(^{103}\) *Id.* at 194–97.

\(^{104}\) *Tavares*, 746 A.2d at 714.

\(^{105}\) 526 U.S. 687 (1999).

\(^{106}\) This is indicated in the exchange between the Court and the counsel for the petitioner-city, George Yuhas:

MR. YUHAS: . . . This case is not atypical in some respects. The city was faced with a complex decision it had to reconcile competing interests, sift through facts, and exercise its discretion and judgment, and it did so.

QUESTION: Five times.

MR. YUHAS: It did so, Your Honor. It was a complicated project . . .

QUESTION: This was the fifth plan presented, right? Each one was successively rejected for a different reason each time?

MR. YUHAS: The initial rejections were for density, and the fifth one was rejected down for two reasons only. There was access, and there was the restoration plan, and that was the first time that—in fact, the city council had faced the question as to whether there was an adequate recommended plan.

QUESTION: And this is typical, you say?


\(^{107}\) See *Williamson County*, 473 U.S. at 191.
apply the regulations at issue to the particular land in question." 108 In MacDonald, Sommer & Frates v. County of Yolo, 109 the Court stressed that a case is ripe if "the type and intensity of development legally permitted" is known. 110 Likewise, "[t]he demand for finality is satisfied [when there is] . . . no question here about how the "regulations at issue [apply] to the particular land in question." 111

Landowners who only halfheartedly pursue the permit process have difficulty proving the existence of a taking. As exemplified in Supreme Court holdings from Agins v. City of Tiburon, 112 and United States v. Riverside Bayview Homes, Inc., 113 to MacDonald, Sommer & Frates v. County of Yolo, 114 there is not a ripe takings claim until the landowner first pursues the administrative permitting process and receives a final decision. State courts have adhered to this rule as well. 115

In Suitum v. Tahoe Regional Planning Agency, 116 the Tahoe Regional Planning Agency imposed an artificial finality requirement upon an elderly landowner. Specifically, after denying her a permit to build her retirement home on a half-acre lot, the agency suggested that she could not bring an inverse condemnation action until she tried to sell a group of transferable development rights in order, supposedly, to determine the value of the affected lot. 117 The Supreme Court dis-

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108 Id.
110 Id. at 348.
112 447 U.S. 255, 260-61 (1980) (holding that enactment of zoning scheme alone does not take property and the owner must apply for permits).
113 474 U.S. 121, 127 (1985) (finding that designation of property as a wetland is not, in and of itself, a taking; the landowner must first apply for permits).
114 See generally 477 U.S. 340 (finding a taking only after a final administrative decision has been rendered).
117 Id. at 792.
agreed and found that she did not have to try to sell the credits before she could bring her takings claim to court.\textsuperscript{118}

In the case of Mr. Palazzolo, the Supreme Court held that his case was ripe. First, the Court found that based upon:

\begin{quote}
[T]he unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property.
\end{quote}

\ldots

\begin{quote}
\ldots[T]he Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands. \ldots On the wetlands there can be no fill \ldots for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.\textsuperscript{119}
\end{quote}

In essence, the Court has embraced a futility exception to the law of regulatory takings. With respect to the uplands portion of the property, the Court found that since all parties agreed that the uplands could be developed to allow a single $200,000 home, and since the State's assertions of ambiguity on this point were improperly raised, "there is no genuine ambiguity in the record as the extent of permitted development on petitioner's property, either on the wetlands or the uplands."\textsuperscript{120}

Remarkably, it appears that the parties' agreement may have been premature. After the United States Supreme Court issued its decision, and before the Rhode Island courts began proceedings on remand, Anthony Palazzolo applied to build a single home on the upland turnaround area, allegedly worth $200,000.\textsuperscript{121} On August 30, 2001, the Rhode Island Department of Environmental Management

\textsuperscript{118} \textit{Id.} at 740–42. \textit{But see} Good v. United States, 39 Fed. Cl. 81, 108 (1997), aff'd, 189 F.3d 1355 (Fed. Cir. 1999). In \textit{Good}, the Court of Federal Claims stated that \textit{Suitum} held that the existence of transferable development rights was relevant to determine whether there had been a taking. However, the Court in \textit{Suitum} expressly said that it was not reaching that particular issue. 520 U.S. at 728.

\textsuperscript{119} \textit{Palazzolo}, 533 U.S. at 619, 221.

\textsuperscript{120} \textit{Id.} at 623.

\textsuperscript{121} Telephone Interview with Anthony Palazzolo (Aug. 30, 2001).
denied the permit, claiming the property was unsuitable for a residential septic system. 122

What may become the most significant aspect of the ripeness holding in Palazzolo is the suggestion that once a landowner has a meaningful permit application denied, the burden shifts to the government to indicate what, if any, other uses of the property may be available. 123 Several times in the opinion the Court implies that the government must “explain” or give an “indication” of its potential acceptance of another or a reduced use. 124 First, the Court implied that a landowner must first submit an application to provide the agency with an opportunity to “explain” the reach of its restrictions: “[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.” 125 Next, after noting that the 11.4 acre beach club had been rejected under a “compelling public purpose” standard the Court notes, “There is no indication the Council would have accepted the application had petitioner’s proposed beach club occupied a smaller surface area.” 126

Finally, the Court put it more directly later in the opinion when it found that “the limitations the wetland regulations imposed were clear from the Council’s denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed.” 127 The lesson here is that once an applicant submits and has rejected a meaningful application to put real property to an economically viable use, an agency must at the very least come forward and suggest other uses that might be available for the property. Such uses must, of course, be economically meaningful. But the agency also must do this in good faith in order to avoid the spectacle of Del Monte Dunes, where the applicant pursued five successive and increasingly restricted applications at the city’s suggestion. 128

122 Id.
123 See Palazzolo, 533 U.S. at 620–21.
124 See id.
125 See id. at 620 (emphasis added).
126 Id.
127 Id. at 625.
V. Requirement of the Lower Courts That Takings Challenges to Wetlands Regulations Be Ripen

In the context of the regulation of wetlands, the lower state and federal courts have had many opportunities to consider the ripeness question. For example, in *Howard W. Heck & Associates, Inc. v. United States*, a property owner was unable to utilize a wetland in New Jersey because the Army Corps of Engineers could not process his permit. The Corps was unable to process his permit because the owner had not acquired the necessary state water quality certification as part of the wetlands permitting process. The State had previously refused to provide the water quality certification because the owner declined to enter into an exhaustive (and he thought futile) discussion of project alternatives. The Federal Circuit held that because there was no final agency decision there could be no claim for a taking. The court also rejected the argument that the permitting process was “futile.”

The Court of Federal Claims found no taking when a wetland permit necessary to build a fifty-nine-acre resort project was denied in *Plantation Landing Resort, Inc. v. United States* because (1) the plaintiff had not proved ownership of land below the mean high water mark; (2) the plaintiff failed to renew a coastal use permit from the State of Louisiana; and (3) the plaintiff had not shown a denial of all economically beneficial and productive use. The court found it unnecessary to weigh the factors for a noncategorical taking which were outlined in *Penn Central Transportation Co. v. City of New York*. This is somewhat inexplicable because, as discussed in Part II supra, the most logical reading of *Lucas v. South Carolina Coastal Council* and

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129 134 F.3d 1468 (Fed. Cir. 1998).
130 Id. at 1470–71.
131 Id. at 1471 n.4.
132 See id. at 1471–72.
133 Id. at 1472.
135 Id. *But see* City Nat'l Bank of Miami v. United States, 33 Fed. Cl. 224 (1995) (no taking because local agency would have denied permits); City Nat'l Bank of Miami v. United States, 30 Fed. Cl. 715 (1994) ( takings claim cognizable even without state permits because the Army Corps of Engineers would have denied permit with or without the permits); Formanek v. United States, 26 Cl. Ct. 332 (1999) (taking found despite lack of state permits because the evidence was clear that such permits would have been granted if applied for).
Penn Central would be to engage in the multifactor balancing test after finding that there is no categorical taking.

The Court of Federal Claims was initially more sympathetic to the plaintiff in City National Bank of Miami v. United States,137 where the owner of a 1247-acre tract of land applied for a dredge and fill permit necessary to mine limestone located on a 190-acre wetland. Here, the plaintiff survived a summary judgment motion because the court concluded that the Army Corps of Engineers would have denied the project with or without the state certification.138 In other words, the case was ripe. In the first Florida Rock, Inc. v. United States appellate decision,139 the court found that a takings claim could only be litigated on the ninety-eight acres that was the subject of the denied permit, despite the fact that the plaintiff owned a total of nearly 1500 acres. Until permits were applied for on the additional acreage, a takings claim on these additional parcels would not be ripe. However, in a subsequent proceeding the court concluded that it would have been futile to apply for a permit to use the remaining 1462 acres, making the claim ripe.140

In City National Bank the court allowed the question to go to trial of whether all 1247 acres had been taken despite the fact that the permit denial was for only 190 acres.141 The court distinguished the early iteration of Florida Rock (finding the question of the 1462 acres not ripe), because the permit denial in City National Bank expressly referred to all 1247 acres.142 The court did not say that those acres had been taken, but did allow the trial to proceed on all 1247 acres.143 However, in a subsequent decision, the court found that the federal government was not responsible for a taking, because local regulation would have prohibited the limestone mining anyway.144

There are practical limits to the finality requirement, usually put in terms of the one meaningful application standard. If the available permitting process is too burdensome, a futility exception might ap-

137 30 Fed. Cl. 715.
138 Id. at 720.
139 791 F.2d 893, 904–05 (Fed. Cir. 1986).
141 30 Fed. Cl. at 720–21.
142 Id.
143 Id.
ply. For example, in *Hage v. United States* the court stated: "[T]he law does not require plaintiffs to apply for a permit if the procedure itself is not a reasonable variance procedure . . . and is so burdensome that it effectively deprives the property of value." 

