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Does Palazzolo v. Rhode Island's Upholding of the Transferability of Takings Claims Require a Rethinking of Takings Jurisprudence

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Does *Palazzolo v. Rhode Island*'s Upholding of the Transferability of Takings Claims Require a Rethinking of Takings Jurisprudence?

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INTRODUCTION

The Fifth Amendment Takings Clause¹ is the most fundamental constitutional protection that property owners have against the government.² Its prohibition against the uncompensated taking of private property is firmly rooted in the common law and historical

1. The "Takings Clause" is the term commonly used to describe that portion of the Fifth Amendment of the United States Constitution, which states: "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

2. DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 1 (2002) (contrasting the protection afforded under the Takings Clause with that provided under the Contract Clause and the Due Process Clause).

legal traditions.³ Yet, in modern times, the interpretation of this clause has produced a complex, ambiguous, and baffling set of rules.⁴ Arguably, this inability to formulate a coherent takings jurisprudence has resulted in Supreme Court decisions that undercut the principles of fairness and equity that underlie this Bill of Rights guarantee.⁵

A recent Supreme Court case that exemplifies this state of affairs is that surrounding the land of Anthony Palazzolo. In 1959, Palazzolo (through a corporation, Shore Gardens, Inc. ("SGI"), that he and two associates had formed) purchased a parcel of land in the town of Westerly, Rhode Island, intending to develop it.⁶ At the time of the land's purchase, the relevant restrictions on the property had not been enacted.⁷ Two years later, in 1961, Palazzolo acquired his associates' fractional interests in SGI to become the corporation's sole owner.⁸ Over the next five years, Palazzolo submitted three different development proposals⁹ for the land to the Rhode Island Division of Harbors and Rivers, all of which were denied.¹⁰ Apparently frustrated by these denials, SGI made no additional development proposals for over a decade.¹¹

In the meantime, two events of critical importance occurred.¹² In 1971, Rhode Island created the Coastal Resources Management

3. GEORGE SKOURAS, *TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE AND CONTROL OF PRIVATE PROPERTY* 11 (1998) (tracing the Takings Clause's history to the *Magna Carta* and possibly Roman times).

4. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967) ("The courts have developed a bewildering array of rules for determining when [a taking occurs]."); see also Henry N. Butler, *Regulatory Takings After Lucas*, REGULATION: THE CATO REVIEW OF BUSINESS & GOVERNMENT, 1993 No. 3, at 76 (noting that the Supreme Court has created a "confused and baffling body of law"); David G. Savage, *No Time Outs for the Taking*, A.B.A. J., Jan. 2002, at 27 (stating that the Supreme Court has "failed to set clear rules" for takings cases).

5. Michael M. Berger, *The Shame of Planners*, LAND USE L. & ZONING DIG., at 6, 8 (2002).

6. *Palazzolo v. Rhode Island*, 533 U.S. 606, 613 (2001).

7. *Id.* at 613-14. SGI purchased the property in 1959, and the relevant restrictions were passed in 1971. *Id.*

8. *Id.* at 613.

9. Proposals were submitted in 1962, 1963, and 1966. *Id.* at 613-14.

10. The 1962 and 1963 proposals were for a dredge and fill permit while the 1966 proposal was for a beach club. *Id.* at 614. The 1962 permit was denied because of a lack of essential information in the proposal and the 1963 and 1966 permits were denied because of the alleged environmental impact the construction would have caused. *Id.*

11. *Id.*

12. These events are of critical importance because the transfer of ownership allowed the state's transferability defense, and the Council's creation spawned the restrictions on development. *Id.*

Council ("Council") and charged it with protecting the state's coastal properties.¹³ Then, in 1978, SGI's corporate charter was revoked¹⁴ and title to the property devolved to Palazzolo in his personal capacity.¹⁵ Palazzolo, now the owner of the land, renewed his efforts at developing the property by submitting development proposals in 1983, and again in 1985.¹⁶ Both proposals were again rejected.¹⁷ Thus, by 1985, Palazzolo, through SGI and in his personal capacity, submitted to the authorities in Rhode Island five separate development plans over twenty-three years.¹⁸ All of those proposals had been turned down. In fact, by 1985, it became reasonably clear that *any* development plan that Palazzolo submitted for this property would be turned down.¹⁹ In essence, Palazzolo purchased this parcel of land, was forced to hold it with no productive use for over twenty years, and was not and never would be able to develop it. The value of the land without the restrictions was estimated to be \$3.15 million,²⁰ yet, without the right to build on the land, that value was entirely illusory.²¹

One might ask whether the State of Rhode Island or the Town Council in Westerly offered any compensation for Palazzolo's deprivation, whether they offered to trade him development rights elsewhere as an exchange, or whether they offered any remuneration for his being asked to carry this public burden alone. They did not. Instead, when Palazzolo brought suit²² to enforce his rights, twenty-seven years after purchasing the land, the government proffered two defenses for why forcing Palazzolo alone to carry this public burden

13. *Id.*

14. SGI's corporate charter was revoked for failure to pay corporate income taxes. *Id.*

15. *Id.*

16. *Id.* at 614-15.

17. *Id.*

18. The five proposals were submitted in 1962, 1963, 1966, 1983, and 1985. *Id.* at 613-15.

19. *Id.* at 621 ("With respect to the wetlands on petitioner's property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands . . .").

20. This figure was "derived from an appraiser's estimate as to the value of a 74-lot residential subdivision." *Id.* at 616.

21. The property with the restrictions retained a value of approximately \$200,000 for building a single-family residence, representing nearly a ninety-five percent diminution in the property's value. *See id.* at 616.

