The Regulatory Takings Notice Rule

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I. INTRODUCTION

A. The "Notice Rule" and Its Variants

In its most general form, the "notice rule" is the doctrine limiting the regulatory takings claims of property owners who acquire their interests after governmental restrictions are promulgated or deemed foreseeable.

One form of the doctrine, the "positive notice rule,"[1] bars such claims absolutely. Another form, the "weak notice rule," treats notice of a pre-acquisition governmental restriction as a factor militating against, although not precluding, judicial vindication of the owner's regulatory takings claim.

The notice rule, in both its positive and weak forms, is derived from two sources. The first is the regulation's effect upon the property right itself, the "background principles notice rule."[2] The second is the regulation's effect upon the subsequent purchaser's expectations, the "expectations notice rule."[3] The "background principles" and "expectations" branches together constitute the notice rule. They also may be asserted separately, in either their positive or weak forms, as bases for denial of an owner's regulatory takings claim.

During the years since the Supreme Court decided *Penn Central Transportation Co. v. City of New York*,[4] and *Lucas v. South Carolina Coastal Council*,[5] a number of courts have ruled on the notice rule, predominantly in its favor.[6]

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[1] Since recognition of the notice rule as a legal category is only emerging, there is no standard terminology to describe its elements. The categorical descriptions employed in this introductory section attempt to fill that gap. I use the label "positive" to implicate the jurisprudential tradition of positivism, often associated with John Austin, which asserts that law is nothing more than the positive command of the sovereign. *See generally*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed. 1995) (1832). It also follows from more contemporary "positivization" of property law. *See infra* Part II.A.2.

[2] The name is derived from the Supreme Court's analysis in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). *See infra* Part II.B.2.

[3] The name is derived most directly from the Supreme Court's analysis in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See infra* Part III.B.2.

[4] 438 U.S. 104 (1978).

[5] 505 U.S. 1003 (1992).

[6] *See infra* Parts II.B.3 (background principles notice rule) and III.E (expectations notice rule); *see also* Robert Meltz, *What Role Does the Law Existing when a Property is Acquired Have in Analyzing a Later Taking Claim?: The "Notice Rule,"* SF64 ALI-ABA 381, 384 (2001)

In its recent decision in *Palazzolo v. Rhode Island*,[7] the United States Supreme Court rejected the positive notice rule, limited in dicta the scope of the background principles notice rule, and effectively endorsed the expectations notice rule in some unspecified form. This article considers the underpinnings of the notice rule, its adjudication by the courts, and the development of the notice rule since the *Palazzolo* decision.

B. The Nature of Property Rights

Palazzolo v. Rhode Island found that the background principles notice rule and the expectations notice rule "together amount to a single, sweeping, rule."[8] Both branches of this sweeping rule involve "property." It is the explicit focus of the background principles notice rule and an implicit focus of the expectations notice rule. Hence, a review of the nature of property is a useful predicate to an analysis of the notice rule itself.

The notion of "property" consisting of more than the possession of a thing has its roots deep in the common law.[9] In its most general sense, "property" is "a complex system of recognized rights and duties with reference to the control of valuable objects . . . linked with basic economic processes . . . validated by traditional beliefs, attitudes and values and sanctioned in custom and law."[10] Putting the same proposition in more practical terms: "That is property to which the following label can be attached. To the world: Keep off unless you have my permission, which I may grant or withhold. Signed: Private Citizen. Endorsed: The state."[11]

(listing notice rule cases).

[7] 533 U.S. 606 (2001).

[8] *Id.* at 626 (citing *Lucas*, 505 U.S. at 1015); *Penn Central*, 438 U.S. at 124.

[9] An early example of this evolution of "ownership" is the conversion of the status of a person who had been wrongfully displaced from ownership. The conceptual shift was from the dispossessed person being regarded as the owner of a mere personal claim to reinstatement as owner of realty, to the person instead being regarded as the continuing owner of reality who may bring an action to eject the wrongful occupant. The assize of novel disseisin (1166), which compelled the person ejected to bring an action at law for summary ouster of the occupant and restoration of the person who had been ejected to ownership. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 358-59 (5th ed. 1956). However, if the ejected person died prior to recovering under assize of novel disseisin, his heir could not pursue it. Since his right was regarded as a chose in action and not as real property, it died with him. *See* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 100-01 (2d ed. 1988). The conceptual shift was introduced in 1176 of the assize of mort d'ancestor. This permitted the heir to pursue what now was regarded as a continuing claim to real property. *See* PLUCKNETT, *supra*, at 360.

[10] A. Irving Hallowell, *The Nature and Function of Property as a Social Institution*, 1 J. LEG. & POL. SOC. 115 (1943).

[11] Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

The U.S. Supreme Court has declared that:

> The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." . . . The constitutional provision is addressed to every sort of interest the citizen may possess.[12]

At the end of the eighteenth century, Lord Coke famously declared: "What is the land but the profits thereof?"[13] This dictum was quoted by the Supreme Court in *Lucas*[14] in connection with the right of use of land, including the right to develop. More generally, however, Coke's dictum stands for the proposition that "ownership" is not possession in and of itself, or something that is framed on a wall or filed in a courthouse. Rather, it is the right to engage in conduct, to exclude others from interfering, and to transfer those rights to others.

The Supreme Court has confirmed that "use" includes reasonable development.[15] Also, it has characterized the right to exclude others as one of the "most essential sticks in the bundle of rights that are commonly characterized as property."[16] Likewise, the Court has accorded the right of disposition constitutional protection, even for miniscule undivided fractional interests.[17] The "value" of property to its owner is subjective and is measured by the consideration that would induce the owner to part with it. However, where the transfer is nonconsensual, an objective standard of value is required. Hence, the Supreme Court has deemed "just compensation" for a taking "normally measured by fair market value."[18] This value, equal to "what a willing buyer would pay in cash to a willing seller,"[19] in turn is equal to the present value of the stream of net income that exercise of the owner's rights are expected to generate. Government actions that affect the owner's conduct are in fact limitations upon the owner's ability to exercise property rights.

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[12] Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 83 n.6 (1980) (quoting United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (alteration in original)).

[13] 1 EDWARD COKE, THE INSTITUTES OF LAWS OF ENGLAND ch. 1, § 1 (1st Am. ed. 1812) (1797).

[14] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992).

[15] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (noting that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'").

[16] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[17] Babbitt v. Youpee, 519 U.S. 234 (1997).

[18] United States v. 50 Acres of Land, 469 U.S. 24, 25 (1984).

[19] United States v. Miller, 317 U.S. 369, 374 (1943).

The Court has never been particularly coherent on this point. In *Agins v. City of Tiburon*,[20] it held that a regulation "effects a taking" if it does not "substantially advance legitimate state interests."[21] Likewise, in *Penn Central*,[22] the Court referred to the need to balance the character of the governmental action against the owner's loss.[23] While the suggestion is that governmental acts are apt to be considered takings if they are less legitimate and intense, invocation of the Takings Clause is most appropriate when the governmental action is totally legitimate and urgently necessary.[24] Insofar as there has been a complete deprivation of economically viable use, *Lucas* rejects the notion of balancing property rights against regulations, even if they are of a pressing public character.

While any taking of property requires compensation, courts regularly seek refuge in the fiction that government might regulate the use of property without affecting the owner's underlying property rights.[25] The notion that government can impose stringent regulation on conduct without substantial adverse effect upon property is both a chimera and a principal cause for the universal view that regulatory takings law has been intractable.

It has become common that courts engaging in regulatory takings analysis conduct a bifurcated analysis, using *Lucas*, "background principles" language in considering whether there has been a complete deprivation of economically viable use followed by the invocation of *Penn Central* "expectations" language in considering whether there has been a partial taking.[26] Yet there is no intrinsic relationship between the tests and the circumstances in which they govern. Rather, the distinction derives from the dichotomy between the Supreme Court's physical takings[27] and regulatory takings jurisprudence, and

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[20] 447 U.S. 255 (1980).

[21] *Id.* at 260.

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

[23] *Id.* at 124.

[24] *See* Eastern Enters. v. Apfel, 524 U.S. 498 (1998). "The [Takings] Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge. The Clause presupposes what the Government intends to do is otherwise constitutional . . . ." *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part).

[25] To name but one example, the Supreme Court's rent control jurisprudence always has maintained that government is regulating the conduct of a business (which may result in a reduction of the value of that business), but not requiring the transfer of an asset. *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 157-58 (1921); Bowles v. Willingham, 321 U.S. 503, 517 (1944); Yee v. City of Escondido, 503 U.S. 519, 527 (1992). Yet the statutory tenure accorded tenants under rent control ordinances is nothing other than a transfer to the tenant of the landlord's reversion in possession reserved at the end of the limited term for which possession was consensually transferred. *See* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 744-45 (1988).

[26] *See, e.g.*, Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997).

[27] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)

the Court's decision in *Lucas* to treat a deprivation of all economic value as "the equivalent of a physical appropriation."[28]

1. Sources of property rights

The development of Anglo-American property law has been a progression from property as a relationship based on feudal services,[29] through a first recognition of property as an alienable right in the Statute Quia Emptores (1290),[30] through the full flowering of the common law, under which the power of alienation became "an integral part of the fee simple."[31]

2. The notice rule is an unbounded subversion of property rights

The ultimate problem with the notice rule is that it combines aggressive forms of two inconsistent doctrinal principles. The common law system of property rights depended on clearly defined property rules with modest room for equitable departures where the facts of an individual case justified them.[32] The attempt to objectify occasional equitable deviations from well-defined rules through the development of "reasonable" investment-backed expectations has the effect of creating competing sets of legal norms.

The classic virtuous circuity in American law was stated by the principal author of the Constitution: "As a man is said to have a right to his property, he may be equally said to have a property in his rights."[33] The notice rule, on the other hand, may lead to a vicious circuity: "A person's property is limited by

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(concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

[28] Lucas v. South Carolina Council, 505 U.S. 1003, 1017 (1992).

[29] *See, e.g.*, De Peyster v. Michael, 6 N.Y. 467 (1852) (surmising that many of the early enfeoffments were made so as to require the feoffee to render personal service).

[30] Statute of Quia Emptores, *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 174 (Carl Stephenson & Frederick George Marcham eds., rev. ed. 1972).

[31] 1 THOMPSON ON REAL PROPERTY § 29.02 n.83 (David A. Thomas ed., 1994) (citing Coke on Littleton, 201 b. 2 WILLIAM BLACKSTONE, COMMENTARIES ch. 7).

[32] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000). The article argues that while parties to contracts have great latitude in defining their agreement, third parties desiring not to run afoul of the property rights of others must expend considerable time and resources in ascertaining their nature. "The existence of unusual property rights increases the cost of processing information about all property rights. Those creating or transferring idiosyncratic property rights cannot always be expected to take these increases in measurement costs fully into account, making them a true externality. Standardization of property rights reduces these measurement costs." *Id.* at 8.

[33] James Madison, *Property*, 1 NAT'L GAZETTE, Mar. 29, 1792, at 174, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865).

an official's determination of his reasonable expectations, and his expectations are limited by the most recent statute, ordinance, or administrative ruling redefining his rights."

3. State conflict of interest

The State is a source of property rights, an adjudicator of property rights, and the entity responsible for paying just compensation. This inherent conflict of interest would be exacerbated vastly if state regulations are treated as defining the ownership rights of subsequent purchasers.[34] The simple, but compelling, reason is greater need for judicial review of State conduct when "the State's self-interest is at stake."[35] If the State might avoid the obligation to pay just compensation by the simple expedient of redefining property, the rule of law itself would be significantly weakened.[36]

II. THE "BACKGROUND PRINCIPLES" NOTICE RULE AND THE REDEFINITION OF PROPERTY

A. The Background of Background Principles

1. The ordinary content of "background principles" of American property law

The Supreme Court's reference to "background principles of the State's law of property and nuisance" in *Lucas v. South Carolina Coastal Council*[37] evinced its recognition of the need for stability in property law. It is clear that, as a "general proposition," property rights are not created or defined by the federal government "in the first instance."[38] As the Court noted in *Board of Regents v. Roth*,[39] "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

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[34] *See generally* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345 (1998) [hereinafter *Takings Quartet*].

[35] *Id.* at 359 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977)).

[36] *See, e.g.*, Richard H. Fallon, *The "Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997) (noting general agreement that, inter alia, the law should embody stability and should bind officials as well as citizens).

[37] 505 U.S. 1003, 1029 (1992).

[38] Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 84 (1980) (describing the states as "possessed of residual authority that enables [them] to define 'property' in the first instance").

[39] 408 U.S. 564 (1972).

understandings that stem from an independent source such as state law."[40] The U.S. Court of Federal Claims recently observed that American property law

> is based upon long and venerable case precedent, developed over the last two centuries. It is further clarified in the light of our law's Common Law antecedents. The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium.[41]

The case law, in turn, finds its roots in both the long common law heritage that colonial settlers understood to be their rights as Englishmen[42] and the necessities of enticing settlers to the New World with the promise of fee-simple ownership of land.[43]

Although the fee simple is the greatest quantum of ownership that a private individual can possess in land, it never has been interpreted as meaning that the owner has unfettered dominion (notwithstanding Blackstone's flight of rhetoric to the contrary).[44] In the largely decentralized process of common law adjudication of the boundaries of property's dominion, the rules propounded by judges, each within a different factual context, must compete with rules devised by other judges. The result was a tendency towards the evolution of legal norms, with only the best rules surviving.[45] This point was implicit in Justice Holmes,[46] amplified by Justice Cardozo,[47] and long explicated by leading scholars.[48]

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[40] *Id.* at 577.