Likewise, in *East Cape May Associates v. New Jersey Department of Environmental Protection*, the court noted that to "require a developer to submit a multiplicity of successive applications in order to attempt to divine, without administrative guidance, what, if any, development of its property will be permitted would be inconsistent with due process of law." The "one meaningful application" rule has been adopted by the Ninth Circuit.

However, an equivocal permit denial from the Army Corps of Engineers may not be enough to save the Corps from takings liability. A denial of a permit "without prejudice" is still final agency action that may take property. In *Cooley v. United States*, the Corps apparently began to worry about its liability after a takings claim had been filed by a landowner who had been denied a permit. Following the advice of counsel, on the eve of trial, the Corps issued the landowner a scaled-back permit that he had not requested. The Court of Federal Claims was unimpressed, ruling that the Corps had no authority to issue the scaled-back permit and thereby attempt to convert the permanent taking into a temporary one.

However, if the Corps returns a permit application with a reasonable request for more information, the landowner must provide that

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145 See, e.g., Hochne v. County of San Bernadino, 870 F.2d 529, 532 (9th Cir. 1989) (stating that "the final decision requirement can be avoided if attempts to comply with that request would be futile").
147 Id. at 164 (citations omitted).
149 Id. at 122. But since the developer had not begun a meaningful application process his claim was not ripe. Id. at 121-22; accord Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001). The Court went further stating that "[g]overnment authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." Palazzolo, 533 U.S. at 621 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999)).
150 Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 405 (9th Cir. 1996)."To satisfy this requirement, a California landowner must submit to local decision-makers at least one meaningful application for a development project and a variance." Id. (quoting S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 503 (9th Cir. 1990)).
153 Id. at 541.
154 Id. at 549-51.
information and obtain a final decision on the permit application before bringing a takings claim.  

*Palazzolo v. Rhode Island* should assist landowners arguing takings cases before these and other lower courts. Courts have at least one loadstar against which to judge when enough is enough. Undeniably, it is still necessary to ripen a case, even if the ripening process is inconvenient, time-consuming, and expensive. But it should no longer be necessary to engage in the ripening process once it transforms from utility into ritual.

VI. THE QUESTION OF WHAT HAPPENS WHEN PROPERTY IS ACQUIRED PRIOR TO THE ADOPTION OF A REGULATION, THE APPLICATION OF WHICH ALLEGEDLY TAKES PROPERTY

One of the decisive issues to the Rhode Island Supreme Court in *Palazzolo v. Rhode Island* was that Mr. Palazzolo acquired his property in 1978, seven years after the creation of CRMC and several more years after the State began to require permits for the filling of coastal wetlands. He could state no claim for a regulatory taking because he had no investment-backed expectations in trying to develop the property, and the right to fill was not part of the title that he acquired from Shore Gardens. Put bluntly, “all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner.” On June 28, 2001, the Supreme Court rejected this so-called “notice rule” exception to the Takings Clause.

A. Is the Underlying Title of Property Diminished When it is Acquired Subject to a Regulatory Scheme?

As a preliminary matter, it should be asked who was on notice of what? Certainly landowners like Mr. Palazzolo were on notice not only of the permitting requirements affecting the filling of property, but also of the centuries of tradition wherein landowners freely reclaimed

157 *Id.* at 717.
158 *Id.* at 716.
159 *Id.* at 716–17.
But Mr. Palazzolo was not on notice that there was an outright ban on all filling of wetlands for residential or private recreational development. He was not on notice that the public would forevermore enjoy the benefits of his property in its undeveloped state without payment. Likewise, Rhode Island was on notice that a regulation that goes "too far" is a taking and that, under the Constitution, "compensation must be paid" when economically beneficial use is denied. That Mr. Palazzolo essentially acquired by operation of law the property from himself, or at least from a corporation of which he was the sole shareholder, suggests that an inflexible notice acquisition rule puts form over substance.

In *Nollan v. California Coastal Commission*, the Court cast doubt on the validity of the "notice rule." The California Coastal Commission was established by the California Coastal Act of 1972. Pursuant to the Act, "stringent regulation of development along the California coast had been in place at least since 1976," and, in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed since 1979 on all 43 shoreline new development projects in [the vicinity of the Nollan property]." The Nollans purchased their property after this time and became subject to the Commission's forced dedication requirement. The Supreme Court found that the restriction violated the Takings Clause because it did not substantially advance legitimate state interests.

However, in dissent, Justice Brennan criticized the Supreme Court's holding on, among other grounds, the fact that the Nollans were "on notice that new developments would be approved only if provisions were made for lateral beach access." With such notice, the Nollans "could have no reasonable expectation of ... approval of

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161 Preseault v. United States, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (finding there is an expectation to be compensated for a physical occupation of one's property by the government).


163 See K & K Constr., Inc. v. Dep't of Natural Res., 551 N.W.2d 413, 418 (Mich. Ct. App. 1996), rev'd on other grounds, 575 N.W.2d 531 (Mich. 1998). In a case where ownership was acquired via a complicated trust ownership, an intermediate appellate court had found that such a change in ownership did not implicate the notice rule. *Id.*


165 *See id.* at 841–42.

166 *Id.* at 859 (Brennan & Marshall, JJ., dissenting).

167 *Id.* at 840–42.

168 *Id.* at 860 (Brennan & Marshall, JJ., dissenting).
their permit application without any deed restriction ensuring public access to the ocean." A majority of the Supreme Court Justices disagreed, stating:

Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Whether it be a taking by a physical invasion or by the application of a regulation, there is no logical reason why the existence of a regulatory scheme should put landowners on "notice" that the right to put their property to an economically viable use has been taken:

The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

However, before Palazzolo was decided there had been a number of significant cases where the courts have reached the opposite conclusion including state courts in New York and Virginia, and the Court of Appeals for the Federal Circuit, and for the District of Co-

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169 Id.
170 Nollan, 483 U.S. at 833 n.2.
173 City of Virginia Beach v. Bell, 98 S.E.2d 414 (Va. 1998).
174 Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999); Forest Props., Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999).
But as one court recently noted when confronted with a theory similar to that adopted by these other courts: “[U]nder such logic, [government] could pass a law that stated that no one could build on their property. After all property had passed hands once, the right to build on one’s property would be lost to everyone.”176 The rule that the purchase of regulated property destroys the right to bring a claim for a regulatory taking caused by the application of the regulation has also been heavily criticized elsewhere as violating the common law meaning of property.177

The Supreme Court’s opinion in Palazzolo put to rest once and for all the notion that title to property is altered when it changes hands. The Court first of all rejected the idea that the right to develop property is a right “created by the State”178 and that the State can redefine the property rights of subsequent owners by prospective legislation because “they purchased or took title with notice of the limitation.”179 The Court was unimpressed by this argument noting that “[t]he State may not put so potent a Hobbesian stick into the Lockean bundle.”180 The Court reasoned:

Were [the Court] to accept [that] rule, the postenactment 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. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.181

The State and many amici had suggested that a rule allowing purchasers of regulated property to challenge the application of those regulations would give the purchasers a “windfall,” especially if the value of the property had been depressed by the regulations. The Court did not agree: “The State’s rule also would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of

179 Id.
180 Id.
181 Id. at 627.
the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.”182 Relying upon the holding in Nollan,183 the Court found that it was imperative that subsequent owners such as Mr. Palazzolo take the same rights as the original owners at the time the regulation is adopted.

B. Background Principles of State Law and the Exclusion of the Full Panoply of Land Use Regulation

An alternative way of expressing the “notice theory” of regulation is to suggest that the underlying background principles of property must include all existing regulatory constraints at the time of acquisition. In Lucas v. South Carolina Coastal Council, the Court said that a regulatory restriction which simply reflected the application of “background principles,” such as those in place against nuisances, could not rise to the level of a taking.184 There being no right to commit a nuisance, there can be no “taking” when the ability to commit a nuisance is denied. In Palazzolo v. Rhode Island, the State and several amici strenuously argued that the “background principles” rubric of Lucas must include the entire panoply of regulations in place when property is transferred.185 In this respect, they argued, Lucas overruled Nollan v. California Coastal Commission.186

This was an easy argument for the Supreme Court to dispose of:

It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title. . . . A regulation or common-law rule cannot be a background principle for some owners but not for others. . . . A law does not become a background principle for subsequent owners by enactment itself.187

Nonetheless, this is not necessarily the end of the inquiry. There may be other background principles that apply equally to all landowners, regardless of the date of acquisition. Such background principles may include the doctrines of nuisance or public trust. And

182 Id.
183 See id. at 609, 629–30.
186 See id. at 629.
187 Id. at 629–30.
some may still argue that long-standing regulations, those that have been in place for generations, have evolved into background principles.

This question of background principles leads to a natural inquiry into exactly what rights a property owner has in the first place. Traditionally, property rights included an array of rights such as the right to sell, give away, hold, and protect a particular thing. As the Supreme Court said, the Constitution protects a "group of rights inhering in the citizen's relation to the physical thing." The Supreme Court has noted that "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law in back of them." Except for the specific property rights created by federal law, such as federal mining claims, state law will generally determine whether something is a protected property right. As the Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis* stated, "[W]e are mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' However, there are instances where federal law can come into play in defining the nature and extent of property rights, such as the navigational servitude or submerged lands boundaries. In the 1992 case of *Nixon v. United

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189 United States v. Willow River Power Co., 324 U.S. 499, 502 (1945) (stating there was no legally protected property interest in maintaining specific water levels in reservoir).
190 *See* Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1031-32 (1992). Once a mining claim is determined to constitute a valid property interest, then state law will control how it can be sold, transferred, inherited, and the like—unless any particular aspect of that property right is preempted by federal law. *See* Duguid v. Best, 291 F.2d 235, 239, 242 (9th Cir. 1961).
191 *See* Lucas, 505 U.S. at 1031-32.
193 *See*, e.g., M & J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir. 1995) (discussing the impact of federal law of navigational servitude and submerged lands on property definitions); *see also* Lucas, 505 U.S. at 1029 (discussing the submerged lands and navigational servitude); Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (defining property rights in the context of submerged lands); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000) (navigational servitude), *aff'd*, 231 F.3d 1354 (Fed. Cir. 2000), *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000). In *Palm Beach Isles*, the court found that
the United States Court of Appeals for the District of Columbia provided one of the more thorough contemporary judicial discussions on how property rights are created through “mutually reinforcing understandings” and “uniform custom and practice.” There the court engaged in a lengthy historical discussion of the ownership and treatment of presidential papers, concluding that Richard Nixon had a property interest in his presidential papers, which are now in the possession of the Archivist of the United States.