22. The suit was an inverse condemnation action. *Id.* at 615. An inverse condemnation suit is one brought by the landowner against a governmental body where the land's use is restricted and it appears that the government is not going to bring eminent domain proceedings to acquire the land. BLACK'S LAW DICTIONARY 287 (7th ed. 1999).

was not a “taking” and deserved no compensation: (1) Palazzolo had no “reasonable expectation” that he would be allowed to build on this property,²³ i.e., he should have known that this might happen; and (2) that of the approximately twenty acres in his property, he could still build on two of the acres,²⁴ i.e., the government did not take *all* his land, just *most* of it. This second defense is called the partial/total dichotomy. Adding insult to injury, although the value of his land if he were allowed to build on it was estimated to be \$3.15 million, the court implied that it may be an entirely fair exchange (or “just compensation” in the terms of the Fifth Amendment) merely to allow Palazzolo a \$157,000 tax deduction as total compensation by having him donate the land to the State of Rhode Island.²⁵

The state’s position, however, is not unusual. These twin defenses offered by the State of Rhode Island against Palazzolo’s takings claim, that the landowner did not have “reasonable investment-backed expectations” for the use of property and that the government did not take all of Palazzolo’s land, are the two most common defenses to takings claims.²⁶ In the case of Palazzolo, however, Rhode Island also proffered a third defense: that Palazzolo’s acquisition of the property, when he acquired personal title to the land at the time SGI’s corporate charter was revoked, took place after the enactment of the regulations governing his property;²⁷ therefore, he had no right to make the claim.²⁸ In other words, takings claims of previous owners are not transferable to new owners. When Palazzolo’s case reached the United States Supreme Court, the

23. *Palazzolo v. State ex rel Tavares*, 746 A.2d 707, 717 (R.I. 2000), *aff’d in part, rev’d in part*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

24. *See id.* at 715. *But see Transcript of the University of Hawai’i Law Review Symposium: Property Rights After Palazzolo*, 24 U. HAW. L. REV. 455, 464 (2002) (describing an instance in which an inspector recently visited Palazzolo’s property and, referring to the two-acre parcel, stated that: “[w]e’re not going to give you a permit here [either]”).

25. *See Palazzolo*, 746 A.2d at 715; Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 5, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047) [hereinafter Amicus Brief]. When the *Palazzolo* case reached the United States Supreme Court in the summer of 2001, the Court remanded the case to the Rhode Island Supreme Court for additional considerations about Palazzolo’s “reasonable expectations.” *Palazzolo*, 533 U.S. at 616.

26. *See generally* *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (illustrating the defendants’ reliance on the above justifications); *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997) (holding that plaintiff’s constructive notice of property restrictions affected the investment-backed expectations and defeated the takings claim).

27. *Palazzolo*, 746 A.2d. at 716.

28. *Id.*

Court accepted Rhode Island's first two arguments, but flatly rejected the third.²⁹ The Court held that takings claims are, in fact, transferable to new owners.³⁰

This Comment will argue that these first two mainstays of takings jurisprudence, reasonable investment-backed expectations and the partial/total dichotomy, are incompatible with the transferability of takings claims announced in *Palazzolo*.³¹ Part I of this Comment will discuss the purpose of the Takings Clause. Part II will examine the rise of the partial/total dichotomy in takings law and its incompatibility with transferability. Part III will discuss the "reasonable investment-backed expectations" analysis used to evaluate takings claims, and its incompatibility with transferability. Part IV of this Comment will explore the advantages and disadvantages of transferability of takings claims. Finally, the Conclusion of this Comment will discuss subsequent interpretations of *Palazzolo* and propose an integrated approach to takings claims that resolves the conflicts discussed in Parts II–IV.³²

29. *Palazzolo*, 533 U.S. at 627.

30. *Id.* Many types of takings claims still are not transferable, even after *Palazzolo*. For example, in a direct condemnation action by the government, or a physical invasion of the property, the right to compensation is not transferable. *Id.* at 628. Even in the area of regulatory takings, *Palazzolo* is not clear as to whether all types of takings are transferable. For instance, once a landowner has received a final administrative decision on the restricted use of his land, the implications of *Palazzolo* may be that the claim is no longer transferable. *Palazzolo* merely holds that the claim is transferable prior to the ripeness of the claim. See Gregory M. Stein, *The Effect of Palazzolo v. Rhode Island on the Role of Reasonable Investment-Backed Expectations*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES*, 41, 50–57 (Thomas E. Roberts ed., 2002) [hereinafter *TAKING SIDES ON TAKINGS ISSUES*].

31. *Palazzolo*, 533 U.S. at 627; see also Erwin Chemerinsky, *Expanding the Protections of the Takings Clause*, *TRIAL*, Sept. 2001, at 70, 70 (describing the Court's holding in *Palazzolo* as unequivocally endorsing the transferability of takings claims). This Comment focuses exclusively on regulatory takings, i.e., where the government causes such a diminution in property value through regulation that, in effect, the regulations constitute a covert or implicit taking of property under the Fifth Amendment. This Comment does not deal with the traditional physical taking of private property by the government through eminent domain proceedings. For a comprehensive view on physical takings, see POWELL ON REAL PROPERTY (Patrick J. Rohan ed., 2002); JULIUS L. SACKMAN & RUSSELL D. VAN BRUNT, *NICHOLS ON EMINENT DOMAIN* (3d ed. 2002); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 *WASH. L. REV.* 553 (1972).

32. This Comment analyzes the Supreme Court's regulatory takings decisions in light of the economic incentives and disincentives that they create for property owners. In some cases, this Comment argues for overturning precedent in light of the illogical effects that the decisions have on those affected. For a contrasting perspective on these decisions from the land use field, see JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* (1998); DOUGLAS W. KMEIC, *ZONING AND PLANNING DESKBOOK* (2d. ed 2001); DANIEL R. MANDELKER, *LAND USE LAW* (4th ed.

I. THE PURPOSE OF THE TAKINGS CLAUSE

The Fifth Amendment to the United States Constitution states, in part: "Nor shall private property be taken for public use, without just compensation."³³ Alternatively known as the "Eminent Domain Clause"³⁴ or the "Takings Clause,"³⁵ this clause has been characterized as a "tacit recognition of a preexisting power"³⁶ of the government³⁷ to "achieve public ends by taking property from private parties"³⁸ from time to time. The Takings Clause imposes two separate requirements on the government.³⁹ First, the "public use requirement" mandates that property may only be taken for public use, not private.⁴⁰ Thus, property generally may not be taken from person A and simply given to person B; instead, it must be used to

1997); EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING (4th ed. 2002). For works taking a more historical view of land use and takings law, see DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION (1993); RICHARD PIPES, PROPERTY AND FREEDOM (1999); BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION (1997).

33. U.S. CONST. amend. V.

34. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 153 (1978).

35. *Palazzolo*, 533 U.S. at 611.

36. *United States v. Carmack*, 329 U.S. 230, 241 (1946).

37. The Takings Clause applies to the individual states through the Fourteenth Amendment. *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 226 (1897).

38. Mark W. Smith, *A Congressional Call to Arms: The Time Has Come for Congress to Enforce the Fifth Amendment's Takings Clause*, 49 OKLA. L. REV. 295, 319 (1996).