[41] Hage v. United States, 35 Fed. Cl. 147, 151 (1996).

[42] FOREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985).

[43] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11 (1992).

[44] Blackstone had referred to "property" as the owner's "sole and despotic dominion." 2 WILLIAM BLACKSTONE, COMMENTARIES *2. "Properly understood, Blackstone's phraseology is not a declaration of the absolute character of private property, but a statement which reveals that unless property could be employed to the complete exclusion of others, it was necessarily qualified—either by the police power or correlative private rights, be they related to access, water, or freedom from manipulation and advantage in the marketplace." Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1639 n.53 (1988).

[45] Arthur Linton Corbin, *The Law and the Judges*, 3 YALE REV. 234, 238 (1914). *See generally*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 635-45 (2001) (explicating theory of evolutionary path dependence in law and quoting Corbin, among others).

[46] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1891) ("The life of the law has not been logic: it has been experience.").

[47] *See* Funk v. United States, 290 U.S. 371, 382-83 (1933) (declaring that "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law").

[48] *See, e.g.*, Robert Charles Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1250-54 (1981); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC

Under the law of nuisance, to use a highly relevant illustration, judges refined the concept that every owner of property has the obligation not to use his land in a way that unreasonably affects the rights of neighboring landowners to do likewise.[49] Furthermore, where the owner acts so as to unreasonably affect the health, safety, and welfare of a substantial part of the community, public officials are allowed to assert their aggregated rights through the doctrine of "private nuisance."[50] In this context, the flexibility of common law property and nuisance principles has been recognized in such cases as *Lucas v. South Carolina Council*[51] and *Palazzolo v. Rhode Island*.[52]

Similarly, the doctrine of adverse possession works to legitimize land holdings when chains of title have been disrupted.[53] Common law property has been hedged by such doctrines as the prohibition of the creation of novel interests,[54] clogging the equity of redemption,[55] and equitable protection for mortgagors.[56]

In addition, over centuries the common law has evolved to limit government's powers to those benefiting the welfare of the general public while protecting individual property rights. The public trust doctrine, preserving the shore for commerce and fishing,[57] the limited power of the sovereign to quarter troops on private land in time of war,[58] and the right of eminent domain itself, carrying with it the requirement of just compensation,[59] are examples.

In discussing the meaning of background principles, it is important not to lose sight of the fact that numerous Supreme Court decisions have recognized

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STRUCTURE OF TORT LAW (1987).

[49] *See* RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (1979) and cases cited therein.

[50] *See* RESTATEMENT (SECOND) OF TORTS § 821B (1979) and cases cited therein.

[51] 505 U.S. 1003, 1029 (1992) (observing by way of indicating the flexibility of the common law that the owner of a nuclear generating plant discovered to be located on an earthquake fault could be ordered to remove all its improvements without government incurring takings liability).

[52] 533 U.S. 606, 630 (2001) (noting "shared understandings of permissible limitations derived from a State's legal tradition" enunciated in *Lucas*).

[53] *See* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 673, 676 (1986).

[54] *See* Merrill & Smith, *supra* note 32, at 29-31.

[55] *See* Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599, 600-01 (1999) (noting that a mortgagor may not cut off his equity of redemption) (citing 4 JOHN D. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1193, at 568-69 (5th ed. 1941)).

[56] *See, e.g.*, PLUCKNETT, *supra* note 9, at 608 (discussing development of equitable redemption).

[57] *See, e.g.*, Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849 (2001).

[58] U.S. CONST. amend. III.

[59] U.S. CONST. amend. V.

these and other fundamental background principles of American property law.[60]

While the Supreme Court has repudiated the expansive view of economic substantive due process exemplified by its decision in *Lochner v. New York*,[61] even scholars who are sympathetic towards increased regulation understand that property rights have a fundamental role in the protection of liberty. Professor Cass Sunstein thus recognized that "[i]t would be difficult . . . to abandon those [*Lochner*-like] baselines altogether without reading the contracts and takings clauses out of the Constitution . . . ."[62]

2. *Property rights in the post-New Deal era*

Since the New Deal, the Supreme Court's jurisprudence generally has posited a hierarchy of rights. In footnote four of *United States v. Carolene Products*,[63] the Court posited that there may be "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . [or reflects] prejudice against discrete and insular minorities . . . ."[64] The effect was an assertion that some guarantees within the Bill of Rights are more fundamental than others.[65]

3. *The new positivism of Reich and Michelman*

If common law property stood for stability and change by slow accretion, the temper of the times of the late 1960s and early 1970s demanded change in many economic and social norms at a quicker pace. One response was the revolution in landlord-tenant law, where the lease, formerly envisioned primarily as the conveyance of an interest in land, became transmuted into a contract for housing services.[66]

More generally, the demand for institutionalization of '60s era benefit programs was popularized by the most cited article ever published in the *Yale*

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[60] *See* Kmiec, *supra* note 44, at 1642.

[61] 198 U.S. 45 (1905).

[62] Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891 (1987).

[63] 304 U.S. 144 (1938).

[64] *Id.* at 152-53 n.4.

[65] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 128-29 (1991) (stating that the footnote was an effort to reorient the meaning of the reconstruction amendment in a post-New Deal world); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980) (asserting the footnote foreshadowed the Warren Court's assumption of a more "activist" or interventionist role).

[66] *See generally* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984) (providing a comprehensive summary).

Law Journal,[67] Charles Reich's *The New Property*.[68] Reich later summarized his thesis:

> Under the New Deal increased constitutional powers were assumed by the government in return for societal responsibility to the individuals who gave up their economic independence in recognition of the greater efficiency of large organizations. The New Property argued that, if the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as entitlements—a substitute for old forms of property.[69]

While one might say that the new entitlements would be no less protected by law than traditional property rights, one could say with equal validity that traditional property rights would be no more protected than governmental benefit programs. An admission that the inevitable thrust of the "new property" would result in politicization of traditional property rights was contained in Professor Frank Michelman's review of the Supreme Court's 1987 takings cases:[70]

> The bounding of entitlements, however, could not forever remain conceptually and morally obvious, apolitical work. Changed and intensified modes of social interaction dislodged latent complexity and so gave rise to the disintegrative analytical vocabulary, and practice in its use, that enables us today to talk so easily and compellingly about conceptual severance. Such changes, along with the emergence of the economically active and regulatory state with its licenses, franchises, and the like, pushed towards the denaturalization and positivization (implying the politicization) of property. Progressives and legal realists came on the scene to demonstrate how in modern conditions the prime moral and political values associated with property—independence, security, privacy—are as much defeated as they are served by adherence to a highly formal system of highly abstract property rights. There is synergy among these effects. For example, the better we learn the analytical lesson of conceptual severance—that every particle of legally sanctioned advantage is property—the more we are forced to recognize in every act of government a redefinition and adjustment of a property boundary. *The war between popular self-government and strongly constitutionalized property now comes to seem not containable but total.*[71]

In hindsight, the courts might promptly have stated that the asserted "new property" does not reduce the protection accorded traditional property. That point was made succinctly in a recent opinion of the U.S. Court of Appeals for

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[67] *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 766 (1996).

[68] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[69] Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 817-18 (1996).

[70] Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1627 (1988).

[71] *Id.* at 1627-28 (emphasis added) (citations omitted).

the Ninth Circuit, *Schneider v. California Department of Correction*.[72] That opinion implicitly rejected the background principles notice rule.[73]

The result of the intellectual ferment associated with the ideas of Michelman and Reich affected not only whether property rights are to be protected (or not) by government, but also how property is to be defined one way (or another) by government. Ironically, the catalyst for the assertion of aggressive positivism in redefining property rights came not from Reich and Michelman or their followers, but rather from what in other circumstances might have been an innocuous qualifier in an opinion by Justice Antonin Scalia.

B. Development of the Background Principles Notice Rule

1. Nollan v. California Coastal Commission *and the continuity of rights*

The gravamen of *Nollan v. California Coastal Commission*,[74] decided by the Supreme Court in 1987, is that while owners may surrender their rights through voluntary exchange, the substance of those rights remains intact. Writing for the Court, Justice Scalia rejected the dissent's assertion that the expectations theory of *Ruckelshaus v. Monsanto Co.*[75] precluded subsequent purchasers from succeeding to their sellers' development rights:

> Justice Brennan also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. He cites our opinion in *Ruckelshaus v. Monsanto Co.* as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter

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[72] 151 F.3d 1194 (9th Cir. 1998). The court stated that:

> The *Roth* 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. . . . [T]here is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny. The States' power vis-à-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional "old property" interests found within the core.

Id. at 1200-01 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982)) (citation omitted).

[73] *Id.* at 1201 ("Were 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.").

[74] 483 U.S. 825 (1987); *see also infra* Part III.D for discussion of expectations notice rule aspects of *Nollan*.

[75] 467 U.S. 986 (1984).

> property rights. In *Monsanto*, however, we found merely that the Takings Clause was not violated by giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit*," of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange" that we found to have occurred in *Monsanto*. 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.[76]

To the background principle that buyers succeed to sellers' rights, referred to in *Nollan*, must be added the background principle that the mere passage of time does not immunize from challenge an otherwise invalid regulation,[77] and that successors of the owners at the time invalid regulations are imposed may mount those challenges.[78] Indeed, even cases aggressively asserting the positive notice rule have allowed that postregulatory purchasers could mount facial challenges to the legitimacy of ordinances.[79]

2. *Background principles in* Lucas v. South Carolina Coastal Council

In *Lucas v. South Carolina Coastal Council*,[80] Justice Scalia observed that there inheres in every private land title "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[81] In light of the elements of the historic framework of property law discussed earlier,[82] the statement would seem unremarkable.

Some sixty years before *Lucas*, in *Pennsylvania Coal Co. v. Mahon*,[83] the Supreme Court held that a regulation may constitute a compensable taking if,

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[76] *Nollan*, 483 U.S. at 833 n.2 (citations omitted) (emphasis in quotations from *Monsanto* added by Court in *Nollan*).

[77] *See, e.g.*, Barney & Carey Co. v. Town of Milton, 87 N.E.2d 9, 14 (Mass. 1949).

[78] *See, e.g.*, Forbes v. Hubbard, 180 N.E. 767, 771 (Ill. 1932); Filister v. City of Minneapolis, 133 N.W.2d 500, 504 (Minn. 1964).

[79] *See*, Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1040 (N.Y. 1997).

[80] 505 U.S. 1003 (1992).

[81] *Id.* at 1029.

[82] *See supra* Parts I.B., II.A.

[83] 260 U.S. 393 (1922).

in Justice Holmes' Delphic words, it goes "too far."[84] A half century after *Pennsylvania Coal*, the Court grappled with the need to supply some content to its takings jurisprudence in *Penn Central Transportation Co. v. City of New York*.[85] There, the Court described its takings cases as engagements in "essentially ad hoc, factual inquiries."[86] One of the factors that was of "particular significance" was the "character" of the governmental action. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[87] Only four years later, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[88] the Court held that where the character of the governmental act is a "permanent physical occupation," the character "not only is an important factor in resolving whether the action works a taking but also is determinative."[89] In other words, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[90] For the time being, at least, the "character of the governmental action" test was stripped of easy to discern content.[91]

In *Lucas*, Justice Scalia dealt with that disparity by fashioning a rule around the suggestion "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[92]

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved . . .
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> . . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent

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[84] *Id.* at 415.

[85] 438 U.S. 104 (1978).

[86] *Id.* at 124.

[87] *Id.* (citing United States v. Causby, 328 U.S. 256 (1946)).

[88] 458 U.S. 419 (1982).

[89] *Id.* at 426.

[90] *Id.*

[91] The "character of the governmental action" test may have a new referent that is on its way to becoming a new categorical takings test. *See* Eastern Enters. v. Apfel, 524 U.S. 498 (1998); American Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 50 (2001); *infra* Part V.C.2.

[92] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992) (citing San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

> landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[93]

In particular, the Court rejected the regulator's assertion "that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[94]

It is clear that Scalia did not regard the residential development of Lucas's two beachfront lots, which had been precluded by the South Carolina Beachfront Management Act, as violative of basic principles of American property law.[95] In lawyerly fashion, however, he enunciated the "background principles" limitation to preclude the possibility of a successful claim of a per se taking based on the preclusion of a land use that, while being the only economically viable use of a parcel, nevertheless was a use clearly regarded as injurious to the community under common law nuisance.

3. *Positive notice rule cases between* Lucas *and* Palazzolo

Those post-*Lucas* cases rejecting the positive notice rule reflected the continuity of rights principle enunciated in *Nollan*.[96] As articulated by the Supreme Court of New Jersey, "the right of a property owner . . . passes to the next owner . . . ."[97] As noted by a Florida appellate court, "land is purchased with future development legitimately anticipated and with no existing bar thereto."[98] The buyer's rights are subject to legitimate regulation, but cannot be extinguished by dint of a preexisting statute. Similarly, a Michigan appellate court had declared in *K & K Construction, Inc. v. Department of*

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[93] *Id.* at 1027, 1028-29 (citation omitted).