Federal law, however, will be relevant when the federal government is involved in an action that may “take” the property interest. As explained by the Ninth Circuit in Adaman Mutual Water Co. v. United States, “[t]he determination of the type of interest taken upon exercise of the federal power of eminent domain is governed by federal law, but will normally be made in accordance with local definitions.” In Adaman, the court looked to Arizona law in finding that when the government took approximately 8.3% of the farmland in the area of an agricultural development project, it had to pay compensation not only for the land, but also for the pro rata share of an irrigation district assessment. Because under Arizona law this assessment was inseparable from the land, it was in fact an equitable servitude which warranted takings compensation. Thus, local law is crucial in determining the nature of an aquatic property interest in condemnation cases.

The clear statements in Lucas that property interests must first be identified before a takings analysis is begun and that an “independent source such as state law” will help define property rights have led to a move to redefine property rights under state law in order to avoid

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195 Id. at 1275–76.
196 Id. at 1277–87.
197 278 F.2d 842, 847 n.4 (9th Cir. 1960) (citing United States ex rel. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 279 (1943)); see also Richmond Elks Hall Ass’n v. Richmond Redevelopment Agency, 561 F.2d 1327, 1330 (9th Cir. 1977) (holding that federal courts are not bound by state law but look to it for aid in discerning the scope of property interests). These formulations may be inconsistent with Justice O’Connor’s dissent in Preseault, 494 U.S. at 20–24.
198 Adaman, 278 F.2d at 847.
199 Id.
200 See id.
takings arguments. But, under any accepted understanding of property, it is clear that property rights have a source so fundamental in our jurisprudence that contemporary regulatory definitions or redefinitions cannot alter the elemental nature of the right.

202 See id. at 1028–29.
203 See, e.g., Schneider v. Cal. Dep't. of Corr., 151 F.3d 1194, 1200–01 (9th Cir. 1998).

The . . . Court's recognition of the unremarkable proposition that state law may affirmatively create constitutionally protected "new property" interests in no way implies that a State may by statute or regulation roll back or eliminate traditional "old property" rights. As the Supreme Court has made clear, "the government does not have unlimited power to redefine property rights." . . . Rather, there is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny.

Id. at 1200 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). Justice Marshall, in his concurrence in Pruneyard Shopping Center v. Robins, noted:

I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law.... Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

The Ninth Circuit observed:

"[T]here is, we think, a 'core' notion of constitutionally protected property," and a state's power to alter it by legislation "operates as a one-way ratchet of sorts," allowing the states to create new property rights but not to encroach on traditional property rights." . . . [W]ere the rule otherwise, States could unilaterally dictate the content of—indeed altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.

Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1108 (9th Cir. 2001) (quoting Schneider, 151 F.3d at 1200–01), reh'g, 271 F.3d 835, 841 (9th Cir. 2001) (en banc), cert. granted, 122 S. Ct. 2355 (2002) (No. 01-1325).
Lawrence H. Tribe writes:

To the degree that private property is to be respected in the face of republican and positivist visions, it becomes necessary to resist even an explicit government proclamation that all property acquired in the jurisdiction is held subject to government's limitless power to do with it what government wishes. Indeed, government must be denied the power to give binding force to so sweeping an announcement, . . . if we are to give content to the just compensation clause as a real constraint on [government] power . . . . [E]xpectations protected by the clause must have their source outside positive law.
Nevertheless, in *Stevens v. City of Cannon Beach*, the Oregon Supreme Court found there was not a taking when a property owner was unable to build on a beach dune area because the ownership rights of the dune did not include the right to exclude the public from its customary use of the dunes. Two members of the United States Supreme Court were troubled by what they saw as an abrogation of existing property definitions. In *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, the Hawaiian Supreme Court held that land ownership in Hawaii is burdened by the right of Native Hawaiians to utilize property to "gather" natural resources in accordance with native custom that may be incompatible with development. Both the Cannon Beach and Public Access Shoreline Hawaii holdings have been criticized as an attempt to redefine property rights. In the case of *Palazzolo*, the State suggested in its briefs and at oral argument that background principles of nuisance and the public trust doctrine should insulate the State from liability. The issues of nuisance and the public trust, not part of the Rhode Island Supreme Court’s decision, and not part of the questions presented, were not addressed by the Supreme Court, but may be important factual concerns in other cases.

1. Is Filling a Wetland a Nuisance?

In virtually every instance where a government has suggested that ordinary environmental regulations that prohibit ordinary development activities can be insulated from the Takings Clause because the prohibited activity is alleged to be a "nuisance," the government has lost. The Court of Federal Claims and the Federal Circuit Court of Appeals, the courts with the most experience in examining takings...
claims in the context of federal wetland regulations, have expressly rejected this notion in every case where it has considered the idea. 210 Other courts have agreed as well. 211 Most importantly, the United States Supreme Court in Lucas was highly skeptical of the idea that building a home in a residential subdivision could constitute a common law nuisance. 212

In Just v. Marinette County, 213 the Wisconsin Supreme Court held that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." 214 Just was cited with approval by the Washington Supreme Court in Orion Corp. v. Washington: "Orion never had the right to dredge and fill its tidelands." 215 A similar result was reached by the New Hampshire Supreme Court. 216 However, in Florida Rock Industries, Inc. v. United States, the Federal Circuit found housing to be a more valuable use than swampland, 217 while the court in Loveladies Harbor, Inc. v. United States expressly rejected the Just formu-

210 See Loveladies Harbor v. United States, 28 F.3d 1171, 1182 (Fed. Cir. 1994) (discussing applicability of "nuisance exception"); Formanek v. United States, 26 Cl. Ct. 332, 340 (1992) (rejecting assertion that filling a wetlands would constitute an "extreme threat to public health"); Fla. Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 168 (1990) (use of wetlands not a nuisance, even if Congress regulated or prohibited use), vacated, 18 F.3d 1560 (Fed. Cir. 1994); Fla. Rock Indus., Inc. v. United States, 8 Cl. Ct. 160, 170 (1985) (making a nuisance exception coterminous with the police power would read the Compensation Clause "out of existence"), aff'd in part, vacated in part, 791 F.2d 893 (Fed. Cir. 1986); see also Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1177 n.10 (Fed. Cir. 1991) (rejecting nuisance defense to regulatory taking of coal mine); Yancey v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (takings damages awarded to turkey farmer who had his turkeys quarantined during an outbreak of Asian flu despite obvious nuisance implications).

211 See, e.g., McDougal v. County of Imperial, 942 F.2d 668, 678 (9th Cir. 1991) ("[E]ven in those cases where the activity restrained was akin to a public nuisance and the state's interest was admittedly substantial, the Court has gone on to weigh the claimant's showing of diminution of value to his property."). To be sure, the trial court in Palazzolo decided that the original 1983 proposal of Mr. Palazzolo to fill eighteen acres of wetlands would be a nuisance, but that conclusion was premised upon the construction of seventy-four septic systems, not the proposal to build a beach club, which was the basis of the takings claim.


213 201 N.W.2d 761, 768 (Wis. 1972); accord Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).

214 201 N.W.2d at 768.


217 791 F.2d 893, 904 (Fed. Cir. 1986).
lation as illogical. More significantly, after Lucas was decided, some courts have begun to expressly reject the notion that a prohibition on filling wetlands can constitute a background principle of state law. This makes some sense, as for many years it was public policy to fill wetlands.

2. Is the Public Trust Doctrine a Relevant Background Principle?

When riparian wetlands are at issue, a relevant inquiry is whether the proposed use of the wetland interferes with the public trust doctrine. Public trust rights traditionally have included the right to access navigable waterways for fishing and navigation. Modern commentators argue that the public trust also includes recreational and ecological values. Thus, any regulation that would restrict the ability of an individual to utilize a private property interest in a resource subject to the public trust would not have a cause of action for a taking because in reality the private property interest never really existed in the first place. In fact, some commentators such as Professor Sax posit that all property rights should be redefined to make them more akin to water rights and subject to an analogous "ecological public trust."

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220 And, as the dissent in Lucas v. South Carolina Coastal Council suggests, the majority holding in Lucas is inconsistent with the Just principle. 505 U.S. at 1059 (Blackmun, J., dissenting).
221 The public trust doctrine was once only a shorthand way of saying that private individuals could not impose a stranglehold on the public's use of and access to navigable waterways. Thus, Illinois could not sell the waterfront without first accommodating the interest of the public in access to the commons (navigable waterways). See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452-54 (1892); see also Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 481 (1988) (holding the doctrine is not confined only to navigable waters).
224 See generally Sax, supra note 4.
The Supreme Court’s recognition of the public trust doctrine dates back to 1892 in Illinois Central Railroad Co. v. Illinois. Although it was originally utilized only as a mechanism to protect public access to navigable waterways, academics in recent years have argued intensely over whether the public trust doctrine must “evolve” into an all-encompassing ecological easement on all private property, which would supposedly limit the reach of the takings doctrine. The debate over how far the public trust doctrine should be used to abrogate traditional and often centuries old understandings of private property rights in land and water is in large part a reflection of competing legal philosophies.