39. DANA & MERRILL, *supra* note 2, at 191 (noting the two requirements of the Takings Clause, namely, the public use and compensation requirements). Federal law is not the only source of protection against government takings. Over twenty states have enacted property protection laws that may provide greater protection than the Fifth Amendment. Steven J. Eagle, *Protecting Property from Unjust Deprivations Beyond Takings: Substantive Due Process, Equal Protection, and State Legislation*, in TAKING SIDES ON TAKINGS ISSUES, *supra* note 30, at 507, 535. Examples include the Texas Private Real Property Rights Preservation Act, ch. 517, 1995 Tex. Gen. Laws 3266 (codified as amended at TEX. GOV'T CODE ANN. §§ 2007.001–2007.045 (Vernon 2002)), which provides for compensation when a government action results in at least a twenty-five percent diminution in the value of real property, TEX. CODE ANN. § 2007.002(5)(B)(ii) (Vernon 2002), and Florida's Bert J. Harris, Jr., Property Rights Protection Act, ch. 95–181, 1995 Fla. Laws 1651 (codified as amended FLA. STAT. ANN. § 70.001 (West 2002)), which provides for compensation when government action has "inordinately burdened" the landowner, FLA. STAT. ANN. § 70.001(2) (West 2002). Additionally, alternative claims might be available to one who believes he is a victim of a regulatory taking. For a concrete summary of alternatives, including estoppel and vested rights, see Susan L. Trevarthen, *Alternatives to Takings: Procedural Due Process, Equal Protection, and State Law Doctrine*, in TAKING SIDES ON TAKING ISSUES, *supra* note 30, at 551.

40. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement . . .").

benefit the general public.⁴¹ Second, the “compensation” requirement states that whenever a taking occurs, there must be compensation, and that compensation must be just.⁴²

Several justifications for the Takings Clause exist.⁴³ First, the protection of property rights encourages private investment and leads to a more prosperous economy.⁴⁴ Second, the clause is equitable, in that no one person or group is forced to bear any burden that should rightfully be borne by all.⁴⁵ Third, the compensation requirement limits the scope of government in that it confines its activities to those that are primarily public, rather than private or “special interests.”⁴⁶ Finally, it requires the government to pay for the resources that it commands, thereby restraining the appetite of government.⁴⁷ The

41. *But see id.* at 232 (holding that the forced sale of land from one landowner to a group of landowners to reduce the evils of a land oligopoly was not a taking); Butler, *supra* note 4, at 76 (noting that the “public use” requirement, in fact, has very little bite as a restriction).

42. *See* DANA & MERRILL, *supra* note 2, at 4. It is significant to note that, unlike the First Amendment, which begins with the words “Congress shall make no law,” U.S. CONST. amend. I, the Fifth Amendment has no such categorical prohibition, other than that a taking be for public use, *see* U.S. CONST. amend. V. The Takings Clause merely states the consequences when a taking does occur, namely, that there be just compensation.

43. For a more thorough discussion of the purposes of the Takings Clause, compare RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 19–29 (1985) (arguing for a broader interpretation of the Takings Clause), with Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 *HASTINGS L.J.* 1245, 1258 (2002) (arguing for a narrower interpretation of the Takings Clause).

44. Butler, *supra* note 4, at 76. For example, landowners are more likely to make investments in developing land when they know that government actions that destroy the value of that land will require compensation from the government.

45. *Id.* If government is trying to achieve some public goal, e.g., environmental or historic preservation, it is fair that the public pays for the resources that help realize that public purpose.

46. *See* *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893) (“[I]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.”); *see also* Butler, *supra* note 4, at 76 (“[T]he public use requirement could limit the scope of government activities to those that involve primarily public, rather than private (special interest), benefits.”).

47. *See* *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives*, 104th Cong. 48 (1995) (statement of Roger Pilon, Senior Fellow and Director, Center for Constitutional Studies, Cato Institute) (noting the substantial danger of an increased demand for private parties to bear public burdens that would arise from ignoring the Takings Clause: “[n]ot every species may be worth preserving—except of course, if its preservation is free”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 58 (4th ed. 1992); Butler, *supra* note 4, at 76 (“[T]he compensation requirement serves as an important restraint by requiring the government to pay for all the resources that it commands.”). The Takings Clause prevents a vicious

Court has tended to focus on the second justification, encapsulated by Justice Holmes who noted in *Armstrong v. United States*⁴⁸ that the purpose of the Takings Clause is to prevent the government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁴⁹ Despite this focus, one must remember that other justifications exist as well, and any takings principle must be judged according to each of those purposes.⁵⁰ It is only in this manner that the full protection of the Takings Clause can be achieved.

II. THE PARTIAL/TOTAL DICHOTOMY

This Comment will refer to the difference in treatment between regulations that leave landowners with some use of their property and regulations that leave owners with no use of their property as the “partial/total dichotomy.”⁵¹ Governmental entities commonly use this dichotomy as a defense to takings claims because most regulations will fall short of depriving landowners of all use of their property.⁵² To understand the rationale for this dichotomy, it is important to first understand how the distinction arose.

A. *Background of the Partial/Total Dichotomy*

The framers’ concept of a taking was a physical taking, where the government physically took and occupied private land for public

economic cycle. Generally, when the price of something decreases, the demand tends to increase. See *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 884–85 (D.C. Cir. 1999) (Williams, J., concurring). Thus, if the price of achieving some public goal by taking private property is “free,” that is, if there was no Takings Clause requiring “just compensation,” then the demand for such actions would increase. Thus, the danger of ignoring the Takings Clause is palpable—the demand for private parties to bear public burdens would increase substantially.

48. 364 U.S. 40 (1960).

49. *Id.* at 49.

50. See, e.g., *The Supreme Court, 2000 Term: Leading Cases*, 115 HARV. L. REV. 306, 456–57 (2001) [hereinafter *2000 Term: Leading Cases*] (arguing that the reasonableness of the government’s action and the sharing of public burdens are the most important justifications for the Takings Clause).

51. While the author coined the term “partial/total dichotomy,” similar phraseology has been used in the past. See Karen M. Brunner, *A Missed Opportunity: Palazzolo v. Rhode Island Leaves Investment-Backed Expectations Unclear as Ever*, 25 HAMLINE L. REV. 117, 119 (2001) (referring to the “dichotomy between partial and total takings analyses”); see also *Dist. Intown*, 198 F.3d at 886 (noting the Supreme Court’s justifications for its distinction between partial and total takings).

52. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992) (noting that it is “relatively rare” that a total taking is found).

use.⁵³ Such physical takings remain the classic case today, and when the government so exercises its eminent domain power, disputes about the fact that a taking has occurred seldom arise.⁵⁴ For instance, in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵⁵ a condominium owner was forced to allow cable-television antennas and wires to be placed on her building.⁵⁶ Despite the very minimal intrusion onto the owner's property, the Court found a taking, even though the antennas most likely *added* value to the building.⁵⁷ Also, in *Nollan v. California Coastal Commission*,⁵⁸ the Court found a taking where the government required a property owner to give up an easement across his property in exchange for a building permit.⁵⁹ Thus, when the government occupies any part of an owner's land, a taking occurs and compensation must be paid.

In addition to a physical taking, the government will be held liable if it effects a regulatory taking. A regulatory taking is where the government does not occupy the property, but regulates the manner in which the owner of the property may use or develop it such that the property's use or value is diminished.⁶⁰ The concept of regulatory takings is said to have begun in 1922 when Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*,⁶¹ wrote that "[t]he 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."⁶² While it likely would be administratively impossible for the government to compensate for every single effect of its regulations, there will nonetheless be a taking when regulations go too far.

The Supreme Court established the analytical method for determining whether regulations go "too far" in the landmark case of

53. See *id.* at 1014 ("Prior to [1922] . . . it was generally thought that the Takings Clause reached only a 'direct appropriation' of property.").

54. See *id.* at 1015; see also *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 324 (2001) (granting summary judgment to plaintiffs whose contractual water rights were taken in order to meet requirements of the Endangered Species Act).

55. 458 U.S. 419 (1982).

56. *Id.* at 419. New York law required a landlord to let cable companies put equipment on his property. *Id.* at 421.

57. *Id.* The cable television antennas may have added value by making that service available to the building's tenants. On remand, however, the district court awarded only \$1 in damages to Mrs. Loretto. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 1137 (4th ed. 1998).

58. 483 U.S. 825 (1987).

59. *Id.* at 841-42.

60. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1480-81 (2002).

61. 260 U.S. 393 (1922).

62. *Id.* at 415.

Penn Central Transportation Co. v. City of New York,⁶³ which involved a building restriction on the famed Grand Central Station in Manhattan. In that case, the City of New York had designated Grand Central Station as a historical landmark and prohibited its owners from erecting an office building in the air space above the station, despite the fact that an office building was a part of the station's original design.⁶⁴

In evaluating the constitutionality of this restriction, the Court laid out what has become the standard three-part test for determining whether a regulatory taking has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the government action.⁶⁵ The Court in *Penn Central* acknowledged that the consideration of these various factors turns such cases into "essentially ad hoc, factual inquiries,"⁶⁶ which, in that particular case, justified the restriction on Grand Central Station with very little compensation to the owners.⁶⁷ Because the regulation of Grand Central Station had not gone too far, the Court held that it was a permissible government law and not a violation of the Takings Clause.

Regulatory takings are subdivided into partial and total takings. For example, in *Penn Central*, the property had remaining value; after all, it was an operating train station. The property was put to productive use, but the use was restricted because the use of the air rights above the station was prohibited. Thus, this sort of government action, where part of the property is taken but some value remains, is known as a "partial" regulatory taking.⁶⁸ Though the Court did not find a taking in *Penn Central*, the three-part test, set out above, is the test used for all partial regulatory takings cases.

63. 438 U.S. 104 (1978); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in *Penn Central* . . . [for] partial regulatory takings.").

64. *Penn Cent.*, 438 U.S. at 115.

65. *Id.* at 123–24.

66. *Id.*

67. *Id.* The owners of buildings subject to historic landmark regulations were, however, "allowed to transfer development rights to contiguous parcels on the same city block." *Id.* at 114. This granting of additional development rights was seen as compensation for the restrictions on the historic parcel. *Id.* at 150 (Rehnquist, J., dissenting).

68. A partial takings claim is a suit for compensation "where an economically viable use survives [the] regulation." *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring).

Unlike partial regulatory takings, a “total” regulatory taking is one in which the regulations covering the land leave no economically viable use for the property. Courts use a completely different methodology for total regulatory takings than they do for partial regulatory takings. The classic example of this methodology occurred in the landmark 1992 case of *Lucas v. South Carolina Coastal Council*.⁶⁹ In *Lucas*, David Lucas purchased two beachfront lots on the Isle of Palms, a barrier island off the coast of South Carolina.⁷⁰ Shortly after his purchase, the government imposed a regulation that prohibited him from building any structures on the land, even though both adjacent parcels of land contained homes.⁷¹ Lucas accordingly filed suit, claiming a Fifth Amendment taking. In reversing the South Carolina Supreme Court, Justice Scalia, declared that when the government forces a landowner to give up “all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”⁷² Thus, *Lucas* established the categorical imperative that if there was a total taking, then the landowner would be due complete compensation,⁷³ but if there was less than a total taking, courts would use the *Penn Central* “ad hoc, fact-intensive analysis,” which typically results in no compensation.⁷⁴

The only exception to this categorical imperative for total regulatory takings occurs when a restriction on the use of property “inhere[s] in the title itself, in the restrictions that background principles of the state’s law of property and nuisance already place upon land ownership.”⁷⁵ Thus, if the restriction on the property comprised part of the “background principles” of state law, there would be no taking.⁷⁶ For instance, if a regulation prohibited a

69. 505 U.S. 1003 (1992).

70. *Id.* at 1006–07.

71. *Id.* at 1008–09.

72. *Id.* at 1019.

73. Upon remand in *Lucas*, the parties negotiated a settlement, and South Carolina purchased Lucas’s lots for \$1.575 million. Carolynne C. White & Gerard G. Alberts, *The Lucas Case and Modern Takings Theory*, STATE LEGISLATIVE REPORT, Vol. 18, No. 9 (Sept. 1, 1993), at <http://www.ncsl.org/programs/esnr/slr93luc.htm> (last visited Nov. 22, 2002) (on file with the North Carolina Law Review).

74. See, e.g., *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) (“[I]n partial takings cases, the government wins.”); see also Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1377 (1993) (stating that Justice Scalia’s approach will cause partial takings to remain uncompensated).

75. *Lucas*, 505 U.S. at 1029.

76. *Id.* at 1030.

landowner from excavating his land to such a degree that the excavation eliminated the lateral support to his neighbors, that landowner would not suffer a taking. Additionally, a landowner would not suffer a taking where he was prevented from using his land in a way that interfered with the government's navigational servitude;⁷⁷ such uses were not part of the title in the first place.⁷⁸

Restrictions on the use of property that are part of the common law principles that inhere in the land only duplicate the results that adjacent landowners can obtain by bringing a nuisance claim or which the government can obtain by bringing an action under its police power.⁷⁹ The crucial aspect of such background principles, however, is that they cannot be newly legislated;⁸⁰ they must be a long-standing part of the common law, such as restrictions against common law nuisance. Unless a total regulatory taking falls into this exception, meaning that the restricted use was not allowed under the background principles of state property law, then the court will find a taking.