[94] *Id. at 1028.*

[95] *Id.* at 1018-19 (noting that the many state laws providing for use of eminent domain to obtain servitudes against development on scenic lands "suggest the practical equivalence in this setting of negative regulation and appropriation"). On remand, the state supreme court agreed that no "such common law principle" of state law precluded Lucas from obtaining just compensation. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

[96] Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987); *see also supra* Part II.B.1.

[97] Karam v. State, 705 A.2d 1221, 1229 (N.J. Super. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J. 1999). "We recognize that rights in property pass from one owner to the next. Thus, 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 of the impediment to development." *Id.* at 1229.

[98] Vatalaro v. Dep't of Envtl. Regulation, 601 So.2d 1223, 1229 (Fla. Dist. Ct. App. 1992).

Natural Resources,[99] that it did "not agree that the timing of the regulation and ownership would act to preclude just compensation where it would otherwise be due."[100]

4. Background principles notice rule cases between Lucas *and* Palazzolo

Between the U.S. Supreme Court's decisions in *Lucas v. South Carolina Coastal Council*[101] and *Palazzolo v. Rhode Island*,[102] a number of federal and state courts adjudicated the positive background principles notice rule. Most have upheld it without any analysis beyond an invocation of *Lucas*. The line of cases of the South Carolina Supreme Court is archetypical. On remand in *Lucas*,[103] the court had readily found a lack of background principles of state law that might preclude development. The only significant difference in its next case, *Grant v. South Carolina Coastal Council*,[104] was that the rule precluding development predated the landowner's purchase. The court found for the state, declaring that *Lucas* "expressly states no compensable taking occurs when the complained-of restriction on use was part of the owner's original title . . . ."[105] Subsequent holdings in *Wooten v. South Carolina Coastal Council*[106] and *McQueen v. South Carolina Coastal Council*[107] were similar. *McQueen* involved denial of a permit to bulkhead and backfill two lots that were purchased many years prior to statutory prohibitions of these activities. According to the South Carolina appellate court, the case bears "a remarkable similitude to *Lucas*."[108] The state supreme court disagreed, holding that the landowner's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations."[109] The vacation of the judgment in *McQueen* by the U.S. Supreme Court and its

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[99] 551 N.W.2d 413 (Mich. App. 1996), *rev'd on other grounds*, 575 N.W.2d 531 (Mich. 1998), *overruled by* Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000).

[100] *Id.* at 417.

[101] 505 U.S. 1003 (1992).

[102] 533 U.S. 606 (2001).

[103] Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992).

[104] 461 S.E.2d 388 (S.C. 1995).

[105] *Id.* at 391.

[106] 510 S.E.2d 716 (S.C. 1999).

[107] 530 S.E.2d 628 (S.C. 2000).

[108] McQueen v. South Carolina Coastal Council, 496 S.E.2d 643, 648 (S.C. App. 1998).

[109] McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 634-35 (S.C. 2000).

remand in light of *Palazzolo*[110] will accord the state court, and possibly the U.S. Supreme Court, with an opportunity to revisit the issue.[111]

Among the federal courts upholding the background principles notice rule have been the U.S. Court of Appeals for the Eighth[112] and Ninth[113] Circuits. State supreme courts upholding the background principles notice rule during this period were those of Iowa,[114] Michigan,[115] New York,[116] Rhode Island,[117] and Virginia.[118]

Some of these cases adopted the background principles notice rule in analyzing the facts as constituting a complete deprivation of economic enjoyment under *Lucas* in tandem with an expectations notice rule approach when alternatively treating the facts as giving rise to a partial takings under *Penn Central*.[119]

Prior to *Lucas*,[120] a number of courts held that a postregulation purchaser had the right to challenge the validity of the land use regulation.[121] Likewise,

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[110] *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000), *cert. granted, judgment vacated, remanded sub nom.* McQueen v. South Carolina Dep't of Health & Envtl. Control, 121 S. Ct. 2581 (2001).

[111] *See infra* Part V.C.5.

[112] Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996).

[113] Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995).

[114] Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (denying development of subdivision based on finding of historically significant ancient human remains as authorized by pre-acquisition statute).

[115] Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634, 638-639 (Mich. 2000), *cert. denied*, 121 S. Ct. 1356 (2001) (denying compensation because lessee did not possess property right to rooftop billboard after regulations to contrary). Furthermore, preexisting regulation meant that the owner could not have had a reasonable expectation that it could have maintained rooftop signs after ordinances prohibiting them. *Id.* at 639-40.

[116] Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997) (applying expectations notice rule); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) (applying expectations notice rule).

[117] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (also applying expectations notice rule).

[118] City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998), *cert. denied*, 525 U.S. 826 (1998) (holding denial of development permit under pre-acquisition ordinance not a compensable taking). "In contrast to *Lucas*, however, the Ordinance at issue here predated Bell's and the Trustee's acquisition of the property. Therefore, the 'bundle of rights' which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions." *Id.* at 417.

[119] *See, e.g.*, Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000); Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (applying expectations notice rule).

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

[121] *See, e.g.*, Filister v. City of Minneapolis, 133 N.W.2d 500, 504 (Minn. 1964) (stating

some post-*Lucas* decisions have permitted the postacquisition purchaser to obtain takings damages. Most notably, even though the landowner in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* was aware of the development regulation when it purchased its land, its takings claim was vindicated in both the Ninth Circuit[122] and the Supreme Court.[123] Other cases adopting this approach include the Ninth Circuit decision in *Carson Harbor Village, Ltd. v. City of Carson*,[124] and *Karam v. State, Department of Environmental Protection*.[125] Taking a somewhat different view, a Florida appellate court in *Vatalaro v. Department of Environmental Regulation*,[126] upheld the right of a postregulation purchaser to pursue a takings claim, since the taking did not occur until the sought-after permits were denied. Similarly, some courts have held that a purchaser may seek a hardship variance from preacquisition zoning.[127]

However, a number of post-*Lucas* cases, while affirming that a subsequent purchaser has the right to challenge the validity of a preacquisition regulation, have either suggested or declared that the owner could not seek takings damages. In *Lopes v. City of Peabody*,[128] for instance, the Supreme Judicial Court of Massachusetts declared:

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law

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"[w]e know of no rule of law that creates an estoppel against attack by such purchaser on the validity of a zoning ordinance"); Cottonwood Farms v. Bd. of County Comm'rs, 763 P.2d 551, 555 (Colo. 1988) (stating that a "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").

[122] Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *aff'd sub nom.* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[123] 526 U.S. 687 (1999).

[124] 37 F.3d 468 (9th Cir. 1994) (upholding "as applied" takings claim of post-regulation purchaser).

[125] 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999) (holding purchaser steps into shoes of original owner).

[126] 601 So.2d 1223, 1229 (Fla. Dist. Ct. App. 1992).

[127] *See, e.g.*, Somol v. Bd. of Adjustment, 649 A.2d 422, 428 (N.J. Super. Ct. 1994) (holding buyer not foreclosed from claiming variance based on knowledge of nonconformity at time of purchase; rather, buyer steps into seller's shoes with respect to whether hardship self created); Hoberg v. City of Bellevue, 884 P.2d 1339, 1342 (Wash. App. 1994) (holding the same).

[128] 629 N.E.2d 1312 (Mass. 1994).

> would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.[129]

However, *Lopes* did not present a claim for takings damages,[130] and whether a postacquisition purchaser might obtain damages was placed in doubt in the court's subsequent decision in *Leonard v. Town of Brimfield*.[131] The court ruled that the owner had never acquired the contested rights under the background principles notice rule, nor would she prevail under the multi-factor *Penn Central* test.[132] The New York Court of Appeals reached a similar result in *Gazza v. State Department of Environmental Conservation*,[133] declaring that:

> While any party adversely affected by government action may attack such action as unconstitutional and illegitimate, petitioner does not claim that wetlands regulation is beyond the State's power. Rather, petitioner simply claims that the property interest he had in building a dwelling on his land was taken by the State through the denial of the setback variance.[134]

C. *The Notice Rule Exacerbates Problems with Background Principles*

1. *"Background principles" as "backdrop principles"*

Those courts that embraced the positive background principles rule subsequent to *Lucas v. South Carolina Coastal Council*[135] implicitly maintained that their decisions were mandated by the reasoning in *Lucas*. In essence, they mistakenly ignored that the "background principles" doctrine embodies an essential limitation of the state's right to redefine property through legislation. Instead, they saw "background principles" as backdrop, as precedent from the past that is mere prelude to legislative action in the present. They asserted that *any* regulation promulgated prior to a landowner's acquisition of title inheres in that title and forms a part of the background principles limiting that title.

Emblematic of this approach was a quartet of interrelated takings cases decided by the New York Court of Appeals in 1997.[136] In one, *Kim v. City of*

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[129] *Id.* at 1315.

[130] *Id.* at 1314.

[131] 666 N.E.2d 1300 (Mass. 1996).

[132] *Id.* at 1303-04.

[133] 679 N.E.2d 1035 (N.Y. 1997).

[134] *Id.* at 1040.

[135] 505 U.S. 1003 (1992).

[136] Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997); Basile v. Town of Southampton, 678 N.E.2d 489 (N.Y. 1997); Gazza v. Dep't of Envtl. Conservation, 679 N.E.2d

New York,[137] the court rejected in indignant terms the elevation of traditional meaning over contemporary legislation:

> Given the theoretical basis of the logically antecedent inquiry—namely, "the State's power over . . . the 'bundle of rights' that [property owners] acquire when they obtain title"—we can discern no sound reason to isolate the inquiry to some arbitrary earlier time in the evolution of the common law. It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title. To accept this proposition would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law.[138]

While it is a truism to say that new law may trump old law, neither the legislature nor the judiciary should make or uphold new law without regard for the past. Even in the case of ordinary statutes and public policy, sometimes apparently outmoded rules quietly have assumed unarticulated, but important, functions.[139] In the case of rules of constitutional import, of course, the stakes are greater. Here repudiation of the old rule may deprive individuals of basic rights.

Before exploring this dimension of the background principles notice rule, however, it is useful to examine the rule's implicit premise that, as a practical matter, the rule does not deprive the postregulatory purchaser of value.

2. *Confusion over who bears the cost of regulation*

Is there a fundamental difference in its effect upon a parcel between a regulation that precludes an existing use and one that precludes only a use in which the parcel has not been engaged? As Professor Michelman stated, "a ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective

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1035 (N.Y. 1997); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); *see also* Eagle, *Takings Quartet*, *supra* note 34.

[137] 681 N.E.2d 312 (N.Y. 1997).

[138] *Id.* at 315 (alteration in original) (citations omitted).

[139] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (1881).

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries, the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

Id.

uses."[140] But it is largely on this assumption that some courts that have invoked the notice rule have asserted that the owner at the time of regulation bears all of the loss and that the postregulatory purchaser bears none of the loss. For instance, the New York Court of Appeals asserted:

> The rule that preexisting regulations inhere in a property owner's title will affect the *value* of property, but this should furnish ample incentive to the prior owner—the party whose title has been redefined by the promulgation of a new regulation—to assert whatever compensatory takings claim it might have. If a prior owner, whether immediate or not, fails to assert a takings claim, it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title. Of course, the parties can condition sale on receipt of the necessary use allowances or prosecution of a takings claim. Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc. Additionally, the rule advanced by the dissent would have the effect of unsettling property law and other land-use restrictions throughout the State. The bright-line rule articulated in *Kim* and *Gazza*, which allows for a subsequent purchaser to challenge the validity of previously enacted laws (as opposed to pursuing a compensatory takings claim), will enhance certainty and, to that extent, facilitate transferability of title.[141]

I have elsewhere equated the court's faith that its "bright-line" test will facilitate transactions to California Supreme Court Justice Roger Traynor's faith in the middle of the last century that, in tort cases, insurance could be substituted effortlessly for fault.[142] I maintained that this assumption was untenable for a number of reasons, including operation of the regulatory takings ripeness rules, the fact that often the seller would be in a poor position to assert the claim and the buyer a good one, and that in many cases it would be difficult to discern when the claim had matured, even apart from the

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[140] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967) [hereinafter *Property, Utility, and Fairness*].

[141] Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997) (citing Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997)); Gazza v. Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997)) (emphasis in original).

[142] *See* Eagle, *Takings Quartet*, *supra* note 34, at 368 (quoting Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring). "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Escola*, 150 P.2d at 441.

ripeness rules. Also, no systematic "windfalls" would be abetted, since windfalls would be fleeting at most.[143]

The U.S. Supreme Court rejected the positive notice rule in *Palazzolo* partly because of problems with ripeness and unfairness to sellers, and those issues will be discussed in that context.[144] Other problems associated with the background principles notice rule remain as important issues after *Palazzolo*.[145]

3. The background principles notice rule is a deprivation of the prior owner's common law right of alienation

One of the most important policies embedded in the development of common law property has been the increasing preference for alienability.[146] Thus, ownership of a fee interest entails not only the rights to make productive use of land and to exclude others from entry, but also includes the right to transfer these interests to another. Even as *Kim v. City of New York*[147] was being decided, for instance, the state law for over a century had been that "[a] grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom . . . ."[148] The Supreme Court in *Palazzolo* summarized the comprehensive survey by Professor Robert Ellickson on this point as concluding that the "right to transfer interest in land is a defining characteristic of the fee simple estate."[149]

Ironically, as previously noted, Professor Michelman conceived of the notion of investment-backed expectations in part because he understood the falsity of the notion that landowners are not harmed by a statute imposed during their tenure but applicable only to subsequent owners.[150] This does not deny that government may enact positive law or apply the background principles notice rule so as to truncate the right of purchasers to pursue their

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[143] *See* Eagle, *Takings Quartet*, *supra* note 34, at 367-78.