Adherents to more traditional doctrines of free enterprise and private property rights see the creation of, and strong protection for, private rights in aquatic resources as more efficient and more just than a system that would leave the power of redistributing the wealth in riparian property to a few judges decreeing the latest expansion of the public trust doctrine. Professor Cohen cogently argues that there is no basis in economics or legal theory for expanding the public trust doctrine. In fact, to do so would only destroy our best chances of protecting ecological integrity. This is because “the notion of an

225 See generally 146 U.S. 387.
227 See Myth of Public Rights, supra note 226, at 208-10. James L. Huffman argues that “the courts have no capacity to make the kinds of decisions which our Constitution allocates to the legislative branch of government.” Id. at 209. Put another way, Huffman is concerned that activist courts are better suited to protecting private rights against the tyranny of the majority rather than protecting majoritarian public rights by “dredging from the depths of the common law waters old doctrines which function to limit private rights.” Id.
evolving unbounded set of communal rights strips clarity, certainty, and predictability from the very core of the public trust doctrine."

The definition of private property rights depends on "existing rules and understandings," and when we actually rely upon such rules and understandings, there is no place for such a transformation of property rights. The public trust doctrine should logically have no ability to negate the existence of a regulatory taking. As Justice Stewart once opined, if a court redefines such existing rules and understandings, then a judicial taking may occur.

In short, if a property right was initially created without being subject to the modern notions of an expanded public trust, then any later imposition of the newly defined public trust carries with it significant takings implications. Once a government sees fit to create a property right, that right cannot later be abrogated or taken away at whim—unless just compensation is paid and there is due process. As the United States Supreme Court held over a century ago:

Under every established government, the tenure of property is derived mediatly or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or State may have thought proper to ordain. . . . It is owing to these characteristics only . . . that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State . . . and the

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228 Cohen, supra note 226, at 275.
229 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).
230 See Hughes v. Washington, 389 U.S. 290, 297-98 (1967) (Stewart, J., concurring) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."); see also Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) (dealing with the question of whether the Hawaiian courts' new definition of water rights "takes" old existing rights), vacated and remanded on exhaustion of state remedies issue, 477 U.S. 902 (1986). But see Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 427 & n.4 (1991) (noting that reserved water rights are protected water rights but that courts are not capable of taking property).
grantee; and both the parties thereto are bound in good faith to fulfil it.\textsuperscript{231}

For most property, the issue is even more basic because the origin of property is usually more fundamental than a contract with government; under Lockean principles, it predates the very existence of government.

Thus, even though a government may someday regret that it created or recognized the existence of property rights in the past, and even though those property rights have become inconvenient to the government today, the government is still bound by its prior action of creating and divesting property rights. The future, no doubt, will see much litigation over the extent of the property interests that were originally acquired by individuals and the extent to which they were “reserved” to the “public trust.”

VII. DOES THE ACQUISITION OF ALREADY REGULATED PROPERTY OBViate THE POTENTIAL OF A TAKING BECAUSE THE OWNER LACKS INVESTMENT-BACKED EXPECTATIONS?

A second rationale given by the Rhode Island Supreme Court for denying Mr. Palazzolo’s claims is that he had no investment-backed expectations to utilize his property in a manner that was governed by the CRMC regulations.\textsuperscript{232} In \textit{Penn Central Transportation Co. v. City of New York},\textsuperscript{233} a landowner’s “distinct investment-backed expectation” was listed as a factor to consider in determining whether liability attaches for a regulatory taking. But it is questionable that \textit{Penn Central} anticipated that notice of a regulatory scheme would eliminate all expectations of obtaining a permit in the context of a takings challenge.\textsuperscript{234} Furthermore, where there is a categorical taking, the role of investment-backed expectations should be limited or nonexistent.\textsuperscript{235} One need look no further than \textit{Penn Central} itself, where one of the appellants, Union General Properties (UGP), acquired its leasehold

\textsuperscript{231} W. River Bridge Co. v. Dix, 47 U.S. 507, 532 (1848) (emphasis added); see also Dows v. Nat'l Exch. Bank, 91 U.S. 618, 637 (1875) (“[T]he owner of personal property cannot be divested of his ownership without his consent, except by process of law.”).


\textsuperscript{234} See infra note 236 and accompanying text.

\textsuperscript{235} Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1363 (Fed. Cir. 2000) (“When there is . . . a regulatory taking that constitutes a total wipeout, investment-backed expectations play no role.”), reh'g en banc denied, 231 F.3d 1365 (Fed. Cir. 2000).
interest in the Penn Central property after it was designated as a landmark.\textsuperscript{236} Despite the fact that UGP was on “notice,” that fact was not dispositive.

Assuming that the Takings Clause is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” the prospect that any landowner (either the original or the new owner) can suffer a wipeout of use and value of the property without the prospect of the government paying compensation to someone should be unsettling.\textsuperscript{237} When that wipeout rises to the level of taking, compensation must be due. Otherwise the State would have acquired the development interests at no cost. Government agencies rationalize that the owner “knows the rules” when regulated property is acquired. But if the original owner cannot bring a takings claim (because of an unwillingness or inability to ripen that claim), and if the new owner cannot, then who can? Nevertheless, despite the illogic, or at least the unfairness, of a rigid application of the notice rule to investment-backed expectations, the Rhode Island Supreme Court has not been alone. While some courts have focused more on the “title theory” of notice, as described in Part VI.A supra, others have focused more on the relationship between notice and investment-backed expectations.

In 1999, the Federal Circuit added a new twist: What matters is not the state of the regulatory scheme at the time property is purchased, but what the developer \textit{should have anticipated the future regulatory regime to be}. In \textit{Good v. United States},\textsuperscript{238} Lloyd Good purchased property in the Florida Keys in 1973, several months before the adoption of the Endangered Species Act. Good began the odyssey of trying to develop his property in 1980.\textsuperscript{239} At first, Good had no trouble, having obtained a dredge and fill permit in 1983.\textsuperscript{240} This permit was replaced with a new but substantially similar permit in 1988.\textsuperscript{241} He obtained all of his required state permits by 1984,\textsuperscript{242} and would have been able to develop his land at that time but for an appeal brought

\begin{thebibliography}{99}
\bibitem{Penn Cent.}See \textit{Penn Cent.}, 438 U.S. at 116.
\bibitem{Good v. United States} 189 F.3d 1355 (Fed. Cir. 1999).
\bibitem{Id. at 1357.} \textit{Id. at 1357}.
\bibitem{Id.} \textit{Id.}
\bibitem{Id. at 1359.} \textit{Id. at 1359}.
\bibitem{Id. at 1358.} \textit{Id. at 1358}.
\end{thebibliography}
by the Florida Department of Community Affairs. One thing led to another, and Good embarked upon a Byzantine series of procedures before the state and federal agencies. While trying to renew his wetlands permits issued by the Army Corps of Engineers, the Lower Keys Marsh Rabbit was listed as endangered in 1990, as was the Silver Rice Rat in 1991. Although the United States Fish and Wildlife Service recommended alternatives, neither the Corps nor Good acted upon the recommendations. Instead, Good’s permit expired and the Corps refused to approve a scaled back permit that Good thought would meet with the approval of state regulators. Good sued for inverse condemnation.

After losing before the Court of Federal Claims, the Federal Circuit upheld the judgment. It was persuaded that regardless of whether Good had been denied economically viable use of his property, he “could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land.” That is because the court concluded that Good was “[s]urely . . . not oblivious” to the trend of “rising environmental awareness translated into ever-tightening land use regulations.” Another recent federal circuit decision has also ruled that landowners on notice of existing regulations may be precluded from bringing regulatory takings claims based on the application of those regulations.

Unbowed by the United States Supreme Court’s opinion in Lucas v. South Carolina Coastal Council, the South Carolina Supreme Court extended the Good rationale to a landowner who had bought two parcels in 1961 and 1963. In McQueen v. South Carolina Coastal Council, the court found that even though it was undisputed that a denial of a

243 Id. at 1359.
244 Good, 189 F.3d at 1358.
245 Id. at 1359.
246 Id.
247 Id. at 1363.
248 Id. at 1361–62.
249 Id. at 1362.
250 Forest Props., Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999); accord Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154, 156 (1999) (holding that owner had actual and constructive knowledge of Clean Water Act of 1972 when property purchased in 1987); see also Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (noting that the landowner had purchased before the wetlands regulations were adopted).
permit to put in a bulkhead and fill property "deprives respondent of all economically viable use of his property," 252 and that there were no "background principles" depriving the owner the right to fill, there was no taking. 253 Unlike Good, the court did not find that the owner was "not oblivious" to the rising tide of environmental regulations in the early 1960s. 254 Instead, the court did not find a taking because the landowner had no investment-backed expectations to develop the property—as evidenced by the fact that the owner waited several decades before attempting to navigate the permitting process, during which time there had been some erosion of the property. 255 That the United States Supreme Court granted certiorari and vacated the decision in light of Palazzolo v. Rhode Island casts a long shadow on the validity of the state court's holding. 256

However, there have been a number of significant cases where courts have reached the opposite conclusion. On February 18, 1997, the New York Court of Appeals issued four opinions finding that property owners are not entitled to condemnation damages when a regulation that results in a taking is adopted prior to the purchase of property. 257 This holding was applied even to instances where the regulation as applied destroyed all use of the property, 258 or when the City of New York physically invaded private property by dumping landfill on a 2400-square foot area. 259 Two owners were found to have no right to compensation when they were unable to use their land because of wetlands restrictions. 260 Ironically, while these New York

252 Id. at 631.
253 Id. at 631–33.
254 Id. at 634.
255 See id.
258 See Anello, 678 N.E.2d 870. Anello purchased the property after a steep slope ordinance was adopted. When the application of ordinance and denial of variance precluded all use of the lot, Anello was found not to be entitled to takings damages. See generally id.
259 See generally Soon Duck Kim, 681 N.E.2d 312. Kim purchased a car wash and service station after a city passed a charter amendment creating a "duty" to provide lateral support for roadways. When road grade was raised owner had duty to sacrifice her land to provide lateral support for the raised roadway. See generally id.
260 See generally Gazza, 679 N.E.2d 1035 (purchaser of wetland not entitled to condemnation award because when he purchased property he could not have purchased right to use wetlands contrary to potential application of regulation); Basile, 678 N.E.2d 489 (when
decisions excised from use a segment of the owner’s property based on the scope of the regulations in place at the time of transfer, the United States Supreme Court did the opposite in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency. In rejecting the “segmentation” of property according to the scope of the regulations, the Court found that “defining the property interest taken in terms of the very regulation being challenged is circular.” In other words, while the New York courts removed the regulated segments from the owners’ bundle of sticks, the Supreme Court in Tahoe-Sierra insisted that the regulated parcel be considered part of the whole parcel. Either way, the landowner loses. While Palazzolo may have eliminated the ability of government to segment property by accident of post-regulation acquisition, it is worth noting that the embrace of such a rule would have adverse consequences.