B. Criticisms of the Partial/Total Dichotomy

In many ways, the partial/total dichotomy, resulting from the *Penn Central* and *Lucas* decisions, makes little sense. First, it is capricious. As Justice Stevens noted in *Lucas*, "the Court's new rule is wholly arbitrary. A landowner whose property is ninety-five percent diminished in value recovers nothing, while an owner whose property is one hundred percent diminished recovers the land's full value."⁸¹ In fact, one landowner's noncompensable partial taking may be a much larger dollar loss than another landowner's compensable total taking. For example, a partial restriction on property resulting in a multi-million dollar loss of value will result in no compensation, but a total restriction on land resulting in only a few thousand dollars

77. A "navigation servitude" is an easement that the federal government possesses, based upon its Commerce Clause power, to regulate commerce on navigational waters in the United States. BLACK'S LAW DICTIONARY 1051 (7th ed. 1999); see *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381-86 (Fed. Cir. 2000) (finding that the "navigational servitude may constitute part of the 'background principles' to which a property owner's rights are subject, and thus may provide the Government with a defense to a takings claim"), *aff'd*, 231 F.3d.

78. *Lucas*, 505 U.S. at 1030.

79. *Id.* at 1029; cf. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting) ("The nuisance exception to the taking guarantee is not coterminous with the police power itself."). The nuisance exception encompasses only those police power actions that a state could bring under common law nuisance.

80. *Lucas*, 505 U.S. at 1028.

81. *Id.* at 1064 (Stevens, J., dissenting).

loss of value will result in total compensation, even if the properties are right next door to each other. This leads to an ironic result where owners may prefer to have their land's use totally destroyed, rather than only partially hindered.⁸²

A second criticism of the partial/total dichotomy is that the distinction conflicts with precedent. The Supreme Court, on many occasions, has treated partial deprivations of property as fully compensable. For example, in *Causby v. United States*,⁸³ the federal government leased a small airport. As a result, planes flew within one hundred feet of the plaintiff's home, thus restricting the landowner's use of property because of noise, vibrations, and fear for personal safety. The Court found a compensable taking in the form of an easement that required compensation, even though many uses of the land remained available to the plaintiff.⁸⁴ Again, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,⁸⁵ a county ordinance temporarily prohibited the plaintiff from rebuilding on his property after a flood had destroyed the prior building occupying the land. The Court found that a "temporary" taking had occurred and ordered compensation.⁸⁶ In *Jacobs v. United States*,⁸⁷ a group of farmers sued the federal government for the occasional flooding of their lands, alleging that the government-constructed dam caused the flooding. The Court found "a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment."⁸⁸

While there is ample precedent that partial interruptions in the use of, and diminutions in the value of, property are fully compensable under the Fifth Amendment, this line of reasoning is not without fault. As in *Loretto*,⁸⁹ the situations in *Causby* and *Jacobs* are both physical takings whereby the government caused actual occupation of the plaintiffs' land. In *Causby*, approaching planes occupied the low airspace above the land, while in *Jacobs*, floodwater

82. See Epstein, *supra* note 74, at 1377 (critiquing Justice Scalia's approach in *Lucas* because it allows no compensation for partial takings).

83. 328 U.S. 256 (1946).

84. *Id.* at 267; see also *Griggs v. Allegheny County*, 369 U.S. 84, 90 (1962) (finding a compensable taking when the local county took an air easement over plaintiff's property for landing at an airport).

85. 482 U.S. 304 (1987).

86. *Id.* at 322.

87. 290 U.S. 13 (1933).

88. *Id.* at 16.

89. For discussion of "physical" takings, see *supra* notes 53–59 and accompanying text.

covered the plaintiff's land. Because they were physical takings, the Court treated these cases differently from partial regulatory takings. Making an exception for physical takings makes little sense, however, because a restriction on land use often has the same effect as a physical taking. For example, it would not have made any difference to the farmers in *Jacobs* had the government simply prohibited the use of that portion of the land that was flooded.⁹⁰ In either scenario, the diminution in value of the farmer's lands is identical. Because "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken,"⁹¹ it should make no difference whether the government is obtaining a value from the use of the land or is simply preventing the landowner from doing something of which the government disapproves. The measure of value is in accordance with what the landowner has given up.⁹² Thus, a determination of whether a taking has occurred should also be viewed from the standpoint of the landowner. Given the precedent established above for fully compensating partial takings to the extent of the value taken,⁹³ and that the standard for viewing this loss is from the perspective of the landowner,⁹⁴ all takings that are identical from the landowner's point of view should be compensated equally. By this reasoning, the partial/total dichotomy should be overturned, with courts compensating all takings, regardless of the extent or nature of their intrusion.

Having established that the partial/total dichotomy is at odds with precedent, because in the past numerous partial deprivations of property have been compensated, a third criticism is that the

90. Justice Stevens has stated that the justification for the differing treatment of physical and regulatory takings comes from the text of the Fifth Amendment itself, because it is obvious when property is physically taken, but not when property is taken by excessive regulations. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478 n.17 (2002). In *Lucas*, Justice Scalia made no distinction between physical and regulatory takings because he looked at the regulation from the point of view of the landowner. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992). When the regulation was equivalent to a physical occupation, from the landowner's point of view, compensation was due. *Id.* at 1017-18. Justice Brennan has noted that "[f]rom the property owner's point of view, it may matter little whether his land is condemned . . . or restricted in use by regulation." *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting). In *Tahoe-Sierra*, Justice Stevens limited this equivalence theory to situations where there is exact equivalence. *Tahoe-Sierra*, 122 S. Ct. at 1480 n.19.

91. *United States v. Causby*, 328 U.S. 256, 261 (1946).

92. *Id.* at 375 ("[T]he owner is to receive no more than indemnity for his loss.").