[144] Palazzolo v. Rhode Island, 533 U.S. 606, 627-28 (2001); *see also infra* Part IV.E.

[145] *See infra* Part V.C.

[146] The Restatement (Second) of Property described the courts of thirteenth, fourteenth, and fifteenth century England as "pursuing, consciously or unconsciously, a policy in favor of the free alienability of land." RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, Introductory Note, Part II (1983); *see also* PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 839 (rev. ed. 1994).

[147] 681 N.E.2d 312 (N.Y. 1997); *see also supra* note 137 and accompanying text.

[148] N.Y. REAL PROP. LAW § 245 (McKinney 1997).

[149] Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (citing Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1368-69 (1993)).

[150] Michelman, *supra* note 140, at 1233; *see also supra* Part II.C.2.

sellers' takings claims. However, exercise of that right itself results in an additional taking.[151]

4. Analogous legal doctrines protecting continuity between sellers and buyers

The continuity of rights principle enunciated in *Nollan*[152] has been regarded as fundamental in property law. It is reflected in many analogous rules that help ensure that all rights owned by sellers are transferred to their purchasers. Indeed, it is long standing and elemental black letter law that, unless there is an explicit reservation by the seller, all of his rights so devolve.[153] Ensuring that all rights possessed by the seller inhered in the buyer was one way to make real estate transactions more attractive and thus encourage the migration of particular parcels from those who valued them less to those who valued them more.

In many instances, courts will refrain from applying a rule where the effect is unjust deprivation of rights that should inhere in the buyer. A good example is the real estate "shelter rule," whereby a purchaser who himself is not a bona fide purchaser takes priority over an earlier bona fide purchaser who first records.[154] Under the rule, a buyer "who takes an interest in property from a bona fide purchaser, may be sheltered in the latter's protective status."[155] The point of the shelter rule is not that the purchaser with notice deserves to win over an earlier bona fide purchaser, but rather "to give the last bona fide

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[151] *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding federal seizure of contract claims against the government of Iran and holding takings claim unripe pending statutory claim under the Tucker Act).

[152] Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987); *see also supra* Part II.B.1.

[153] *See, e.g.*, Blackman v. Striker, 37 N.E. 484 (N.Y. 1894). "The deed must be held to convey all the interest in the lands which the grantor had, unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant." *Id.* at 485; *see also* 9 THOMPSON, *supra* note 31, at § 82.13(c)(2) (citing cases: "[T]he entire estate or interest of the grantor passes to the grantee, unless there is specific language to the contrary."). Providing symmetry, the correlative principle *nemo dat qui non habet* indicates that a person cannot sell what he does not own.

[154] The doctrine arises where the original owner of an interest in property, *O*, sells first to bona fide purchaser *A*, who does not record. *O* then (wrongfully) sells to a second bona fide purchaser, *B*. *A* then records soon after *B*'s purchase, and *B* subsequently sells to *C*. Since *A*'s deed is recorded prior to *C*'s purchase, *C* has constructive notice of it and therefore cannot be a bona fide purchaser with respect to it.

[155] *See* Sun Valley Land & Minerals, Inc. v. Burt, 853 P.2d 607, 614 (Idaho Ct. App. 1993); Jones v. Indep. Title Co., 147 P.2d 542, 543 (Cal. 1944).

purchaser, who otherwise could not sell what was rightfully his, "the benefit of his bargain by protecting his market."[156]

In truth, of course, individuals in the real estate market are both buyers and sellers, and any interpretation of real estate recording acts that would make properly researched titles less secure would harm everyone dependent upon the efficient use of privately owned resources. This explanation, in turn, simply reflects the more general truth that stable and well-defined property rights benefit the society as a whole.[157]

A further example of the common law's preference for continuity is the adverse possession doctrine of "tacking," in which transferees assumed their transferors' rights even when the transferors lacked legal ownership. The record owner of land will lose the right to eject a wrongful occupant upon the termination of the statutory period to bring the eviction action, at which time the occupant acquires title.[158]

5. The positive background principles rule encourages unrestrained regulation

Without "objective rules and customs that can be understood as reasonable by all parties involved,"[159] a background principles rule degenerates into the sovereign's ipse dixit. The positive background principles doctrine goes far beyond ensuring that government, as Justice Kennedy put it, "should not be prevented from enacting new regulatory initiatives in response to changing conditions." Common law principles are flexible enough to deal with new developments where warranted. The Court in *Lucas* cited potential discoveries relating to safe siting of a nuclear generating plant as an example.[160]

III. THE "EXPECTATIONS" NOTICE RULE—THE REIFICATION OF AN INTUITION

The second branch of the positive notice rule refers to the principle that the purchasers are limited to those exercises of their property rights that they did expect, or should have expected. The notion that landowners do not deserve what they should not have expected invokes the principle of fairness, a

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[156] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 676 n.10 (4th ed. 1998).

[157] *See, e.g.*, PAUL HEYNE, THE ECONOMIC WAY OF THINKING 366 (7th ed. 1994) (noting that "stable expectations [about property rights] are the foundation of effective cooperation in any large, complex society").

[158] *See, e.g.*, 7 POWELL ON REAL PROPERTY ¶ 1012 (rev. ed. 1996).

[159] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035 (Kennedy, J., concurring); *see also infra* note 237 and accompanying text.

[160] *Lucas*, 505 U.S. at 1029.

doctrine traditionally the purview of equity. As the notion of "expectations" has become more objectified in succeeding judicial iterations, the question of how or why that concept should substitute for "property" itself becomes both more intriguing and puzzling. The U.S. Supreme Court's recent decision in *Palazzolo v. Rhode Island*[161] increases the role that expectations will play in the Court's takings jurisprudence.[162] Prior to considering *Palazzolo* and the subsequent caselaw, however, it is useful to review how the idea of expectations arose and grew.

A. Equity Historically Has Protected Common Law Property

Over the centuries, equity jurisprudence has protected owners whose property was subject to harsh and unjust deprivation through a literal application of real property law. Even prior to the creation of courts of chancery, for instance, common law courts in the twelfth and thirteenth centuries were ameliorating the unfairness resulting from strict mortgage foreclosure through preservation of the mortgagor's equity of redemption and from the retention of property unfairly taken through the device of restitution.[163]

The application of equitable principles did sometimes constrict the actions of landowners. Neighbors, for instance, could obtain injunctive relief against certain land uses. However, this was to prevent a landowner from impinging upon the right of adjoining owners to make reasonable use of their own property. Likewise, a government action based on public nuisance was not a limitation on property rights, but merely an assertion of the aggregate rights of a substantial number of aggrieved property owners. Thus the nuisance action does not limit property rights, but instead protects them.[164]

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[161] 533 U.S. 606 (2001).

[162] As this article went to press, the Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___ S. Ct. ___, 2002 WL 654431 (Apr. 23, 2002) (No. 00-1167). The majority opinion reiterates the role of expectations and its prominence in *Palazzolo*.

[163] *See generally* PLUCKNETT, *supra* note 9, at 673-80.

[164] This principle, of course, was one of the "background principles of the State's law of property and nuisance already place upon land ownership" that Justice Scalia declared to inhere in property in *Lucas*, 505 U.S. at 1004.

B. The Development of Expectations as a Limitation on Property Rights

1. Michelman and crystallized expectations

The origin of "expectations" as a critical aspect of takings analysis begins with an influential article by Frank Michelman, *Property, Utility, and Fairness*.[165] Michelman, in rejecting Justice Holmes's conceptualization that there was a taking when government went "too far,"[166] applied a different principle to determine whether compensation was required:

> The customary labels—magnitude of the harm test, or diminution of value test—obscure the test's foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation*.[167]

In support of his thesis, Michelman offered the familiar example of the special provision in newly enacted zoning ordinances for prior nonconforming uses:

> What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.[168]

The target of Michelman's analysis was not the landowner or a purchaser as such, but rather the speculator, who sees changes in law not as the cause of any genuine loss, but rather as an occasion for pressing a contrived claim for compensation.

> The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby *land speculator* who is unable to show that he has yet formed any specific plans for his vacant land still has a package of

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[165] *See* Michelman, *Property, Utility, and Fairness*, *supra* note 140.

[166] *Id.* at 1233; *see* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

[167] Michelman, *supra* note 140, at 1233 (emphasis added).

[168] *Id.* (citation omitted).

> possibilities with its value, though lessened, still unspecified—which is what he had before.[169]

In sum, Michelman argued that, if government has to compensate all owners whose property rights are diminished by a new ordinance, compensation would prove prohibitively expensive. The compromise is to compensate only those owners who could demonstrate that they had suffered the sharp pang of loss.

While the foregoing suggests that Professor Michelman's analysis was based on fairness, it was as least as much a function of pragmatism.[170] His concept of "property" was not based on fundamental notions of rights or duties. Instead, it was based upon utilitarian theory, as advocated by Jeremy Bentham. "Property, according to Bentham, is most aptly regarded as the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources."[171]

Michelman understood that people would not work or invest "unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings."[172] The redistribution of their anticipated earnings to others would impair this necessary assurance. However, not all redistributions would have this effect.

> [T]he utilitarian's solicitude for security is instrumental and subordinate to his goal of maximizing the output of satisfactions. Security of expectation is cherished, not for its own sake, but only as a shield for morale. Once admit that not all capricious redistributive effects are totally demoralizing, and utilitarian theory can tell us where to draw the line between compensable and noncompensable collective impositions. An imposition is compensable if not to compensate would be critically demoralizing; otherwise, not.[173]

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[169] *Id.* at 1234 (emphasis added).

[170] Michelman's construct is too detailed and subtle to be fully treated here. For a fuller treatment of his balancing of efficiency gains (the excess of benefits produced by the governmental action over the costs it imposes), demoralization costs (the dollar value of the adverse effects upon losers and their sympathizers who observe the failure to compensate), and settlement costs (the dollar value of the time, effort, and resources necessary to reach a settlement that will prevent demoralization costs), see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 141-58 (1995).

[171] Michelman, *Property, Utility, and Fairness*, *supra* note 140, at 1211 (citing JEREMY BENTHAM, THEORY OF LEGISLATION chs. 7-10 (6th ed. 1890)).

[172] *Id.* at 1212.

[173] *Id.* at 1213.

2. *Brennan and "distinct investment-backed expectations" in* Penn Central

Justice William Brennan's opinion for the Supreme Court in *Penn Central Transportation Co. v. City of New York*,[174] adopted Professor Michelman's thesis.[175] Writing for the Court, Brennan adopted an ad hoc balancing test to determine whether a compensable taking had occurred. In making such determinations, not all factors were of equal significance:

> [T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, *the extent to which the regulation has interfered with distinct investment-backed expectations* are, of course, relevant considerations. So, too, is the character of the governmental action.[176]

Justice Brennan did not define "distinct investment-backed expectations" in *Penn Central*. He did, however, assert that the landowner could not demonstrate a taking "simply by showing that [it had] been denied the ability to exploit a property interest" it previously believed it could develop, namely the "air rights" over Grand Central Terminal.[177] Significantly, Brennan's analysis essentially ignored the fact that the framework of the terminal originally had been strengthened, undoubtedly at some expense, for the "express purpose" of permitting construction of just the sort of office building above the terminal that the city's landmark preservation law subsequently forbade.[178] There is no indication that Brennan intended to imply anything more than landowner dessert. Neither *Penn Central* nor the Court's subsequent cases, for instance, have suggested that those obtaining their interests through unexpected inheritance or similar circumstances are bereft of Takings Clause protection on the ground that they had received a windfall instead of established reliance upon an investment.

The lack of clarity in the *Penn Central* investment-backed expectations discussion is evidenced by an early comment of a leading land use scholar:

> Curiously, Justice Brennan did not mention either the estoppel or vested rights doctrines in *Penn Central*. This omission may be an oversight, or may indicate that investment-backed expectations must be considered even though they do not create an estoppel or a vested right. If this interpretation is correct, the

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[174] 438 U.S. 104 (1978).

[175] *See* Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63, 66-67 (1996).

[176] *Penn Central*, 438 U.S. at 124 (citation omitted) (emphasis added).

[177] *Id.* at 130.

[178] *Id.* at 115 n.15.

expectations taking factor introduces a landowner tilt in taking theory that did not exist before.[179]

This observation raises the obvious lack of continuity between Justice Brennan's formulation and the historic body of property jurisprudence. There is nothing in the Court's subsequent takings jurisprudence to indicate that the omission of estoppel or vested rights was an oversight.[180] It also suggests that augmentation of the estoppel and vested rights doctrines by investment-backed expectations would lead to a change in the caselaw favoring landowners. In fact, post-*Penn Central* opinions have shown great deference to government regulators. Furthermore, prior to the Supreme Court's decision in *Palazzolo v. Rhode Island*,[181] the very concept of partial regulatory takings had a tenuous existence.[182]

3. *Landowner "expectations" become "reasonable expectations"*

While the shift from Professor Michelman's crystallized expectations[183] to Justice Brennan's "distinct investment-backed expectations" might simply be a matter of style, the shift from the latter phrase in *Penn Central* to "reasonable investment-backed expectations" in *Kaiser Aetna v. United States*,[184] suggests a change of substance. After all, "expectations" are individualistic and possibly idiosyncratic views of the world. "Reasonableness," on the other hand, implies both the individual judgment and the societal determination that the judgment is at least plausible. Thus, inclusion of the term "reasonable" may "reflect a shift to an objective standard."[185] Facing such a requirement, it might not be enough for Professor Michelman's "speculator" to assert, or even prove, an honest (if naive) understanding of the permissible uses of his land. Rather, he would have to show that the high price he paid for a parcel of raw land, for instance, could be explained only in terms of his intended use

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[179] Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 5 (1987).