The practical implications of such a rule will be that landowners will have a compelling incentive to challenge regulations whenever they are passed and that regulated property will become increasingly difficult to sell. In addition, property interests will be balkanized to the extent that neighboring landowners will own potentially very different property interests, depending on when each neighbor purchased property in relation to the regulations. In time, as regulations ratchet down on the rights to use property, and as owners are unable to bring ripe challenges to the regulations and must sell their land, the State will acquire an ever enlarging regulatory servitude over private property.

In City of Virginia Beach v. Bell, a residential lot was acquired from a corporation by a fifty percent shareholder in the corporation. Like the Rhode Island court in Palazzolo, the Virginia Supreme Court held there was no taking, because the acquisition occurred after the adoption of a local dune protection ordinance, and therefore the new owner did not acquire any right to develop the property in a manner contrary to the ordinance.

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262 Id. at 1483. See also the discussion in Part VIII.B infra.
263 See Lopes v. City of Peabody, 629 N.E.2d 1312, 1315 (Mass. 1994) (finding that rule prohibiting purchaser from challenging existing regulations would have adverse policy impacts).
265 Id. at 417–18.
But other states and the Ninth Circuit have rejected, years before *Palazzolo*, this application of the notice rule—often without specific reference to either the "title theory" or the "investment-backed expectations theory." For example, New Jersey recently held in *Karam v. State* that "the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge." The Ninth Circuit in *Carson Harbor Village Ltd. v. City of Carson* found that an as-applied but not a facial takings challenge can be brought by a purchaser of regulated property. Likewise, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, the Ninth Circuit allowed a landowner's takings claims to proceed despite the fact that land was purchased with knowledge of permitting requirements. In Florida, the court in *Vatalaro v. Department of Environmental Regulation* held that even though a property owner acquired land after a regulatory scheme was adopted, she could still pursue an as-applied takings claim. The court reasoned that no taking occurred until after the State denied the landowner's permit application when the State determined the property was suitable only for limited passive recreational use.

Finally, the Supreme Court's treatment of the relationship between the "notice rule" and the "investment-backed expectations prong" of *Penn Central* is a bit inconclusive. As discussed previously, the Court rejected outright the idea that the existence of a regulation

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267 705 A.2d 1221.

268 Id. at 1229.

269 37 F.3d at 476-77.

270 95 F.3d 1422 (9th Cir. 1996), aff'd, 526 U.S. 687 (1999).

271 See id.

272 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992). In *State, Department of Environmental Protection v. Burgess*, the court declined to follow the "flawed" reasoning of *Vatalaro*, holding that even though Burgess purchased property before the wetlands regulations were adopted, he had no reasonable investment-backed expectations to develop this remote and isolated parcel. See 772 So. 2d 540, 542 n.1 (Fla. Dist. Ct. App. 2000), appeal denied *sub nom.* Burgess v. State, 791 So. 2d 1095 (Fla. 2001) (table decision), cert. denied *sub nom.* Fla. Dep't of Envtl. Prot. v. Burgess, 122 S. Ct. 615 (2001).

273 *Vatalaro*, 601 So. 2d at 1229.

274 See id; see also Cottonwood Farms v. Bd. of County Comm'rs, 763 P.2d 551, 555 (Colo. 1988) ("The majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor . . . .").
affects the “background principles” of property. It also noted that on remand the court need not discuss the notice rule and background principles in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner’s claim under *Penn Central*.

But the concurring opinion of Justice O'Connor, in this five to four decision, states that *Palazzolo*'s “holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis" and that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of . . . expectations.” Justice O'Connor did, however, criticize the Rhode Island court for elevating such expectations to “dispositive status” because then the “State wields far too much power to redefine property rights upon passage of title.” Justice Scalia, however, in his concurrence, was emphatic that notice of preexisting regulations should play no part in a *Penn Central* analysis:

> [T]he fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. 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.

Thus, while there is still some room for debate over the extent to which notice of a preexisting regulation informs investment-backed expectations, there is no debate over whether such notice affects underlying title to the extent that a new landowner cannot pursue a challenge to the application of a regulation.

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276 *Id.* at 630.
277 *Id.* at 633 (O'Connor, J., concurring).
278 *Id.* (O'Connor, J., concurring). Justice O'Connor's focus on the continuing importance of investment-backed expectations was adopted by the Court in its dicta in *Tahoe-Sierra*. *See* 122 S. Ct. 1465, 1486 (2002).
279 *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).
280 *Id.* at 637 (Scalia, J., concurring) (citations omitted).
VIII. HOW MUCH USE AND VALUE OF PROPERTY CAN GOVERNMENT DESTROY BEFORE IT IS LIABLE FOR INVERSE CONDEMNATION?

In *Palazzolo v. Rhode Island*, Mr. Palazzolo alleged his property would have been worth $3.1 million had he been allowed to fill in the wetlands.281 While the government disputed that figure, it further claimed that because the property had a value of $200,000 if a small upland portion could be developed, or a value of $157,000 as an open space gift, then there could be no taking.282 The question of how far is “too far” remains one of the more vexing issues in the law of regulatory takings. It had been hoped that the Supreme Court would provide some guidance in answering the question: Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero. Unfortunately, other than holding that the remaining $200,000 value was too much to be considered a categorical taking, the Court did not reach the issue of partial takings.

A. What Occurs If a Portion of the Land Has Already Been Developed? What Is the Relevant Parcel in a Takings Analysis?

An owner of multiple parcels who has fewer than the total number “taken” by regulation, or an owner of one large tract who has only a portion taken by a permit denial, naturally wants to be compensated for a taking, just as the owner of a tract where only a portion has been physically invaded wants compensation. The government, on the other hand, wants to claim that since the owner still has something of value left, there has been no taking in the constitutional sense. Such considerations are squarely addressed in the Supreme Court’s discussion of the relevant parcel in *Lucas*:

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

282 Id. at 715.
owner has suffered a mere diminution in value of the tract as a whole.\textsuperscript{283}

Similarly, in \textit{Palazzolo}, Mr. Palazzolo is unable to utilize eighteen acres of wetlands. He may, however, be able to use a few additional acres of uplands.\textsuperscript{284} This presents the question: Have the wetlands been taken, or is there enough remaining upland to absolve the government of liability? This has been referred to as the "denominator problem."\textsuperscript{285}

In \textit{Loveladies Harbor, Inc. v. United States},\textsuperscript{286} the federal circuit upheld an award of $2.6 million in compensation for the denial of a Army Corps of Engineers' dredge and fill permit to develop 12.5 acres of wetland.\textsuperscript{287} Among other arguments, the government asserted that because the owner of the property had successfully developed a substantial portion of the 250 acres he originally owned, no taking should be found.\textsuperscript{288} The government reasoned that the owner recouped a substantial portion of his original investment-backed expectations from when he first purchased the property in the late 1950s.\textsuperscript{289} The court did not agree.\textsuperscript{290} Instead, it examined the actual property owned at the time of the alleged taking and declined to reach back in time to look at property that once might have been owned by the same owner, even if contiguous to the taken property.\textsuperscript{291}

\begin{tabular}{l}
\textsuperscript{283} Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992). \\
\textsuperscript{284} Tavares, 746 A.2d at 710 n.1. \\
\textsuperscript{286} 28 F.3d 1171 (Fed. Cir. 1994). \\
\textsuperscript{287} \textit{Id}. at 1178, 1183. \\
\textsuperscript{288} \textit{Id}. at 1180. \\
\textsuperscript{289} \textit{Id}. As the Federal Circuit observed in \textit{Loveladies Harbor, Inc. v. United States}: \\
\begin{quote}
If the tract of land that is the measure of the economic value after the regulatory imposition is defined as only that land for which the use permit is denied, that provides the easiest case for those arguing that a categorical taking occurred. On the other hand, if the tract of land is defined as some larger piece, one with substantial residuary value independent of the wetlands regulation, then either a partial or no taking occurred. . . . This is the denominator problem.
\end{quote}
\textsuperscript{289} \textit{Id}. at 1181. \\
\textsuperscript{290} \textit{Id}. \\
\textsuperscript{291} \textit{Id}.
Earlier, however, in *Ciampitti v. United States,*\(^2\) the Claims Court declined to find a taking because the property owner had already developed some of his land, and he also retained some property that was not impacted by wetlands regulations.\(^3\) Furthermore, the court found that the property owner's argument that he could rely on a loophole in property law to allow him to develop land without a permit was not a reasonable investment-backed expectation.\(^4\)

In *Palm Beach Isles Associates v. United States,* the trial court found some significance to the fact that the property was purchased in the 1950s and partially sold off in 1968.\(^5\) On appeal, however, the court found that the trial court erred by focusing on only the history of the purchase and sale in relation to the relevant statutory scheme.\(^6\) Instead, it found that other "factual nuances" should be analyzed, including the developer's plans and the geographic connection between the lots.\(^7\) The Federal Circuit has also considered the issue in


\(^3\) Id. at 320. As to whether a taking had occurred, the court observed:

Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.

Id. at 318–19.

\(^4\) Id. at 320.