93. See *supra* notes 83-88 and accompanying text.

94. See *Lucas*, 505 U.S. at 1017.

dichotomy conflicts with the text of the Constitution itself.⁹⁵ The Fifth Amendment does not say, "Nor shall private property be taken for public use *unless the owner is left with some property*." The text simply says that what is taken must be compensated.⁹⁶ No textual basis exists for concluding that compensation is due only in the context of total takings. While a lack of textual support further indicates that the partial/total dichotomy needs reformulation, it must be conceded, however, that the original intent of the Takings Clause was limited to instances of eminent domain, where the government physically took and occupied property.⁹⁷ The idea that the Takings Clause applied to government regulation was not propounded until the early twentieth century.⁹⁸ The amount of regulation that exists today, however, is mammoth in comparison to that existing in the eighteenth century,⁹⁹ and interpreting the Takings Clause to encompass regulatory takings is consistent with viewing the Constitution as a "living document"¹⁰⁰ that interprets constitutional principles in light of their application to modern events.

Fourth, the partial/total distinction is inconsistent with another purpose of the Takings Clause, which is to restrain the appetite of government.¹⁰¹ After *Lucas*, it is unlikely that any state legislature

95. It should be noted, however, that the intention of some of the framers of the Constitution specifically did not agree with the concept of "regulatory takings." *Id.* at 1028. A textual approach thus may be a weak argument in favor of expanding the definition of regulatory takings. See generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 798-818 (1995) (arguing that modern takings jurisprudence exemplifies a disregard for the framers' intent).

96. U.S. CONST. amend. V.

97. DANA & MERRILL, *supra* note 2, at 4 (discussing the original meaning of the Takings Clause).

98. *Id.* But see Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1218 (1996) (arguing that regulatory takings law began long before the twentieth century).

99. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1142 (1995) (noting the recent "avalanche of federal environmental legislation"). But see WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 80 (1995) (noting that regulations infringing on property rights were common in the late colonial period).

100. See Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What is?*, 19 HARV. J. L. & PUB. POL'Y 9, 14 (1995) (discussing the "living document" theory of interpretation).

101. See Epstein, *supra* note 74, at 1391 (noting the possibility of using the Takings Clause "as a welcome restraint on the appetite of government"). *Lucas* provides a clear example of this restraint. After the case was remanded, the State of South Carolina decided to purchase Lucas's property from him. Then, as the new property owner, South Carolina decided to offer the lots for sale for residential purposes. See Butler, *supra* note 4, at 81.

will ever institute a regulation that will take all of a landowner's property, which will require full compensation, when only taking ninety-five percent of the property will not require compensation. Instead of acting as a restraint on the growth of government, the partial/total dichotomy only encourages the expansion of government. Professor Richard Epstein noted that "the Court has provided an effective blueprint for confiscation that budget-conscious state legislators will be eager to follow to the letter."¹⁰² In effect, we may have witnessed the last regulatory taking, at least according to the *Lucas* definition, but as *Palazzolo* illustrates, not the last intrusion on property rights.¹⁰³

A final problem with the partial/total dichotomy is pragmatic: the dichotomy encourages lower courts to follow the antithesis of the model, that is, it allows courts to ignore *Penn Central* and find no compensable taking whenever there is less than a total taking. According to *Penn Central*, a partial regulatory taking is compensable if it meets the three-part test which evaluates (1) the economic impact on the claimant, (2) the interference with investment-backed expectations, and (3) the character of the invasion.¹⁰⁴ But, in practice, courts rarely find partial regulatory takings.¹⁰⁵ The simple *Lucas* formulation that treats a total deprivation as a taking encourages courts to infer the negative implication of that rule¹⁰⁶ and find no taking unless there is a total loss of use. The *Lucas* formulation provides "an attractive bright line rule for lower court judges"¹⁰⁷ but it is not consistent with the thrust of *Penn Central*, which is that partial takings deserve compensation.¹⁰⁸

This role reversal demonstrates that actions that may appear to be in the public interest when they are 'free'—that is, when the political decision makers don't bear the costs—are not necessarily attractive government programs once the political decision makers must bear the budgetary costs of their actions. It is difficult to find a better example of how protection for owners of private property serves to restrain the growth of government.

Id.

102. Epstein, *supra* note 74, at 1377; see Butler, *supra* note 4, at 79 (stating that *Lucas* "creates a clear road map for . . . legislators . . . to avoid regulatory takings claims").

103. Butler, *supra* note 4, at 79.

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

105. For discussion on regulatory takings, see *supra* notes 60–67 and accompanying text.

106. Butler, *supra* note 4, at 79.

107. *Id.*

108. Part of the reason that no taking was found in *Penn Central* is that the landowner had received development rights as partial compensation. *Penn Cent.*, 438 U.S. at 122.

C. *The Denominator Problem*

The difference in treatment between partial and total regulatory takings engenders its own difficulty, known as the “denominator problem.”¹⁰⁹ First mentioned in *Keystone Bituminous Coal Ass’n v. DeBenedictis*,¹¹⁰ the denominator problem involves determining “the unit of property whose value is to furnish the denominator of the fraction” of what was taken.¹¹¹ In other words, if the denominator is only that part of the property that has been affected by regulations, then the fraction of the property affected by regulation will equal one, and there will have been a total, and thus compensable, taking. In *Lucas*, Justice Scalia spelled out the problem:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze this situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.¹¹²

109. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380 (Fed. Cir. 2000) (citing *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987)), *aff’d*, 231 F.3d 1354; *see also* Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20, 55–62 (1998) (discussing the issue of whether a court should focus on the “value remaining” or the “value taken”). *See generally* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996) (describing the denominator problem as it relates to regulatory takings). The problem is also known as the question of the relevant parcel, the non-severance rule, or the non-segmentation rule. *Transcript of the University of Hawai’i Law Review Symposium: Property Rights After Palazzolo*, *supra* note 24, at 466.

110. 480 U.S. 470 (1987).

111. *Id.* at 497.

112. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *see also* *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (noting the existence of the “persisting question of what is the proper denominator in the takings fraction”); Coletta, *supra* note 109, at 59 (noting the fact that “courts have for so long failed to reach a consensus on this issue [is an illustration] that hidden complexities and strong emotions are an integral part of the regulatory takings arena”). Property may also be divided in ownership temporally (as in leases or remainder interests), vertically (as in air rights or surface rights), or by usage (such as residential zoning). The Court has answered the denominator problem, as it relates to temporal property rights, by disallowing division in regulatory takings. *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 122 S. Ct. 1465, 1483 (2002); *see also infra* notes 131–36 and accompanying text. The Court has also answered the denominator problem as it relates to vertical division of property, by disallowing division in regulatory takings. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 506 (1987); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 115 (1978). The Court has sent mixed signals on the denominator issue for the functional division of property. *Compare* *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (implying that the function of devising property can be divided from other functions), *with* *Andrus v. Allard*, 444 U.S. 51, 67–68

The facts of *District Intown Properties, Ltd. v. District of Columbia*¹¹³ illustrate the crucial task of identifying the denominator in takings cases. In *District Intown*, the government designated an apartment complex in Washington, D.C., as a historical landmark, thereby restricting its development.¹¹⁴ The apartment owner also owned a vacant parcel of land next to the apartment building and submitted applications for building permits for the vacant land.¹¹⁵ When the permits were denied, the landowner filed a takings claim. The court in *District Intown* considered the “relevant parcel” to be both of the lots combined.¹¹⁶ The court went on to hold that a taking did not occur because the vacant lot added to the value of the apartment building¹¹⁷ and there was not a denial of all “economically viable use.”¹¹⁸ In other words, the court held the denominator to be all of District Intown’s property.¹¹⁹ But if the court had determined the denominator to be only the vacant parcel, then compensation would have been due. Thus, defining the “relevant parcel” is essentially the entire question for determining whether a taking has occurred.¹²⁰

Palazzolo once again resolved the denominator question to the detriment of the landowner.¹²¹ Although the government had prohibited Palazzolo from building on eighteen acres out of his twenty-acre parcel, and the Court mentioned the denominator problem,¹²² the Court did not find a *Lucas* taking because the remaining two acres retained “significant worth.”¹²³

Not all cases work to the detriment of the landowner as do *District Intown* and *Palazzolo*, however. In *Palm Beach Isles*

(1979) (holding that the function of selling property will not be severed from other functions).

113. 198 F.3d 874 (D.C. Cir. 1999).

114. *Id.* at 876.

115. *Id.*

116. *Id.* at 885.

117. The court held that the vacant lot added to the aesthetic value of the apartment complex. It may be noted that courts can always attribute an aesthetic value to adjacent land. Thus, a landowner of adjacent property will more often than not lose a takings claim on the former view. *Id.* at 888–89 (Williams, J., concurring).

118. *Id.* at 885.

119. *Id.*

120. *Id.* at 881–82 (noting that once the district court answered the denominator question, its summary judgment on the takings claim was “unremarkable”).

121. Palazzolo owned twenty acres of property, only two of which were usable after the regulation. The Court found the denominator to be the entire twenty acres, instead of just the affected eighteen acres. *See supra* notes 6–25 and accompanying text.

122. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

123. *Id.* at 632.

Associates v. United States,¹²⁴ for example, a group of investors purchased 311.7 acres of land on a barrier island from the State of Florida in 1956. The parcel was bounded on one side by the Atlantic Ocean and on the other side by a small lake, and a road bisected the length of the property. Twelve years after the purchase, the owners sold off the land on the Atlantic side of the road, constituting 261 of the acres, for over \$1 million. The owners held the remaining 50.7 acres, which primarily consisted of submerged wetlands, with development in mind. In 1972, the land became subject to restricted development under the Clean Water Act,¹²⁵ and the government denied previously accepted development plans. Considering the landowner's takings claim for the remaining 50.7 acres, the United States Court of Appeals for the Federal Circuit found that the two parcels were distinct.¹²⁶ Factors influencing the court included that there was a road separating the parcels, they were not part of the same original development plan, and the parcels had different physical characteristics.¹²⁷ Having thus identified the relevant parcel, the court found a taking.¹²⁸

Courts have developed a variety of methods for determining the relevant parcel. "The factors considered are: (1) whether the neighboring parcels are contiguous, (2) whether they were acquired simultaneously, (3) whether they have been treated as a single unit, and (4) the extent to which the restricted lot benefits the neighboring lot."¹²⁹ Despite these criteria, determining the relevant parcel remains difficult.¹³⁰

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,¹³¹ the Court took its most significant step toward solving the denominator problem. Addressing whether a thirty-two month

124. 231 F.3d 1354 (Fed. Cir. 2000), *modifying* 208 F.3d 1374 (Fed. Cir. 2000).

125. Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1994 & Supp. III 1997)).

126. *Palm Beach Isles Assocs.*, 231 F.3d at 1364.

127. The parcel to the east was beachfront property fronting the Atlantic Ocean and the parcel to the west was marshland and submerged property in Lake Worth.

128. The case was remanded to determine if a navigational servitude on the land existed, which would make the takings claim moot. *Palm Beach Isles Assocs.*, 231 F.3d at 1365.

129. *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 888 (D.C. Cir. 1999) (Williams, J., concurring).

130. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (calling the denominator issue a "difficult, persisting question"); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (characterizing it as a "difficult question").

131. 122 S. Ct. 1465 (2002).

moratorium on development was a *per se* taking of property,¹³² the Court held that the proper analysis was to consider the property as a whole, and not to disaggregate the fee interest into temporal slices.¹³³ Because the Court found that the moratorium affected only a small portion of the property, the short temporal interest, the Court easily rejected a *Lucas* taking.¹³⁴ Although the *Tahoe-Sierra* decision only involved the denominator problem in a temporal context,¹³⁵ and thus is only controlling in that context, the decision generally endorses the “parcel as a whole” doctrine.¹³⁶ That may indicate an approaching consensus to viewing all of the landowner’s holdings as comprising the denominator in takings cases.

Even if the parcel as a whole doctrine becomes the standard view of property for takings purposes, it is not without problems.¹³⁷ One such problem is that the rule breeds inefficient land transactions.¹³⁸ If a different party owned the vacant parcel of land in *District Intown*, the *Lucas* rule would produce a taking because the entire value of the parcel would be eliminated. In *Palazzolo*, if only the wetlands had been purchased originally, or if the uplands had been sold off shortly after purchase, the *Lucas* rule would result in a compensable taking. The parcel-as-a-whole doctrine thus encourages landowners to engage in inefficient transactions, such as purchasing and holding land in smaller size lots, setting up needless joint ventures and subsidiary corporations, or putting the smaller parcels in the name of a relative or friend.¹³⁹ The parcel as a whole doctrine also discriminates against those with larger landholdings and those who happen to concentrate

132. *Id.* at 1470.

133. *Id.* at 1483. A temporal slice of property would be any temporal ownership in property less than the fee, e.g., a leasehold, life estate, term of years, etc.

134. *Id.* at 1484.

135. *Id.* at 1483–84.

136. *Id.*; see also Thomas E. Roberts, *A Takings Blockbuster and a Triumph for Planning*, LAND USE L. & ZONING DIG., at 4, 5–6 (2002).

137. *Tahoe-Sierra*, 122 S. Ct. at 1496 (Thomas, J., dissenting) (calling the parcel as a whole doctrine a “questionable rule” and referring to the Court’s acceptance of it as “puzzling”).