[180] Indeed, estoppel recently has been used to deny compensation. *See, e.g.*, People v. S. Cal. Edison Co., 996 P.2d 711 (Cal. 2000) (estopping landowner from collecting twenty-five years' interest on eminent domain claim when landowner did not pursue its rights for most of that time).

[181] 533 U.S. 606 (2001).

[182] *See* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *on remand*, 45 Fed. Cl. 21 (1999).

[183] Michelman, *Property, Utility, and Fairness*, *supra* note 140, at 1233 (asserting proper test for regulatory taking as "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.").

[184] 444 U.S. 164, 175 (1979).

[185] Washburn, *supra* note 175, at 67.

and that the use was feasible and would result in at least as high a rate of return being generated as would be available through alternative investment vehicles.

On the other hand, it is not clear that *Kaiser Aetna* in fact intended to mandate governmental review of the plausibility of owners' views. The author of the opinion, then-Justice William Rehnquist, is not known as an advocate of expanded government powers in the land use area. Subsequent cases do not draw a sharp terminological distinction.[186]

C. Enlarging the Dominion of Expectations

Whether or not intended by *Kaiser Aetna*, the morphing of "investment-backed expectations" to "reasonable investment-backed expectations" suggests an attempt to make the expectations test objective.[187] To the extent that is true, it is necessary to construct a standard for evaluating the purchaser's conduct.

Professor Daniel Mandelker suggested in 1987 that "'[r]easonable' implies that the expectation must be appropriate under the circumstances. Determining whether a regulation is reasonable may also require a balancing test that weighs public benefits against private costs."[188] However, expectations is one of three factors listed by the Supreme Court in *Penn Central*[189] as having "particular significance" in the "essentially ad hoc" takings inquiry,[190] the other two factors being the economic effect on the landowner and the character of the governmental action.[191] It would seem, therefore, that Professor Mandelker suggested a balancing test within a balancing test. Given that such a proposition makes little logical sense, it might be that Mandelker presciently understood that, at least in the minds of some courts, "investment-backed expectations" would crowd out the other prongs of the three-factor test.

Indeed, in a double-barreled victory for legal positivism, a panel of the U.S. Court of Appeals for the Federal Circuit concluded, in *Good v. United States*,[192] that owners are responsible for understanding not only the regulations in force at the time of purchase, but the "regulatory climate" as well.[193] Furthermore, the court rejected the idea that *Lucas* introduced a test

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[186] *Id.* at 67 n.24 (reviewing caselaw and noting that some courts continue to use the term "distinct" investment-backed expectations, that others use both "distinct" and "reasonable" interchangeably, and that some have used "distinct, reasonable, investment-backed expectations").

[187] *See supra* Part III.B.3.

[188] Mandelker, *supra* note 179, at 14.

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

[190] *Id.*

[191] *Id.*

[192] 189 F.3d 1355 (Fed. Cir. 1999).

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

for complete deprivations of economic use that was totally independent of the *Penn Central* expectations test.[194]

The owner in *Good* had acquired land that was subject to various federal and state wetlands regulations. The application of these rules to Good's parcel, which was the subject of many years of negotiation and litigation, was determined largely in Good's favor. However, the Endangered Species Act was passed during this period and ultimately resulted in a denial of development. Good argued that he could not have expected to be denied a permit based on a law that did not exist at the time of his purchase.

The court conceded that this position was "not entirely unreasonable,"[195] but asserted that changes in law prior to Good's purchase put him on notice of a "regulatory climate" that could defeat his development application.[196] Even with respect to laws enacted before purchase, landowners may fail to anticipate subsequent developments at their peril. They must discern what statutes mean from the day of their enactment, although those meanings might be ascribed to them by the courts only years later,[197] and although earlier lines of decisions might later be determined to be mistaken.[198] Along the same lines, the Oregon Supreme Court declared, in *Dodd v. Hood River County*,[199] that "to be reasonable, investment-backed expectations must take into account the current state of the law, as well as the government's power to change the law."[200]

Such decisions, as I previously have contended,[201] constitute nothing as much as the reductionist formula of the early Holmes: "Law is prophecy."[202]

D. Roots of the Expectations Notice Rule

While the land use regulatory takings cases established the ground for the expectations notice rule, the rule itself was instantiated in Supreme Court cases

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[194] *Id.* at 1361; *see also infra* note 217 and accompanying text.

[195] *Id.* at 1361.

[196] *Id.*

[197] *See* Brace v. United States, 48 Fed. Cl. 272, 282-83 (2000).

[198] *See* Dep't of Envtl. Prot. v. Burgess, 772 So.2d 540 (Fla. App. 2000) (holding that permit denial did not frustrate any reasonable investment-backed expectations since property was not developed for thirty years and noting that court was not persuaded by owner's reliance on a previous precedent, which it found flawed).

[199] 855 P.2d 608 (Or. 1993).

[200] *Id.* at 616.

[201] Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437, 445 (2000).

[202] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 458 (1897). "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.* at 461.

not involving real property, *Ruckelshaus v. Monsanto Co.*,[203] *Connolly v. Pension Benefit Guaranty Corp.*,[204] and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*.[205]

In *Monsanto*, the Supreme Court rejected the claim of a chemical company that release by the Environmental Protection Agency of proprietary information regarding a pesticide constituted a taking. Prior legislative amendments had put the company on notice that the EPA would release its application to register the pesticide, thus denying it an investment-backed expectation of confidentiality.[206] Likewise, in *Concrete Pipe*, past federal pension legislation was deemed to negate the formation of reasonable, investment-backed expectations contrary to subsequent legislation.[207] *Connolly*, in which liability for withdrawal had been mandated after the company had joined an industry pension plan, was treated similarly.[208]

E. Expectations Notice Rule Cases

While cases favoring the expectations notice rule represented the majority view prior to *Palazzolo*,[209] most of those courts did not consider the rule in a coherent fashion, and the decisions largely mix notice rule issues with others.

The U.S. Court of Appeals for the Federal Circuit has been in the forefront of courts applying expectations theory. In *Loveladies Harbor, Inc. v. United States*,[210] it held that the denial of a permit under section 404 of the Clean Water Act[211] constituted a compensable taking.[212] The court's holding was based on the fact that there was a complete deprivation of value with respect to the relevant parcel,[213] and hence a per se taking under *Lucas v. South Carolina Coastal Council*.[214] In the course of its opinion otherwise favoring

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[203] 467 U.S. 986 (1984).

[204] 475 U.S. 211 (1986).

[205] 508 U.S. 602 (1993).

[206] *Monsanto*, 467 U.S. at 1005-06.

[207] *Concrete Pipe*, 508 U.S. at 646 (finding no reasonable expectation in light of Congress's legislation in the pension field).

[208] *Connolly*, 475 U.S. at 226-27 (same).

[209] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[210] 28 F.3d 1171 (Fed. Cir. 1994).

[211] Pub. L. No. 92-500, § 2, 86 Stat. 884 (1972), amending the Federal Water Pollution Control Act (codified as amended at 33 U.S.C. § 1344 (1988)).

[212] *Loveladies Harbor*, 28 F.3d at 1183.

[213] *Id.* at 1179-82.

[214] 505 U.S. 1003 (1992).

landowners, however, the court restated the "distinct investment-backed expectations" test of *Penn Central Transportation Co. v. City of New York*.[215]

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.[216]

In its opinion in *Good v. United States*,[217] the Federal Circuit panel rejected the view that *Lucas v. South Carolina Coastal Council*[218] constitutes a categorical test for regulatory takings independent of *Penn Central*.[219] It held instead that *Lucas* negated only the need to apply the "character of the regulation" test. "For *any* regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him."[220] Another Federal Circuit panel rejected this interpretation in *Palm Beach Isles v. United States*,[221] holding that the law of the circuit, as annunciated in *Loveladies Harbor*, was that a categorical taking under *Lucas* trumped the expectations as well as the character test in *Penn Central*.[222] Since the Federal Circuit declined to review *Palm Beach Isles* en banc, the dispute between that panel and the *Good* panel remains unresolved. The Federal Circuit's post-*Palazzolo*[223] use of the expectations notice rule in *Commonwealth Edison Co. v. United States*[224] suggests that it regards *Palazzolo* as a strong affirmance of the circuit's precedent.

In accord with the holding in *Good* that the reasonable investment-backed expectations were required for complete as well as partial takings is the Ninth Circuit ruling in *Hoeck v. City of Portland*,[225] where the court found that the city's demolition of a vacant building was not a complete deprivation of economic use, since the lot still had considerable value. Because the law at the time the owner took title precluded him from maintaining an abandoned building, there was no interference with a reasonable, investment-backed

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[215] 438 U.S. 104 (1978).

[216] *Loveladies Harbor*, 28 F.3d at 1177.

[217] 189 F.3d 1355 (Fed. Cir. 1999).

[218] 505 U.S. 1003 (1992).

[219] Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978).

[220] *Good*, 189 F.3d at 1360 (emphasis added).

[221] 208 F.3d 1374, *reh'g denied*, 231 F.3d 1354, *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000).

[222] *Id.* at 1358-61.

[223] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[224] 271 F.3d 1327 (Fed. Cir. 2001) (en banc); *see also infra* Part V.A.1.

[225] 57 F.3d 781, 787-89 (9th Cir. 1995).

expectation. The result would be the same even if the property interest were narrowed to include only the building.[226] The Eighth Circuit agreed in *Outdoor Graphics, Inc. v. City of Burlington*,[227] which relied upon *Hoeck* and an overly broad reading of the Federal Circuit's holding in *Avenal v. United States*.[228]

In *Avenal*, Judge Plager described the plaintiff's conduct as a "textbook example" of a property owner rushing into a business that took advantage of favorable water salinity levels "created at least in part by earlier government activity," and bringing suit when the levels "were again tampered with to their (this time) disadvantage."[229] It would thus be more accurate to say that in *Avenal* the property owner's expectations were not dependent upon government interpretations of rights, but rather were created by government actions which, by their very nature, were apt to be transient and reversible.

The highest courts of a number of states have adopted the expectations notice rule. These include Michigan,[230] New Hampshire,[231] New Jersey,[232] New York,[233] South Carolina,[234] and Rhode Island.[235]

F. "Reasonable Investment-Backed Expectations" Encourages Circuity

Expectations theory has always been subject to a fundamental flaw—expectations are a function of rights, and rights, in turn, are a function of expectations. In his *Lucas* concurrence, Justice Kennedy warned about the danger of circuity even as he pressed for recognition that "background principles" be permitted to go beyond the common law to some extent:

> The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use

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[226] *Id.* at 788-89.

[227] 103 F.3d 690 (8th Cir. 1996) (holding that right to erect billboard did not inhere in title, nor constitute reasonable investment-backed expectation, at time of purchase).

[228] 100 F.3d 933 (Fed. Cir. 1996).

[229] *Id.* at 937.

[230] Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000), *cert. denied*, 121 S. Ct. 1356 (2001).

[231] Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984).

[232] Karam v. New Jersey, 705 A.2d 1221, 1229 (N.J. Super. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J. 1999) (adopting background principles notice rule also).

[233] Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997) (applying background principles notice rule); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) (applying background principles notice rule).

[234] McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 633-35 (S.C. 2000) (applying background principles rule).

[235] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (applying background principles notice rule).

> of their property. The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.
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> There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. *Some circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.*
>
> In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.[236]

If Justice Kennedy means by this that expectations are meant to evolve over decades and centuries, he is recapitulating the common law tradition. If he contemplates a process where positive law has more sway, he fails to square the circle. Judge Stephen Williams of the U.S. Court of Appeals for the District of Columbia Circuit confronted this dilemma unswervingly in his concurrence in *District Intown Properties v. District of Columbia*.[237]

> [I]n its consideration of . . . "reasonable investment-backed expectations," the majority's analysis begs the question whether any landowner, in a world where zoning regulations are prevalent, could ever argue that a particular regulation was "unexpected." The presumption is insurmountable: "Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative needs." Although the Takings Clause is meant to curb inefficient takings, such a notion

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[236] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring) (emphasis added) (citation omitted).

[237] 198 F.3d 874, 886-87 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000).

> of "reasonable investment-backed expectations" strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.[238]

It is the nature of legislation to be prospective and to act through general classifications. On the other hand, it is the nature of common law adjudication to be retrospective and to apply legal principles to specific parties and unique facts.[239] The "reasonable investment-backed expectations" rule tends to obliterate this distinction.