\(^5\) 42 Fed. Cl. 340 (1998), vacated, 208 F.3d 1374 (Fed. Cir. 2000), aff'd, 231 F.3d 1354 (Fed. Cir. 2000), reh'g en banc denied, 231 F.3d 1354 (Fed. Cir. 2000). The trial court found of some significance the purchase of the property after the adoption of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (2001). See id. at 361. But on appeal the Federal Circuit rejected this theory, finding that the existence of navigational servitude does not defeat takings claim because the permit was not denied in order to protect navigation. See 208 F.3d at 1385–86.

\(^6\) 208 F.3d at 1381.

\(^7\) Id. The court found that:

The regulatory imposition that infected the development plans for the 50.7 acres was unrelated to [Palm Beach Isles Associates'] plans for and disposition of the 261 acres of beachfront upland on the east side of the road. The development of that property was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed on the lake side of the spit. Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified.
Tabb Lakes, Ltd. v. United States\textsuperscript{298} and Forest Properties, Inc. v. United States\textsuperscript{299}

In East Cape May Associates v. New Jersey Department of Environmental Protection, the appellate division of the New Jersey Superior Court recently discussed at length the ways that various states have determined the relevant parcel in takings analyses.\textsuperscript{300} The State argued that separate large parcels owned by the same principals who owned the affected wetland parcel should be considered together for the purpose of a takings analysis.\textsuperscript{301} The court remanded for further analysis of the nature of the ownership interests, the zoning of the various parcels, and when the other parcels had been built on and disposed of.\textsuperscript{302}

B. What Occurs If Only a Portion of an Owner’s Undeveloped Property Is Taken?

The United States Supreme Court has cautioned against segmentation of larger units of property for takings purposes.\textsuperscript{303} However, as the Court pointed out in \textit{Lucas v. South Carolina Coastal Council}, there may be circumstances where the total holdings of the landowner may not be the relevant parcel.\textsuperscript{304} Some commentators have lumped various manifestations of the “segmentation” of property under the rubric of “conceptual severance.”\textsuperscript{305} Such severance can occur by parcel or

\textit{Id.}

\textsuperscript{298} See 10 F.3d 796, 802 (Fed. Cir. 1993) (finding that it would not consider every lot where a permit had been denied as a separate parcel; otherwise every permit denial would result in a taking).

\textsuperscript{299} See 177 F.3d 1360, 1365–67 (Fed. Cir. 1999) (joining together nine acres of submerged lakebed with a sixty-two-acre tract of upland that the owner had already sold, as part of single development scheme).


\textsuperscript{301} \textit{Id.} at 119.

\textsuperscript{302} \textit{Id.} at 128–29.

\textsuperscript{303} See, e.g., \textit{Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust}, 508 U.S. 602, 643–44 (1993). Although this was a pension liability case, unrelated to real property, the Court concluded that the relevant question is whether the property taken is all or only a portion of the whole. \textit{Id.} at 644; \textit{Penn Cent. Trans. Co. v. City of New York}, 438 U.S. 104, 138 (1978) (finding that air rights over train station not considered a separate parcel).


\textsuperscript{305} See, e.g., Margaret Jane Radin, \textit{The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings}, 88 \textit{COLUM. L. REV.} 1667, 1676–77 (1988). Conceptual severance refers to the division of property into its component parts in accord with common law principles of interests in property. See \textit{id.} at 1676. Some criticize the idea of conceptual severance, suggesting that all such interests should be lumped together in a takings analysis. See \textit{id.} at 1676–77.
lot (horizontal segmentation), by time (temporal segmentation), or
by height (vertical segmentation).\footnote{See Raymond R. Coletta, The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis, 1 U. PA. J. CONST. L. 20, 36 (1998) ("In the vertical dimension, the relevant parcel is viewed columnally from the depths of the earth to the heights of the sky.").} In \textit{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency}, however, the Court emphasized the need to look to the "parcel as a whole," and rejected such "conceptual severance," at least for temporal severance.\footnote{122 S. Ct. 1465, 1483 (2002).} This idea—that landowners receive compensation when property interests are taken through regulation—is inimical to these commentators. Therefore, they suggest, instead, that courts lump every conceivable interest in a property together, horizontally, vertically, and across time, thereby making the taking of any economically viable use less than likely.\footnote{Id.} Professor Eagle, in turn, criticizes this notion of lumping, de-riding it as "conceptual agglomeration."\footnote{STEVEN J. EAGLE, \textsc{Regulatory Takings} \S 64(c) (2) (iii) (1996).} Indeed, fears of conceptual severance are little more valid than a child’s fear of the bogeyman. For centuries the common law has promoted carving out discrete interests in property to maximize its utility. Whether it be the subdivision of large estates, the creation of leasehold interests for a limited duration of time, or the independent sale of mineral rights, severance is an essential core of Anglo-American conceptions of property. From Locke’s application of his "labor theory," to the creation of interests in property, to more recent utilitarian approaches to the theory of property, a hallmark of every such theoretical conception is that property is divisible, with discrete interests controlled by discrete entities. There is little to fear if courts were to recognize this tradition in modern times. In other words, there is no reason in law or logic for the courts to treat property any differently in the context of regulatory takings.

Happily for litigators and law review authors the treatment of this issue in the state and lower federal courts has been mixed, hopelessly contradictory, and defiant of synthesis. The inconsistency of the lower courts may be a function of some courts’ predilection towards favoring government over landowners, or vice versa, a predilection that some would equate to "fairness."\footnote{See Daniel R. Mandelker, \textit{New Property Rights Under the Taking Clause}, 81 \textsc{Marq. L. Rev.} 9, 19 (1997) (recognizing the inability of courts to apply a consistent theory of segmentation, this commentator suggests abandoning segmentation theory in favor of "fairness.").} In the array of cases listed below,
an advocate for either the government or the private landowner will have plenty of case law for support. What practitioners will lack is any sort of consistent treatment in the lower courts that they can point to in arguing what the relevant parcel should be in any particular case.

1. Some Courts Have Refused to Look at Restricted Parcels or Portions of Parcels Separately

Recently, the court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency refused to find a temporary taking where a large number of properties had been subject to several moratoria, which denied all use and value to the properties for over twenty years.311 Previously, the trial court found that one particular moratorium took all economically viable use for that period of time.312

Other courts have also declined to treat separately those portions of a single parcel that are regulated differently. For instance, in Zealy v. City of Waukesha,313 the Wisconsin Supreme Court determined that all the property owned by landowners would be considered for takings purposes; it declined to look only at the portion allegedly zoned into inutility by the city's actions.314

In K & K Construction, Inc. v. Department of Natural Resources, the Michigan Supreme Court combined both separate parcels and differently regulated portions of the same parcel.315 The court combined a fifty-five acre parcel, of which between twenty-seven and twenty-eight acres were untouchable because of wetlands, with two other parcels of sixteen and 3.4 acres, for purposes of determining whether there was a taking.316 The court reasoned that the parcels were owned in whole or in part by the same owner of the fifty-five-acre parcel.317 The Michigan example was followed in Karam v. State,318 where the appellate court examined the title history of a lot comprised upland and wet-

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312 See id.
313 548 N.W.2d 528 (Wis. 1996).
314 See id. at 533.
316 See 575 N.W.2d at 534, 537-38.
317 See id. at 537. The court remanded the case to determine whether a separate 9.6-acre parcel should be combined, and, if combined, whether the destruction of the use and value of the twenty-seven or twenty-eight acres out of the whole constituted a taking. Id. at 540.
318 723 A.2d 943 (N.J. 1999).
land sections and found the two portions to be a single unit for tak­ings analysis purposes. In District Intown Properties Ltd v. District of Columbia,319 the District of Columbia Circuit found that nine lots would be considered together because the units were originally held together and the developer planned to develop them as a single project.320 A concurring opinion objected, calling for, among other things, the type of test described by a lower court in Machipongo Land & Coal Co. v. Commonwealth, Department of Natural Resources.321 However, reference to Machipongo is unavailing as the Pennsylvania Supreme Court reversed, finding that the entirety of a coal deposit must be considered in a tak­ings analysis, not just the coal within a protected watershed. In doing so the court cited to Keystone Bituminous Coal Ass'n v. DeBenedictis for its rejection of vertical severance (of the mineral estate)322 and to Tahoe-Sierra for the rejection of temporal severance.323 The court remanded the case on the issue of horizontal severance, instructing the trial court to examine various factors dealing with the property’s history, as set forth in Loveladies Harbor.324

2. Other Courts Have Treated Regulated Portions of Property as the Takings Denominator

However, other courts have been more willing to look at just those parcels or portions of a single parcel that are affected by the regulation. In Boise Cascade Corp. v. Board of Forestry,325 the Oregon Supreme Court found that a timber company stated a claim for inverse condemnation when fifty-six acres of old-growth redwood timber were set aside within a sixty-four-acre parcel in order to protect the habitat

320 Id. at 876–77.
322 799 A.2d at 766–68.
323 Id. at 768.
324 Id. (citing Loveladies Harbor v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994)).
of the Northern Spotted Owl.\textsuperscript{326} Similarly, in \textit{Twain Harte Associates, Ltd. v. County of Tuolumne},\textsuperscript{327} a California Court of Appeal looked only to property subject to the same zoning constraints in a takings analysis.\textsuperscript{328} Likewise, in \textit{American Savings \& Loan Ass’n v. County of Marin},\textsuperscript{329} the Ninth Circuit broke property into two segments for a takings analysis because the county had zoned and regulated each portion differently.\textsuperscript{330} The New York Court of Appeals applied “conceptual severance” to the regulation of single room occupancy hotel rooms in \textit{Seawall Associates v. City of New York}.\textsuperscript{331} Finally, in \textit{Mekuria v. Washington Metropolitan Area Transit Authority},\textsuperscript{332} the trial court had no trouble segmenting separate developed parcels where they were subject to separate leases and were not physically contiguous.\textsuperscript{333}

Perhaps the most elegant model for analyzing the takings denominator was proposed by John Fee who suggested that “any identifiable segment of land is a parcel for purposes of regulatory takings analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments.”\textsuperscript{334} In other words, if government imposes a small setback requirement on a property, it would not likely be a taking so long as the setback could not be used in a manner economically independent of the larger parcel. However, if the setback is large enough, then there may very well be takings implications. This test was adopted by a Pennsylvania appellate court in \textit{Machipongo},\textsuperscript{335} but on appeal the Pennsylvania Supreme Court remanded the case for more factual analysis concerning whether the history of the parcel supported treating land declared unsuitable for mining as a separate parcel.\textsuperscript{336}

\begin{itemize}
\item \textsuperscript{326} Boise Cascade Corp. v. Bd. of Forestry, 935 P.2d 411, 414, 415–16 (Or. 1997).
\item \textsuperscript{329} 653 F.2d 364 (9th Cir. 1981).
\item \textsuperscript{330} \textit{Id.} at 366–67.
\item \textsuperscript{331} 542 N.E.2d 1059, 1060–61 (N.Y 1989).
\item \textsuperscript{332} 45 F. Supp. 2d 19, 31 (D.D.C. 1999) (finding a taking when a construction project prevented reasonable access to parcels).
\item \textsuperscript{333} \textit{Id.} at 30.
\item \textsuperscript{334} Fee, \textit{supra} note 321, at 1557. This analysis enables courts to make a rational distinction between small setbacks and more significant amounts of land.
\item \textsuperscript{336} \textit{Machipongo Land \& Coal Co., Inc. v. Commonwealth, Dep’t of Natural Res.}, 799 A.2d 751, 768 (Pa. 2002).
\end{itemize}
3. Where Will the Supreme Court Land on the Denominator Issue?

As noted, in both Penn Central Transportation Co. v. City of New York and Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust the Court warned against the segmentation of property in a takings analysis. However, Concrete Pipe did not involve real property, and Penn Central dealt with a rather unique fact situation where the landowner had already conceded the viability of transferring the development rights in the air rights. Furthermore, too much should not be read into Penn Central's warning about segmentation because the Lucas Court expressly rejected as "extreme" and "unsupportable" the notion advocated by the New York Court of Appeals in Penn Central, namely examining "the diminution in a particular parcel's value... in light of total value of the taking claimant's other holdings in the vicinity." Significantly, in Palazzolo v. Rhode Island, the Supreme Court expressed a great deal of interest in this question. At oral argument, the Court repeatedly asked counsel about whether Mr. Palazzolo's eighteen acres of wetlands should be treated separately from the small upland portion of his property. However, finding that the issue had

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Penn Cent., 438 U.S. at 137.


For example, there was this exchange between the Attorney General of the State of Rhode Island and the Court:

QUESTION: Is it—is it your position, General Whitehouse, if someone has, say a section of land, a square mile, either—a square mile. And picks out a 10-acre plot at one edge of that and applies for zoning use and claims that it’s denied, he claims to have been denied all economic use. That the fact that he has a remaining everything square mile minus 10 acres means that that has to be taken into consideration, too?

GENERAL WHITEHOUSE: Yes, I think it is, Your Honor.

QUESTION: I don’t think our cases support that.

GENERAL WHITEHOUSE: Well, the most recent—I would go back to, for instance, at the earliest expression the Penn Central case, which used the term parcel-as-a-whole and from which the parcel-as-a-whole discussion has emerged and then most recently in Justice Scalia’s concurring opinion in the Suitum [v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997),] decision, you referred to the relevant property as the aggregation of all the owners property subject to the regulation at least those that are contiguous.

QUESTION: We don’t generally get our law out of concurring opinions.

GENERAL WHITEHOUSE: That’s correct, Your Honor. But I believe—
not been squarely presented to it, it declined to reach it.\textsuperscript{342} Nor did the Court address the segmentation issue that arose from the fact that there were already seventy-four subdivided lots on Mr. Palazzolo’s eighteen-plus acres.\textsuperscript{343}

The Court in \textit{Palazzolo} “expressed discomfort with the logic of this rule” and cited to the analysis by Fee discussed in the preceding section.\textsuperscript{344} The Court in Tahoe-Sierra seemingly embraced the “parcel as a whole” rule, at least with respect to temporal severance. The question remains open as to whether the government can take eighteen acres of Mr. Palazzolo’s property without compensation because he can use one-tenth of an acre, why not take 999 acres of 1000-acre plot, and so on? One would hope that the takings clause is not so fickle as to be transformed into a rule that the more one owns the more the government can take without paying compensation.

C. What Occurs If Only a Portion of the Value of Property Is Taken?

In footnote eight of the Supreme Court’s opinion in \textit{Lucas},\textsuperscript{345} Justice Scalia suggests that even if some use and value remained in a

\textbf{QUESTION:} But in the Chief’s hypothetical, what if he then sells off all except the 10-acre plot and then reapplies, and the 10-acre plot is again denied to development, then there’s been a taking. It’s such a silly result. There is not in the first case, because he hasn’t yet sold off the rest of the one square mile, but if he sells off the rest of the one square mile, and makes the very same application, gets the very same result, then there’s been a taking. That seems to me very strange.


\textsuperscript{342} Palazzolo v. Rhode Island, 533 U.S. 606, 631–32 (2001). Indeed, the issue of the denominator was not included in the questions presented, and only raised by counsel for Mr. Palazzolo in the brief on the merits as an analog to the doctrine of physical invasions, Petitioner’s Brief on the Merits, supra note 18, at *45, and when responding to an \textit{amicus} brief that suggested no compensation is due whenever anything of value remains on the property. See Petitioner’s Reply Brief, 2001 WL 57593, at *19, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

\textsuperscript{343} See generally Palazzolo, 533 U.S. 606.

\textsuperscript{344} Id. at 631 (citing Fee, supra note 321). The \textit{Palazzolo} majority further stated: “Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole . . . ; but we have at times expressed discomfort with the logic of this rule, . . . a sentiment echoed by some commentators.” Id. (citations omitted).


regulated parcel there might still be a taking. In his dissent, Justice Stevens criticized the Lucas categorical rule, wherein a total deprivation of use and value is a taking, because, he felt, landowners who were just a few steps short of a total deprivation would not recover under the rule. The majority, however, countered that "[t]his analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." In other words, if the use and value of the property has been completely destroyed, there has been a compensable taking. If there is some residual use or value, however, the landowner is left with an opportunity to utilize a Penn Central analysis to determine whether there has been a "partial" taking.

The idea that a taking can occur even when there is some value remaining in the property has a certain equitable appeal. As the Court of Federal Claims put it:

The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.

This issue was brought to the forefront in Florida Rock Industries, Inc. v. United States. In that case, a mining company was awarded $1.02 million after it could not obtain a permit needed to mine ninety-eight acres of limestone in a wetland. On appeal, however, the government argued that there was no taking because it alleged the property

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546 See id. at 1064 (Stevens, J., dissenting).
547 Id. at 1019 n.8.
548 See id. at 1015–19 nn.6–8.
551 See id. at 176.
remained significant value despite the wetlands regulations.\textsuperscript{352} This was based on an allegation that a speculator in Arizona made an offer to buy the property shortly after the permit was denied.\textsuperscript{353} This sort of argument, of course, is contrary to the government's usual position in condemnation cases, because the government now appears to be arguing that speculative value of property should be considered in a takings case.\textsuperscript{354}

In 1994, the Federal Circuit Court of Appeals issued its decision in the appeal of Florida Rock.\textsuperscript{355} It is recommended reading for anyone dealing with the issue of the valuation of a regulated wetland and the existence of a "partial" taking. The court ruled that the trial court had improperly dismissed the relevance of an offer to buy the property, despite the fact that the offer may have been made without a proper appreciation of the impact of the regulatory impediments on developing the property.\textsuperscript{356} The court, however, continued that even if the property retained some value—based in part on speculation—there still might be a "partial" taking.\textsuperscript{357} It instructed the trial court to weigh the various factors articulated in Penn Central\textsuperscript{358} in order to determine whether there was a taking.\textsuperscript{359} This decision represents an unequivocal embrace of the doctrine of partial takings.\textsuperscript{360} On remand to the Court of Federal Claims, Chief Judge Smith found that a seventy-three percent diminution in value of the property, when analyzed in light of other Penn Central factors such as the inflation-adjusted investment, constituted a taking of the ninety-eight acres.\textsuperscript{361} In Walcek v. United States,\textsuperscript{362} the Court of Federal Claims found that a diminution in value of 59.7\% did not constitute a taking, categorical or otherwise. It also suggested that Chief Judge Smith's Florida Rock opinion, in that it analyzed other investment related factors, was "disharmonious" with the Supreme Court precedent.\textsuperscript{363} In a subsequent decision in the Florida

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\textsuperscript{352} See Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567-68 (Fed. Cir. 1994).
\textsuperscript{353} See id. at 1563.
\textsuperscript{354} See discussion infra Part II.
\textsuperscript{355} 18 F.3d 1560, 1573 (Fed. Cir. 1994).
\textsuperscript{356} See id. at 1565-66.
\textsuperscript{357} See id. at 1568-69.
\textsuperscript{358} 438 U.S. 104 (1978).
\textsuperscript{359} See Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1570-71 (Fed. Cir. 1994).
\textsuperscript{360} But see Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1577 (10th Cir. 1995) (rejecting the partial takings analysis of Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), in the context of an alleged taking of big game hunting rights).
\textsuperscript{361} Fla. Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 43-44 (1999).
\textsuperscript{363} See id. at 271 n.37.
Rock line of cases, Chief Judge Smith held that the entire 1500-acre parcel had been taken, finding it pointless to require the landowner to go through the permitting process on the remainder.364