While some advocates of expansive government have argued that public welfare programs are "a necessary part of any system of property rights,"[240] they have recognized that well-defined property rights must be preserved. It is important to devise a framework in which property rights might prove stable through constitutional means, as "[a] well-drafted constitution can guard against a system in which ownership rights are effectively subject to continuous political revision."[241] To be sure, "[i]f property rights are secure, there is a firm limit on what the democratic process is entitled to do."[242] However, "government control of property—through constant readjustment of property rights—simply reintroduces the collective action problem originally solved by property rights."[243]

IV. THE SIGNIFICANCE OF *PALAZZOLO*

A. A Brief Review of the Facts

Anthony Palazzolo, a lifelong resident of Westerly, Rhode Island, brought an inverse condemnation action against the state Coastal Resources Management Council ("CRMC") alleging that its denial of his application to fill some eighteen acres of coastal wetlands constituted a taking under the federal and state constitutions. The trial court found for CRMC.[244] The Rhode

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[238] *Id.* at 886-87 (Williams, J., concurring) (citation omitted).

[239] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (deeming "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"); *cf.* Rogers v. Tennessee, 532 U.S. 451 (2001) (approving retroactive reinterpretation of common law permitting murder conviction where victim died more than a year and a day after defendant's act).

[240] CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 210 (1997).

[241] *Id.* at 204.

[242] *Id.* at 208.

[243] *Id.* at 210.

[244] Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 86-1496, 1995 WL 941370 (R.I. Jan. 15, 1995). This description of the facts relies upon Steven J. Eagle, Palazzolo v. Rhode Island: *A Few Clear Answers and Many New Questions*, 32 ENVTL. L. REP. 10,127, 10,128-29 (2002).

Island Supreme Court affirmed, holding that the case was "not ripe for judicial review," but proceeded to a discussion of the merits nevertheless.[245]

Palazzolo was president of Shore Gardens, Incorporated ("SGI"), since its incorporation on July 29, 1959. On December 2, 1959, Palazzolo, with Natale and Elizabeth Urso, transferred three adjoining parcels in the Town of Westerly to SGI. In 1959, while Palazzolo and Natale Urso were the sole shareholders in SGI, it submitted to the town a new plat subdividing the entire property into eighty lots. Between 1959 and 1961, SGI transferred for value eleven of the lots to various grantees. These lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land. In 1960, Palazzolo acquired Urso's interest and became the sole shareholder. In 1969, five of the previously sold lots were reacquired by SGI. After this transaction, SGI was the record owner of seventy-four of the original eighty lots. Although SGI's corporate charter was revoked in 1978, it remains the record owner, and all taxes on the property are assessed to SGI.[246] However, upon revocation Palazzolo became owner of the parcel by operation of law.[247]

The parcel consists primarily of coastal wetlands and marshlands, including some eighteen acres of wetland and a small, but undetermined amount of upland not exceeding an acre or two. Some of the platted lots are substantially under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters run-off into the pond.[248]

Between 1962 and 1985, Palazzolo filed several applications with state agencies seeking permission to substantially alter the property. During the same period, state regulations governing alterations to coastal wetlands became increasingly stringent. On March 29, 1962, Palazzolo submitted an application to the Division of Harbors and Rivers ("DHR") of the Department of Natural Resources ("DNR") to dredge the pond and use the dredge to fill the subject property. This application was returned to Palazzolo by DHR because it lacked essential information. On May 16, 1963, Palazzolo filed an application seeking approval to build a bulkhead, to dredge the pond, and to fill the property. At the time of these two applications, there was no statutory requirement that any state agency approve the filling of coastal wetlands, but

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[245] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 709 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[246] *Palazzolo*, 533 U.S. at 614.

[247] *Palazzolo*, 746 A.2d at 716.

[248] *Id.* at 709-10.

a party wishing to dredge a river or pond was required to gain approval of DHR.[249]

In 1965, the Rhode Island Legislature adopted an act on inter-tidal wetlands protection that gave DNR the authority to restrict filling in coastal wetlands. On April 29, 1966, Palazzolo applied for DHR approval to dredge the pond and fill the tidal marshlands so he could construct a recreational beach facility, and, on April 1, 1971, DHR issued a decision approving the applications and giving Palazzolo the option of either constructing a bulkhead and filling the marsh or constructing a beach facility. On November 17, 1971, DHR revoked its assent, and this revocation was not appealed.

In 1971, the Legislature created the Coastal Resources Management Council ("CRMC") and gave it authority to regulate coastal wetlands. In 1977, the CRMC promulgated a set of regulations—the Coastal Resources Management Program—that prohibited the filling of coastal wetlands without a special exception from the CRMC.[250]

In March 1983, Palazzolo filed an application with the CRMC seeking approval to construct a bulkhead on the shore of the pond and fill approximately eighteen acres of salt marsh. That application, nearly identical to the application submitted in 1963, was rejected by the CRMC. Palazzolo did not appeal that decision. In January 1985, Palazzolo filed an application to fill wetlands on the property, again for the purpose of creating a recreational beach facility. This application, nearly identical to the 1966 application, was denied by the CRMC on February 18, 1986. Palazzolo's appeal of this denial itself was denied.[251]

While Palazzolo's appeal of the 1986 CRMC decision was proceeding, he filed the instant action alleging that the CRMC's denial of his application constituted a taking of his property without just compensation, in violation of the Fifth Amendment to the United States Constitution and article 1, section 16, of the Rhode Island Constitution. Palazzolo sought damages in the amount of $3,150,000, based on the profits he claimed he would receive from filling the wetlands and developing the property as seventy-four lots for single-family homes. A jury-waived trial was held in June 1997, and on October 24, 1997, the trial justice issued a thirteen-page decision that made findings of fact and law. The trial justice concluded that Palazzolo's property had not been taken and Palazzolo appealed.[252]

The Rhode Island Supreme Court noted that SGI was the owner of the parcel from its purchase in 1959 until the corporation's charter was revoked

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[249] *Palazzolo*, 533 U.S. at 614.

[250] *Palazzolo*, 746 A.2d at 710-11.

[251] *Id.* at 711 (citing Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 86-1496, 1995 WL 941370, at *1 (R.I. Jan. 15, 1995)).

[252] *Id.*

in 1978. By that time, when the defunct corporation's assets devolved upon its sole shareholder "the regulations limiting his ability to fill the wetlands were already in place."[253] The court concluded: "[A] regulatory takings claim may not be maintained where the regulation predates the acquisition of the property."[254]

B. The Supreme Court's Holding

The Supreme Court's opinion in *Palazzolo* was written by Justice Kennedy.[255] Four justices dissented.[256] The Court reversed the Rhode Island Supreme Court and held that the case was ripe for decision.[257] It upheld the state court's determination that there was no categorical taking under *Lucas v. South Carolina Coastal Council*.[258] The Court also noted takings damages under its more general takings test in *Penn Central Transportation Co. v. City of New York*[259] had been considered by the Rhode Island Supreme Court. Justice Kennedy stated that, as it did in its *Lucas* analysis, the state court found "the date of acquisition of the parcel . . . determinative, and the court held [petitioner] could have had 'no reasonable investment-backed expectations that were affected by this regulation' because it predated his ownership."[260]

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[253] *Id.*

[254] *Id.*

[255] Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined in the opinion. However, the meaning of *Palazzolo* must be interpreted in part with reference to the sharply differing views enunciated in the concurring opinions of Justices O'Connor and Scalia, both of whom are necessary for Justice Kennedy's majority. *See infra* Part IV.D.

[256] Dissenting were Justice Stevens (except on the ripeness issue), Justice Ginsburg, joined by Justices Souter and Breyer. Justice Breyer also wrote a separate dissent.

[257] *Palazzolo*, 533 U.S. at 620. The Court stated that:

> While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

Id. Justice Stevens joined the majority's ripeness holding, making the lineup six to three on that issue.

[258] 505 U.S. 1003 (1992). Justice Kennedy noted that petitioner's argument to sever the upland from the lowland part of the parcel, not raised below, was made too late. *Palazzolo*, 533 U.S. at 631-32. Furthermore, petitioner was not left with only a "token interest," since "[a] regulation permitting a landowner to build a substantial residence on an eighteen acre parcel does not leave the property 'economically idle.'" *Id.* at 631 (citation omitted). However, the Court pointedly noted its "discomfort with the logic" of the "parcel as a whole" rule. *Id.* at 631.

[259] 438 U.S. 104, 124 (1978).

[260] *Palazzolo*, 533 U.S. at 616 (citing Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 717 (R.I. 2000)).

Since the U.S. Supreme Court rejected the positive notice rule, it remanded petitioner's *Penn Central* claim for further consideration.[261]

C. Rejection of the Positive Notice Rule in Palazzolo

The most significant and unequivocal aspect of the Supreme Court's *Palazzolo* decision is its rejection of the positive notice rule. Justice Kennedy, writing for the Court, declared:

> When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use and to the *Penn Central* claim. While the first holding was couched in terms of background principles of state property law, and the second in terms of petitioner's reasonable investment-backed expectations, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.
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> The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.... The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's 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

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[261] *Id.* The Court's invocation of the partial takings test in *Penn Central* and its remand under it should encourage more use of that test by courts in the future. Indeed, one commentator, fearful of just such a result, styled his discussion "Backhanded Support for 'Partial Takings' Claims." *See* John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11,112, 11,114 (2001).

> 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.[262]

Palazzolo thus rejects the positive notice rule, i.e., it states that the petitioner's claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[263] However, this is less than a full-throated affirmation of the crucial sentence in *Nollan*: "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."[264]

The importance of the Court's holding can be gleaned by considering the import of a contrary ruling. That would have constituted an open invitation to legislative bodies to redefine property, knowing the inevitable transfers over a modest number of years would attenuate rights extant prior to regulation.

While the rejection of the positive notice rule is important, *Palazzolo* hardly is definitive. While the Court's *Nollan* formulation affirmatively denied that a prior regulation that would effect a taking would have *any* role in limiting property rights, the *Palazzolo* formulation merely denies that the prior status of the regulation would have a *conclusive* role.

D. The Role of the Expectations Notice Rule—Divergence within the Palazzolo *Majority*

Despite his sometimes ardent rhetoric, Justice Kennedy in fact opined upon the notice rule rather sparely. This may well have been prompted by his need to keep his five to four majority intact. Had he adopted the reasoning in the concurring opinion of Justice Scalia, he might well have lost the necessary vote of Justice O'Connor.

1. Justice Kennedy endorses Nollan *(more or less)*

Justice Kennedy's opinion for the Court described *Nollan* as "controlling precedent for our conclusion."[265] He denied that *Nollan*'s "holding was limited" by *Lucas*. While declining to specify the "precise circumstances" under which a regulation becomes a background principle, he asserted: "A law does not become a background principle for subsequent owners by enactment

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[262] 533 U.S. at 627 (citations omitted).

[263] *Id.* at 630.

[264] Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987); *see also supra* note 76 and accompanying text for the full text of footnote 2.

[265] *Palazzolo*, 533 U.S. at 629.

itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles."[266]

Nevertheless, the Kennedy opinion did not assert that notice of a regulation in advance of purchase was irrelevant in a partial takings analysis. His lack of definitiveness on the role of notice permitted (or, more likely, resulted from) substantially divergent views of the role of the notice rule in the Scalia and O'Connor concurrences.

2. *Justice Scalia and logical consistency*

The concurring opinion of Justice Scalia declared:

> In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance") 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.[267]

He scoffed at Justice O'Connor's concern about "windfalls," comparing knowledgeable developers, whose ability to discern and overcome regulations that constitute takings exceeds that of their sellers with buyers at stock exchanges and auctions, whose expert knowledge also exceeds that of their sellers.[268] For the courts to treat the developer's advantage as unfair is not, in any event, to return the "windfall" to the "naïve" original owner. Rather,

> Justice O'Connor would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief*.[269]

3. *Justice O'Connor's quest for fairness*

Justice O'Connor began her concurrence by stating that she joined the Court's opinion, "but with my understanding of how the [notice rule] must be considered on remand."[270] After expressing agreement with rejection of the positive notice rule, she added that the "more difficult" issue is the "role the

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[266] *Id.* at 630.
[267] *Id.* at 637 (Scalia, J., concurring) (citations omitted).
[268] *Id.* at 636-37.
[269] *Id.* at 637.
[270] *Id.* at 632 (O'Connor, J., concurring).

temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis."[271]

> If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, *then the State wields far too much power* to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners *may reap windfalls and an important indicium of fairness is lost.* As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It *simply restores balance to that inquiry.* Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula."[272]

In thus setting excessive state power under the positive notice rule against windfalls resulting from a straight *Nollan* analysis, Justice O'Connor achieves a result she finds just right—permitting courts to take all into account in ad hoc *Penn Central* fashion. While this Goldilocks equilibrium is tidy,[273] it hardly meets Justice Scalia's objections squarely. Why should regulations constituting takings have more "salience" in defining property rights than, say, confessions elicited without *Miranda* warnings have "salience" in establishing criminal guilt?[274] After all, in criminal procedure as well as in property law, there are advocates for abstention from a "set formula" approach.[275]

4. The O'Connor majority on expectations

The view of the expectations notice rule expressed in the O'Connor concurrence has the support of a majority of the Court. Justice Breyer's dissent explicitly agreed with the O'Connor concurrence that the positive notice rule should be rejected, but that preacquisition regulations should be

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[271] *Id.* at 632-33.

[272] *Id.* at 635-36 (emphasis added) (citation omitted).

[273] *Cf.* Michael M. Berger, *Annual Update on Recent Cases*, C997 ALI-ABA 43, 47 (1994) (describing the Court's analysis of the contending "very generalized statements," very precise fit, and "rough proportionality" standards for nexus between harm and ensuing exaction in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), as "a Goldilocks and the Three Bears sort of critique").