There was a substantial takings award in *Formanek v. United States*,365 a case involving a calcareous fen bog wetlands, where the Court of Federal Claims found that a taking occurred when the Army Corps of Engineers denied a dredge and fill permit.366 The Court of Federal Claims rejected the government’s arguments that the property could not be developed under state or local law.367 It also rejected the argument that the development would constitute a nuisance because there was no “extreme threat to public health.”368 Because the permit denial reduced the fair market value from $933,921 to $112,000, the government was ordered to pay compensation of $933,921, plus interest.369 This is notable because the court found a taking in spite of the fact that some value, albeit a dramatically reduced value, remained in the property.370

In a somewhat odd decision, *O’Connor v. Corps of Engineers*371 the court was asked to decide whether the denial of a permit to place fill on a wetland for a tennis court was a taking.372 After noting that it probably did not have jurisdiction to rule on the takings issue (which it did not), the court went on to speculate that the action was not a taking.373 The court crafted its own formulation of a regulatory taking, finding that a “taking occurs when a consideration of fairness and justice dictates that the economic impact of the regulation on the owner and the owner’s distinct investment backed expectations far outweigh any benefit to the public that the regulation is designed to promote.”374 However, the court found no taking because the loss of the tennis court was not a denial of all use of the property and did not outweigh the benefit to the public from protecting the wetlands.375

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365 26 Cl. Ct. 332, 332 (1992). The federal government declined to appeal this award.
366 *Id.* at 341.
367 *Id.* at 337.
368 *See id.* at 340.
369 *Id.* at 341.
370 *See id.* at 340.
372 *See id.* at 187.
373 *See id.* at 197–98.
374 *Id.* at 198.
375 *See id.*
More recently, in *Karam v. State*, a New Jersey appellate court found that the denial of a permit to develop riparian property was not a taking because, when considered as a whole, some value remained in an upland section of the property.

A few cases have found that landowners have not proved a taking when the land retains some residual recreational value, reasoning that the owners never had any "reasonable investment-backed expectations" to further develop the property. In a cursory opinion, the Maine Supreme Court held in *Wyer v. Board of Environmental Protection*, that the existence of potential recreational uses such as parking, picnics, and barbecues, were enough "value" to obviate a taking claim. Similarly, in *State, Department of Environmental Protection v. Burgess*, a Florida appellate court found no taking because, although the owner could not erect a tent platform, he could still use the property for recreational purposes, namely "nature walks and fishing."

While footnote eight of *Lucas* and the experience of some lower courts would seem to have taken care of Justice Stevens' argument that the existence of some small value will always obviate a takings claim, some commentators continue to suggest that *Lucas* makes it harder for a court to find a taking. Such arguments usually note the unique factual setting of *Lucas*, where the South Carolina Court of Common Pleas found that there was no value remaining in the property. From this fact the thesis is propounded that a taking was found in that case only because there was no value remaining in the property. Furthermore, because all land must have some value, it will be next to impossible for a court to find any regulatory taking in the future. Taking this syllogism one step further, critics continue by suggesting that except for those "no-value" cases, that leaves only a "negative implication" wherein courts will presume no taking if some value

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378 747 A.2d 192 (Me. 2000).
379 See id. at 193–94.
381 Id. at 543.
remains. But this argument ignores the emphasis the Lucas court placed on the use of property, as the opinion repeatedly uses language such as "beneficial use" or "productive use." The only time it discusses value is in the context of the facts of the case and not as an indispensable element of a takings claim.

Whatever doubts about the existence of residual value that may have remained after Lucas should have been dispelled in Palazzolo.

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384 See, e.g., Richard J. Lazarus, Putting the Correct "Spin" on Lucas, 45 STAN. L. REV. 1411, 1427 (1993) ("Instead, the negative implication of the category's nonapplicability will dominate the lower courts' takings analyses. These courts will likely apply the opposite presumption that no taking has occurred."). This is also, of course, what the Rhode Island Supreme Court essentially did in Palazzolo when it concluded its evaluation of economic impact upon finding that some value remained in the property. See Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 717 (R.I. 2000), aff'd in part, rev'd in part, remanded sub nom. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); see also Plantation Landing Resort, Inc. v. United States, 30 Fed. Cl. 63, 69 (1993) (finding that the court need not explore other factors referred to in Penn Central and later cases because there was no denial of economically viable use), aff'd, 39 F.3d 1197 (Fed. Cir. 1994) (table decision).

385 See Lucas, 505 U.S. at 1012 (finding that "temporary deprivations of use are compensable"); id. at 1013 (commenting on "beneficial use of ... land"); id. at 1014 ("If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.'" (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)); Lucas, 505 U.S. at 1015 (finding "categorical treatment appropriate where regulation denies all economically beneficial or productive use of land"); id. at 1016 ("[T]he Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land'") (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)) (emphasis added)); Lucas, 505 U.S. at 1016 n.6 (commenting on "economically beneficial use of ... land"); id. at 1016 n.7, 1017 (stating that "deprivation of all economically feasible use" and "all economically beneficial use" and "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation") (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)); Lucas, 505 U.S. at 1018 (discussing "all economically beneficial uses" of land and "economically beneficial or productive options for its use"); id. at 1019 (commenting on "preventing developmental uses" and concluding that to "sacrifice all economically beneficial uses in the name of the common good, that is, to leave ... property economically idle" would result in a taking); id. at 1027 (discussing "all economically beneficial use" of land); id. at 1030 (discussing "all economically productive or beneficial uses of land"); id. at 1031 (noting that although "common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the essential use of land").

386 Lucas, 505 U.S. at 1007 (stating that regulation has a "dramatic effect on the economic value"); id. at 1016 n.7 (discussing property interest "against which the loss of value is to be measured" and concluding that 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"); id. at 1026 (holding that regulation "wholly eliminated the value of the claimant's land").
One of the grounds for the Rhode Island Supreme Court’s decision was that because there was $200,000 in value left in the property, if one-tenth of an acre of upland could be used for a residential lot, there was no categorical taking under *Lucas* and therefore no taking at all.\(^{387}\) The United States Supreme Court agreed with the Rhode Island Supreme Court that the remainder value of $200,000 was not insignificant and that there was no categorical taking under *Lucas*:

Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle."\(^{388}\)

Importantly, however, the Court found that the existence of this value in the property did not eliminate the possibility that there had been a taking.\(^{389}\) Instead, the Court remanded the case to the state court to determine whether there had been a taking under the factors articulated in *Penn Central*,\(^{390}\) stating that

> [t]he [lower] court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence. The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded.\(^{391}\)

With the Court’s affirmation of *Lockean* principles, one would think that it would redouble its focus on the loss of *use*, rather than mere value. As the Court noted in *Lucas*, Lord Coke once wrote: "[F]or what is the land but the profits thereof?"\(^{392}\) While some have


\(^{389}\) *Id.* at 632.

\(^{390}\) *Id.*

\(^{391}\) *Id.*

\(^{392}\) 505 U.S. at 1017 (alterations in original) (quoting 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND ch. 1, § 1 (1st Am. ed. 1812)).
interpreted “profits” to mean only raw value, this is not what Coke meant. The full citation of Coke’s statement is:

But if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery secundum formam chartae, the whole land itself doth pass; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, all whatsoever parcel of that land, doth passe.

The reference to mines, herbage, and so forth clearly implies more than the residual value that might be left in property; it involves the fruits of the use of property. It would be hard to reconcile this common law tradition with the notion that the government can take the vesture, the mines, the herbage, and most of the trees without paying compensation to the owner.

The implications to the practitioner should be an emphasis on the uses of the property. If a landowner can make a strong case that there is no economically beneficial use remaining in the property, the landowner should be able to maintain an allegation that the categorical per se rule of Lucas applies, whether or not some residual value remains. To the extent that this “value” actually reflects a remaining “use,” the landowner should be prepared to make an argument for a partial taking, using perhaps the template of Chief Judge Smith’s decision in Florida Rock Industries, Inc. v. United States.

If there are some significant uses remaining, but those uses are severely reduced, then a landowner should be prepared to demonstrate the ways in which the use has been diminished through a comparison of the before-and-after conditions of the property. The Court in Palazzolo would place such an analysis under the umbrella of Penn Central. Such considerations may include a before and after comparison of: (1) the various uses allowed on the property; (2) the real

393 See, e.g., KENDALL ET AL., supra note 382, at 197. This rationale was also adopted by the Ninth Circuit. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 216 F.3d 764, 781 (9th Cir. 2000) (equating “profits” with value), reh’g denied, reh’g en banc denied, 228 F.3d 998 (9th Cir. 2000), aff’d, 122 S. Ct. 1465 (2002).
394 COKE, supra note 392, ch. 1, § 1.
extent to which the land can be used; (3) the time horizons of the development; (4) the changes in the market risk of development caused by the restrictions; and (5) any changes in fair market value.

There is no doubt that ordinary market forces can effect each one of these factors. However, when a landowner can show that the regulatory restriction has caused a severe reduction in use and value, a reduction that is not caused by mere changes in the market, then considerations of fairness militate compensation. In other words, when a landowner is forced to "bear burdens, which in all justice and fairness, should be borne by the public as a whole," the landowner is owed compensation. The fact that some small value remains in the property is simply not a dispositive factor, if it is properly weighed in light of the overarching concerns that attach to rights in property. In other words, the loss of use, not the remainder of token value, should be the primary consideration.

CONCLUSION

Property rights and aquatic resources are not mutually exclusive terms. As never before, however, there is a debate between those favoring an ever-increasing level of uncompensated regulation of private property and those in favor of the protection of private property rights. The issue is not whether government can decree that aquatic resources be left in their natural state, but instead who will pay the costs of dedicating real property to conservation uses. In recent years, private property owners have been winning the debate before the United States Supreme Court and some federal courts. As a result, the advocates of the regulatory state are urging stricter ripeness standards, for a rule that notice of preexisting regulations eliminates the ability to bring a takings challenge when the regulation is applied, and that there can be no taking whenever there is any value left to the allegedly taken property. By taking away some of the more pernicious governmental defenses to regulatory takings claims in Palazzolo v. Rhode Island, the United States Supreme Court has injected new life in the doctrine of regulatory takings.

398 See id. at 618 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).