[274] *See* Miranda v. Arizona, 384 U.S. 436 (1966) (requiring specific warnings respecting right to remain silent and right to counsel before custodial interrogation of criminal suspects).

[275] *See* Dickerson v. United States, 530 U.S. 428 (2000) (rejecting attempt to establish totality-of-the-circumstances test as alternative to mandatory *Miranda* warnings in establishing validity of confessions made during custodial interrogations where suspect is not represented).

considered "within the *Penn Central* framework."[276] The Ginsburg[277] and Stevens opinions[278] also adopted the O'Connor view.

For this reason, Justice Kennedy's invocation of *Nollan* may be seen more as a brake upon future application of the expectations notice rule than as a preclusion of it. The rule appears destined to play an important (albeit undetermined) role in adjudicating partial regulatory takings claims.

E. The Background Principles Notice Rule in Palazzolo

1. Background principles dicta

The Court held in *Palazzolo* that the petitioner did not suffer a per se taking, since "[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"[279] None of the Justices disputed this finding. Thus, it was unnecessary for the Court to engage in a close analysis of whether the Rhode Island wetland development prohibition constituted a background principle of state law. However, the Court's opinion reiterated its *Lucas* view of how background principles should be defined:

> [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. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.[280]

This passage, while dicta, does stress the constrained nature of "background principles." The invocation of "shared understandings" seems aimed at precluding novel legal interpretations. The assertion that a rule "cannot be a background principle for some owners but not for others," if taken literally, would preclude differentiation between the owner at the time the regulation was imposed and a subsequent purchaser. Thus it would, by definition, preclude a background principles notice rule.

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[276] *Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting).

[277] *Id.* at 654 n.3 (Ginsburg, J., dissenting) (joined by Justices Souter and Breyer).

[278] *Id.* at 643 n.6 (Stevens, J., concurring in part and dissenting in part).

[279] *Id.* at 631.

[280] *Id.* at 630 (citation omitted).

2. Interaction with ripeness principles

It might be tempting for a reviewing court otherwise inclined to find for the government in a takings case to surmount the differentiation hurdle by asserting that the burden of a regulation inures only against the owner at the time it was promulgated. That was the position of the state supreme court in *Palazzolo*,[281] and was the reason why Justice Stevens, who otherwise dissented, concurred on the ripeness issue.[282] This casual conclusion seems wrong both as a matter of settled property law and proper fact determination.[283]

A significant impediment to this sort of reasoning is the Court's discussion distinguishing the appropriate treatment for the time of a physical taking as distinguished from the time of a regulatory taking. In the former case, the fact of physical invasion is apparent and the rule is that the owner at the time of the invasion is entitled to compensation.[284]

> A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.[285]

The Court also noted that restricting takings claims to the owner at the time the restriction was imposed would be "capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic."[286]

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[281] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 716-17 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[282] Palazzolo v. Rhode Island, 533 U.S. at 638-45 (Stevens, J., concurring in part and dissenting in part).

[283] *See* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001). "It is a well-recognized principle in valuing property at either eminent domain or inverse condemnation, that speculative values must be disregarded. Yet in this branch of regulatory takings law, courts freely speculate about conditions 'in a perfect world' en route to arriving at conclusions concerning the relationship between hypothetical values and the imputed economic expectations of plaintiffs." *Id.* at 527 (citation omitted).

[284] *Palazzolo*, 533 U.S. at 628 (citing Danforth v. United States, 308 U.S. 271, 284 (1939); 2 SACKMAN, EMINENT DOMAIN § 5.01[5][d][i] (rev. 3d ed. 2000)).

[285] *Id.*

[286] *Id.*

The immense difficulties faced by landowners in dealing with the Court's Byzantine *Williamson County* ripeness rules[287] have been the subject of considerable discussion.[288] The higher the ripeness barriers, the more difficult it might be for the government defendant to demonstrate that the claim ripenened early, so that the pre-regulatory landowner suffered the taking, as opposed to a successor.

V. THE NOTICE RULE AFTER *PALAZZOLO*

In spite of the Supreme Court's rejection of the positive notice rule in *Palazzolo v. Rhode Island*,[289] it is too soon to predict its practical demise. As William Faulkner observed, "[t]he past is never dead. It's not even past."[290] The materials in this section suggest that much of the positive notice rule might be resurrected in fact by creative courts aggressively applying the background principles and expectations notice rules.

While it is too early to draw any definitive conclusions, the first regulatory takings cases decided after *Palazzolo* present a diversity of approaches.

Most obvious is the realization that *Palazzolo* rejected the positive notice rule.[291] However, some courts have continued to adhere to the idea that less than a complete taking is not compensable.[292] Others have explicitly recognized that *Palazzolo* stands for the proposition that, where there is less than a complete deprivation of economic use, the property owner simply loses the benefit of the *Lucas* per se test and has recourse instead to the *Penn Central* multifactor test.[293] The U.S. Court of Federal Claims found that

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[287] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (setting forth "final determination" and "denial of compensation" ripeness prongs).

[288] *See, e.g.*, John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999).

[289] 533 U.S. 606 (2001).

[290] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

[291] E. Cape May Assocs. v. State Dep't of Envtl. Prot., 777 A.2d 1015, 1024 (N.J. Super. Ct. App. Div. 2001) (admonishing 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") (quoting *Palazzolo*, 533 U.S. at 629-30).

[292] *E.g.*, Zealy v. City of Waukesha, 153 F. Supp. 2d 970 (E.D. Wis. 2001). The *Zealy* court noted that the state supreme court had "concluded that, in determining whether a taking has occurred, a court must consider the parcel of land as a whole and must determine whether the owner has been deprived of all or substantially all of the value of the land," *id.* at 979, and that the ruling "is consistent with" *Palazzolo*. *Id.* at 979 n.7. *See also* Pheasant Bridge Corp. v. Township of Warren, 777 A.2d 334, 344 (N.J. 2001) (describing *Palazzolo* as holding that the "[Rhode Island] Supreme Court did not err in rejecting regulatory takings claim where plaintiff not deprived of all economically beneficial use of parcel").

[293] *See* Cwynar v. City & County of San Francisco, 109 Cal. Rptr. 2d 233, 254 (Cal. Ct.

Palazzolo adopted a "modified" ripeness period respecting regulatory takings.[294]

A. *The Expectations Notice Rule*

1. *Expectations, takings, and due process in* Commonwealth Edison

The role of the expectations notice rule was highlighted and possibly extended in the U.S. Court of Appeals for the Federal Circuit's en banc decision in *Commonwealth Edison Co. v. United States*.[295] While the court noted *Palazzolo*'s rejection of the positive notice rule, it quickly added: "As Justice O'Connor's concurring opinion . . . makes clear, however, even in that context the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations."[296]

Commonwealth Edison strengthened the expectations notice rule through a two-step process. First, it held that, under the Supreme Court's four-one-four split in *Eastern Enterprises v. Apfel*,[297] "the Takings Clause does not apply to legislation requiring the payment of money."[298] Second, it said that "[w]here a Due Process violation is alleged because the government has ordered the payment of money, we think that reasonable expectations are to be judged as of the point at which the complaining party entered into the activity that triggered the obligation . . . ."[299] Furthermore, "[t]he reasonable expectations test does not require that the law existing at the time of processing would impose liability, or that liability would be imposed only with minor changes in then-existing law. The critical question is whether extension of existing law

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App. 2001); R & Y, Inc. v. Municipality of Anchorage, 34 P.3d 289, 293 n.12 (Alaska 2001); Braunagel v. City of Devils Lake, 629 N.W.2d 567, 573 (N.D. 2001).

[294] *See* Banks v. United States, 49 Fed. Cl. 806, 826 n.29 (2001).

[295] 271 F.3d 1327 (Fed. Cir. 2001) (en banc).

[296] *Id.* at 1350 n.22 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 632-36 (2001) (O'Connor, J., concurring)).

[297] 524 U.S. 498 (1998) (holding the imposition of the requirement for a cash payment that was severe, disproportionate, and extremely retroactive to constitute an unconstitutional exaction). A plurality opinion by Justice O'Connor deemed the exaction a taking. *Id.* at 528-29. While four dissenters regarded the exaction as constitutional under the Due Process Clause, Justice Kennedy stated that it was unconstitutional under that clause. *Id.* at 547 (Kennedy, J. concurring in the judgment and dissenting in part). Thus, Kennedy was the fifth vote towards striking the statute, but deeming due process the appropriate analysis. *See also*, Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

[298] *Commonwealth Edison*, 271 F.3d at 1329.

[299] *Id.* at 1350.

could be foreseen as reasonably possible."[300] Thus the Federal Circuit affirmed, albeit without citation, a panel's "regulatory climate" analysis in *Good v. United States*.[301]

B. The Background Principles Notice Rule

The U.S. Supreme Court's repudiation of the positive background principles rule in *Palazzolo*[302] provides a great incentive for courts to attempt to demonstrate that stringent new regulations really have their genesis in longstanding public trust theory.

1. Foundations of the public trust doctrine

The public trust doctrine is traceable back to the Romans. Under the Justinian Code, certain natural resources, including the sea and its shores, running water, and the air, were deemed the common property of mankind, and navigable waters were legally available for public use in fishing and commerce.[303] The English common law perpetuated those principles, with the gloss that these rights were owned by the sovereign in trust for the public.[304]

In the United States, the doctrine's contours were explicated in *Illinois Central Railroad Co. v. Illinois*,[305] where the Supreme Court in 1892 discussed the purposes of the trust and emphasized its permanence. The Court also held that the common law rights of the sovereign in tidal lands had devolved to the states, and that the criterion for public trust property was navigability. It also established remedies for a breach of the trust obligation by a state.

The notion of expanding the public trust doctrine has been an irresistible lure for those wishing to vitiate traditional private property rights.[306] In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*,[307] for instance, the Supreme Court of Hawai'i extended what had been the customary gathering rights of residents of small districts into generalized rights to extract resources that were to be enjoyed by all Hawaiians. In one stroke, the court

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[300] *Id.* at 1357.

[301] 189 F.3d 1355 (Fed. Cir. 1999); *see also supra* note 192 and accompanying text.

[302] Palazzolo v. Rhode Island, 533 U.S. 606, 627-28 (2001); *see also supra* Part IV.E.

[303] *See* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the Peoples' Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196-97 (1980).

[304] *See* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).

[305] 146 U.S. 387 (1892).

[306] *See generally* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10,003 (2000) (analyzing the English antecedents of American public trust law and their misconstruction in some leading cases).

[307] 79 Hawai'i 425, 903 P.2d 1246 (1995).

"accomplished what nearly 150 years of Hawaiian jurisprudence had failed to do: the repudiation of the English common law of custom in favor of an entirely indigenous construction of the doctrine."[308]

While the public trust doctrine traditionally involved access to beach areas below the mean high tide (the "wet sand" area), courts recently have extended those rights to the "dry sand" area above the high tide mark—an area traditionally reserved for private landowners. In *Stevens v. City of Cannon Beach*,[309] the Supreme Court of Oregon held that property owners never possessed the right to obstruct public access to the dry-sand portion of their property and that if such a right had existed it had been extinguished through long usage and custom.[310] In *Matthews v. Bay Head Improvement Ass'n*,[311] the Supreme Court of New Jersey held that the public trust doctrine itself allows a judicial determination that public use of the dry sand above the "ordinary high water mark" is necessary for public trust rights in the wet sand to be enjoyed fully.[312]

In Wisconsin, the state supreme court, in the well-known case of *Just v. Marinette County*,[313] rejected the thesis that land ownership confers development rights. It recently reaffirmed that holding in *Zealy v. City of Waukesha*.[314] *Just* also declared that the "active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty."[315]

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[308] David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1431 (1996).

[309] 854 P.2d 449 (Or. 1993); *see also* Jamee Jordan Patterson, *California Land Use Regulation Post* Lucas*: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California*, 11 J. ENVTL. L. 175, 179 (1993).

[310] *Stevens*, 854 P.2d at 456-58; *see also* Erin Pitts, Comment, *The Public Trust Doctrine: A Tool for Enduring Continued Public Use of Oregon Beaches*, 22 ENVTL. L. 731, 732 (1992).

[311] 471 A.2d 355 (N.J. 1984).

[312] *Id.* at 321-26. In cases not referring to the public trust doctrine, state efforts have not been as successful. *See, e.g.*, Sotomura v. County of Hawai'i, 460 F. Supp. 473, 482-83 (D. Haw. 1978) (holding that new state definition of seaward boundary of private ownership at seaweed (high wave) line rather than mean high tide line violated Due Process); *see also* Hughes v. Washington, 389 U.S. 290, 296-98 (1967) (Stewart, J., concurring) (arguing Washington Supreme Court violated federal constitution in holding beach accretions belong to state despite clear precedent that they belong to inland property owners).

[313] 201 N.W.2d 761, 768 (Wis. 1972) (declaring 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").

[314] 548 N.W.2d 528 (Wis. 1996).

[315] *Just*, 201 N.W.2d at 768.

*2. Expanding the public trust doctrine in post-*Palazzolo *cases*

In an early post-*Palazzolo* opinion, a Wisconsin intermediate court implicitly criticized the U.S. Supreme Court's rejection of the positive notice rule, expansively applied the state's public trust doctrine, and rejected a transfer of property rights because it might lead to the formation of incorrect expectations by future owners.

The case, *ABKA Ltd. Partnership v. Wisconsin Department of Natural Resources*,[316] involved a project named Abbey Harbor, consisting of a swimming pool, a parking area, a Harbor House, and 407 boat slips. The slips were created between 1962 and 1987 by the dredging of a creek, permits for which had been issued by the Wisconsin Public Service Commission. The slips had been rented to boat owners, but in 1994 ABKA decided to convert them to condominium ownership. No physical changes were contemplated.[317]

The state Department of Natural Resources ("DNR") insisted that it had jurisdiction over the change of ownership to "dockominium" form and ABKA applied for a permit with the understanding that it reserved the right to challenge DNR jurisdiction. Also, environmental groups objected to issuance of the permit on the ground that it would violate the state's public trust doctrine.[318]

The Wisconsin appellate court decided that it was not bound by the contrary understanding between ABKA and DNR and that, by applying for the permit, ABKA had waived its objection to DNR jurisdiction.[319] On the merits, the court cited the century-old U.S. Supreme Court case delineating the public trust doctrine,[320] but noted: "Although the public trust doctrine was originally designed to protect commercial navigation, it has been expanded to protect the public's use of navigable waters for purely recreational and nonmonetary purposes."[321] It viewed Wisconsin Supreme Court precedent as expansive:

> Public policy factors signifying the public interest include the wish to preserve the natural beauty of our navigable waters, to obtain the fullest public use of these waters, including but not limited to navigation, and to provide for the convenience of riparian owners. Such public interest concerns also include maintaining the safe and healthful condition of the water, protecting spawning grounds and aquatic life, controlling the placement of structures and land uses,

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316 635 N.W.2d 168 (Wis. Ct. App. 2001).
317 *Id.* at 171-72.
318 *Id.* at 173.
319 *Id.* at 178-79.
320 *Id.* at 179 (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892)).
321 *Id.* at 177-78 (citing State v. Bleck, 338 N.W.2d 492, 497-98 (Wis. 1983)).

> preserving shore cover and natural beauty, and promoting the general attractiveness and character of the community environment.[322]

In its quest for guidance in applying this essentially boundless set of guidelines, the court looked to the assertion in a recent student note in an environmental law journal: "When conflicts occur over the use of the waters of the state, riparian rights must always surrender to the public interest."[323] While the dockominiums "technically" met the requirements of state condominium law,[324] and did not "adversely impact water quality, quantity or flow,"[325] the court found that their "creative manipulation of riparian rights . . . obstruct[s] the public's complete access to the waterways and creates a claim of private ownership upon water owned by the public."[326] "ABKA's marketing materials do nothing to dispel that expectation."[327]

A definition of the public trust doctrine that encompasses vague standards such as "general attractiveness" and peripheral considerations such as the content of advertising is almost infinitely malleable.

On remand of *Palazzolo* from the U.S. Supreme Court, the Supreme Court of Rhode Island determined that it would have to further remand the case to the Superior Court for the required *Penn Central* analysis.[328] It sought comments from counsel on inclusion in its remand order of the issue of "the relevance of the public trust doctrine to the reasonable investment-backed expectations of plaintiff Palazzolo."[329]

*C. Other Anticipated Post-*Palazzolo *Issues*

1. The tenuous link between prices, intent, and expectations

The Rhode Island Supreme Court also indicated that its remand order would include the solicitation and evaluation of information regarding the initial purchase price paid by Shore Gardens, Inc. ("SGI") and the price received when SGI sold six of the original parcels.[330]

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[322] *Id.* at 177 (citing Sea View Estates Beach Club, Inc. v. State Dep't of Natural Res., 588 N.W.2d 667, 676 (Wis. Ct. App. 1998)).

[323] *Id.* at 179 (citing Karin J. Wagner, Note, *Geneva Lake Dockominiums: An Exercise of Riparian Rights in Violation of the Public Trust Doctrine*, 4 WIS. ENVTL. L.J. 243, 248 (1997)).

[324] *Id.* at 180.

[325] *Id.* at 181.

[326] *Id.*

[327] *Id.*

[328] Palazzolo v. State *ex rel.* Tavares, 785 A.2d 561 (R.I. 2001) (Order).

[329] *Id.* (citing Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995)).

[330] *Id.*

Because courts adjudicate rights and not value, the use of such information is questionable. Possibly this information might be relevant to whether SGI received more for the tracts it sold than it had paid for its original parcel, a gain that would be attributable to Palazzolo, upon whom SGI's assets devolved when its charter was revoked for nonpayment of its franchise fee. However, the fact that the landowner sold the parcel for more than it paid for it did not preclude the award of takings damages in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[331] Possibly the Rhode Island Supreme Court has in mind the "economic impact of the regulation" factor of *Penn Central* (as distinct from the "interfere[nce] with distinct investment-backed expectations" factor).[332] However, the relationship between the absolute amount of a given claimant's loss and whether the government engaged in a regulatory taking never has been made clear.

More likely, and alleviating the need for clarity, the state supreme court might be concerned with issues of "fairness" and "windfalls" enunciated in Justice O'Connor's concurring opinion in *Palazzolo*.[333] Such a use would highlight the subjectivity associated with an amorphous expectations notice rule standard.

2. *Character of the regulation, targeting, and expectations*

In *Penn Central Transportation Co. v. City of New York*,[334] one of the enumerated takings factors was "the character of the governmental action." While the Court in *Penn Central* treated "character" in terms of whether there was a physical appropriation or something akin to it, the meaningful life of that distinction was only two years.[335] However, it may be that other attributes of "character" should be taken into account in discerning the role of preacquisition regulations after *Palazzolo*. In *American Pelagic Fishing Co. v. United States*,[336] the U.S. Court of Federal Claims noted that the plurality opinion in *Eastern Enterprises v. Apfel*[337] "suggests that, in considering the character of a governmental action alleged to constitute a taking, at least two other factors are also relevant: (1) whether the action is retroactive in effect,

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[331] 526 U.S. 687 (1999).

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

[333] Palazzolo, 533 U.S. at 635-36 (O'Connor, J., concurring); *see also supra* Part IV.D.3.

[334] 438 U.S. 104 (1978).

[335] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (making permanent physical occupation categorically a taking, thus removing such cases from the ad hoc test of *Penn Central*).

[336] 49 Fed. Cl. 36 (2001) (holding statute that uniquely precluded fishing by plaintiff's ship to constitute a taking).

[337] 524 U.S. 498 (1998).

and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual."[338]

The concern about targeted legislation in *American Pelagic* mirrors the Supreme Court's concern about targeted application as a violation of the Equal Protection Clause in *Village of Willowbrook v. Olech*,[339] and as a violation of the *Agins* "substantially advance" prong[340] in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[341]

Given the Court's continued concern with fairness, as evidenced by Justice O'Connor's *Palazzolo* concurrence,[342] claimants may be able to make imaginative use of these doctrines.

3. Countervailing concerns for objectivity

As noted previously, concerns regarding circularity in the definitions of expectations and rights have played an important role in the regulatory takings debate.[343] One of the landmark cases in which circularity has been an important issue is *Katz v. United States*,[344] where reasonable expectations of a criminal defendant's privacy both shaped and were shaped by government's investigative powers. As the Supreme Court recently noted in *Kyllo v. United States*,[345] the "*Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable."[346]

Kyllo involved the use of thermal imaging, by which police were able to sense from the public street the use of high-intensity lamps inside the defendant's home consistent with indoor marijuana growth. Justice Stevens's dissenting opinion, in which Justice O'Connor joined, stressed that the imaging did not reach inside the home, but detected heat waves emanating

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[338] *American Pelagic Fishing Co.*, 49 Fed. Cl. at 50 (citing *Eastern Enters.*, 524 U.S. at 532-37).

[339] 528 U.S. 562 (2000).

[340] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that "[t]he 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") (citations omitted).

[341] 526 U.S. 687 (1999) (upholding municipality's continual ratcheting up of development requirements as fast as developer met them as basis for jury award based upon the disparity between the city's conduct and its own articulated standards).

[342] Palazzolo v. Rhode Island, 533 U.S. at 635-36 (2001) (O'Connor, J., concurring).

[343] *See supra* Part III.F.

[344] 389 U.S. 347 (1967) (holding that defendant convicted of illegal gambling had a justified reliance in privacy of his business conversations made from a glass-enclosed telephone booth).

[345] 533 U.S. 27 (2001).

[346] *Id.* at 2043 (citing, e.g., 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(d), at 393-94 (3d ed. 1996)).

from the home and detected out in the public street.[347] The majority opinion, written by Justice Scalia, held that sense-enhancing technology that is not in general public use, and which gathers information not otherwise obtainable without a physical intrusion into the home, constitutes a search. "This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[348]

The limitation of the permissible intrusion so as to protect privacy, as it was understood in 1791, seems quite analogous to the grounding of property rights in, as *Palazzolo* phrased it, "shared understandings of permissible limitations derived from a State's legal tradition."[349] Were the Court to employ *Kyllo* functionality in future property rights cases, the scope for subjectivity would be less, and expectations, to the extent they are a factor, would be shaped accordingly.

4. The effects of anticipatory drafting

Another range of issues that is predictable in future litigation involving the expectations and background principles notice rules involves the extent to which parties to a property purchase and sale might shape their agreements to anticipate regulatory takings problems. One clear illustration is the use of explicit assignments of existing and inchoate regulatory takings claims. The New York Court of Appeals, for instance, had explicitly disclaimed ruling on this issue in its adoption of the positive notice rule.[350]

Likewise, buyers and sellers might be expected to more carefully coordinate their strategies to maximize the value of their aggregate property rights. A contract explaining that the buyer paid the specified price in recognition of the skill and risk entailed in its pursuit of a takings claim, for instance, might dispel the notion that the vindication of the buyer's rights would represent a "windfall."

5. A glimpse at McQueen

As noted previously,[351] the U.S. Supreme Court instructed the South Carolina Supreme Court to reconsider its decision in *McQueen v. South*

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[347] *Id.* at 2048 (Stevens, J., dissenting).

[348] *Id.* at 2043.

[349] Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

[350] Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1039 n.4 (N.Y. 1997) (declaring that "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court").

[351] *See supra* note 103 and accompanying text.

Carolina Coastal Council[352] "in light of *Palazzolo*."[353] The state supreme court subsequently ordered the parties to brief the following issues:

> 1. Did the Court of Appeals err in finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?
>
> 2. Do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?
>
> 3. May a court use investment-backed expectations to determine McQueen's damages?[354]

The last of these issues is especially intriguing, since it seems to envision that, while there are no background principles that would absolve the state from the just compensation requirement of *Lucas*, nevertheless the expectations notice rule would apply. Thus, a complete wipe-out of value might be coupled with zero damages. The landowner has requested that the court consider other issues relevant to the role of expectations in a taking of all economic use and delay in exercising rights.[355]

D. Ripeness

The Supreme Court has granted certiorari in *Franconia Associates v. United States*,[356] a case involving the statutory termination of the unfettered right of prepayment that had been promised borrowers who constructed government-subsidized low-income rental housing in rural areas. The property owners had received the loans prior to enactment of the restriction and had lost the right to accelerate conversion of their housing into market-rent units because of it. The Federal Circuit held that the owners' takings and contract clause actions accrued with the passage of the statute and that their claims were time-barred under 28 U.S.C. § 2501 for failure to bring suit in the U.S. Court of Federal Claims within six years of the date the statute was enacted.[357]

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[352] 530 S.E.2d 628 (S.C. 2000).

[353] McQueen v. South Carolina Coastal Council, 530 S.E.2d 628 (S.C. 2000), *cert. granted, judgment vacated, remanded sub nom.* McQueen v. South Carolina Dep't of Health & Envtl. Control, 121 S. Ct. 2581 (2001).

[354] Order, January 10, 2002.

[355] *See* Motion, February 15, 2002.

> Does the U.S. Supreme Court's decision in *Palazzolo* . . . mean that Mr. McQueen (A) need not prove that the challenged restriction interferes with his reasonable investment-backed expectations, because he has raised a categorical takings claim, and that (B) even if relevant to a categorical takings claim, his reasonable investment-backed expectations are not extinguished by a delay in seeking development permits?

Id.

[356] 240 F.3d 1358 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 802 (2002).

[357] *Id.* at 1362-63.

The grant of certiorari was limited to the following issues:

> 1. Whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.
>
> 2. Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.[358]

Given that the effects of statutory enactments upon existing property rights is more clear in some cases than in others, the statute of limitations issues raised in *Franconia Associates* seem more akin to the regulatory takings issues in *Palazzolo* than to the physical takings it had compared them with.[359]

VI. CONCLUSION

The Supreme Court's notice rule jurisprudence is decidedly a work in progress. Its opinion in *Palazzolo v. Rhode Island*[360] is beneficial in that it clearly rejects the positive notice rule. However, it does little to clarify the background principles notice rule and invites recourse to the amorphous expectations notice rule. The latter result, if not carefully circumscribed in future opinions, poses a substantial threat to sharply defined notions of property and to individual liberty.

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[358] Franconia Assocs. v. United States, 122 S. Ct. 802 (2002).

[359] Palazzolo v. Rhode Island, 533 U.S. 606, 627-28 (2001); *see also supra* Part IV.E.

[360] 533 U.S. 606 (2001).