138. See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1552 (1994). Professor Fee gives the following example: Imagine five empty identical beachfront lots alongside one another. Suppose that four of them were owned by persons who had homes elsewhere, and the fifth lot was owned by someone living in a lot immediately behind her oceanfront parcel. If a new regulation prohibited building on all five lots, the first four likely would receive compensation, but the fifth would not, even though they are identical. *Id.*

139. By subdividing land in this manner, an owner increases the chance that any burdensome regulation will affect an entire individual parcel, thus denying the owner all economically viable use of the land and requiring full compensation from the government.

those holdings in a particular area. There is simply no reason that the Takings Clause should offer less protection to someone with more property than someone with less property, as under the parcel as a whole doctrine.

D. Transferability is Inconsistent with the Partial/Total Dichotomy

In addition to the internal inconsistency and doctrinal confusion of the partial/total dichotomy, *Palazzolo* provokes another criticism. Because *Palazzolo* held that the post-regulation acquisition of property is not a bar to a takings claim,¹⁴⁰ this holding may offer landowners some relief from the partial/total dichotomy. In other words, *Palazzolo* simply could have sold off the eighteen acres of property that were subject to the wetlands restriction and allowed the subsequent owner to bring a *Lucas* claim for that parcel.¹⁴¹

If a takings claim depends on how broadly or narrowly one defines the affected property interest, and in many instances the transfer of ownership is not a bar to making a claim, owners could creatively buy, sell, and deed land to isolate the restricted parcel in a single lot. If a total takings claim always is compensable, with few exceptions, and a partial taking will rarely be compensated, landowners have a significant incentive to hold title in such a way as to be able to make a total takings claim.

For example, if a landowner has ten acres of land, seven of which are burdened by a regulation that likely prohibits development of them, while the remaining three can be freely built upon, the landowner will not be able to make a total taking claim based upon the entire ten acres.¹⁴² If the landowner, however, can sell the burdened seven acres to a new party, then the new owner will possess seven acres of economically idle land for which the owner will be able to make a total takings claim.

The preceding example depends upon the transferability of a takings claim, that such a claim is one of the rights that accompany land ownership and (absent a contrary agreement between the parties) is passed on to the new owner. Transferability, as upheld in *Palazzolo*, undercuts the partial/total dichotomy. No landowner,

140. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

141. It also may have been possible for *Palazzolo* to sell off the two acres and bring a claim on the remaining eighteen, although courts may be suspicious of such strategic behavior. For factors courts use in determining the relevant parcel, see *supra* note 129 and accompanying text. Clearly, the timing of the transaction will determine whether such a transfer will work (e.g., a post-ripeness claim may not work). See *supra* note 30.

142. See *Palazzolo*, 533 U.S. at 631.

properly advised of the current law, would ever make a partial takings claim when a far more viable total takings claim may be made. This can be done by transferring the ownership of a portion of the land and consolidating ownership so that one owner can make a total takings claim. Although in *Palazzolo*, the Court seemed not to have foreclosed consideration of the denominator issue, when transfer of the property is feasible,¹⁴³ owners may be better off in dividing the property and making a total takings claim of the affected portion.¹⁴⁴

A likely response to this analysis is that the Takings Clause is primarily concerned with “justice and fairness,”¹⁴⁵ and that a transaction designed to circumvent the law would not deserve compensation under a constitutional provision with this purpose. The Takings Clause, however, is designed to secure justice for the individual landowner, partly by limiting the government’s reach into private individuals’ affairs.¹⁴⁶ And, justice dictates that society must pay for the benefits that it receives by restricting development on land, rather than saddling the single owner with the entire burden.

E. Advantages of the Partial/Total Dichotomy

Given all of the problems with the partial/total dichotomy and its illogical results, one might inquire into its historical roots. Professor Epstein postulates an answer:

It seems evident that [the Court] resorted to this wholly artificial distinction to avoid having to attack zoning (not to mention rent control) head on—including the zoning that existed on the Isle of Palms when Lucas purchased his land. After all, zoning is, quite simply, a system of partial restrictions on land use, which would be routinely subject to intense constitutional scrutiny if the total/partial distinction in *Lucas* is abandoned.¹⁴⁷

143. In *Palazzolo*, the Court, although it mentioned the unresolved nature of the denominator issue, stated that petitioner claimed the entire twenty acres (including the upland portion) as the basis for his *Lucas* claim and therefore the Court would not consider, *sua sponte*, revising the denominator to include only the encumbered eighteen acres. *Id.* Despite this, the Court indicated that had petitioner claimed only the burdened portion of the land as the denominator of his claim, that it was at least possible that only the burdened portion would have been so considered. *Id.*

144. See *supra* note 74 and accompanying text (mentioning the difficulty of a partial takings claim).

145. *Palazzolo*, 533 U.S. at 633 (O’Connor, J., concurring) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978)); see also Michelman, *supra* note 4, at 1172 (proposing that the proper test for compensability is “fairness”).

146. 2000 *Term: Leading Cases*, *supra* note 50, at 455.

147. Epstein, *supra* note 74, at 1388 (citation omitted).

Indeed, the government cannot reasonably be expected to compensate every diminution in the value of a person's property that results from government regulation.¹⁴⁸ If, for example, during a water shortage the government prohibits watering of lawns except on every other day, the government should not expend resources to pay for every brown lawn. But to say that trifling losses should not be compensable is different from saying that only total losses are compensable. There is a large area in between, an area where many takings cases lie. As the law stands today, many landowners are forced to be the sole bearers of the burden that the Takings Clause says should rightfully be borne by the public as a whole.¹⁴⁹

III. INVESTMENT-BACKED EXPECTATIONS

The second common defense to takings claims is that the owner of the property has no "investment-backed expectations"¹⁵⁰ for using the property in the manner prohibited by regulation.¹⁵¹ For instance, in *Palazzolo*, the Rhode Island Supreme Court held that because Palazzolo acquired the property after the government enacted the regulations barring development of his land, he could not have had any "investment-backed expectations" that he would be allowed to build on his land.¹⁵²

The concept of investment-backed expectations has great appeal as a tool for determining which takings claims are legitimate. Investment-backed expectations correspond to one of the purposes of the Takings Clause, to protect and encourage private investment.¹⁵³ If no private investment-backed expectations for a particular use of land exist, then the prohibition of that use seems more reasonable and less of a hindrance on the property owner's business and investment.

For example, if one purchases a beachfront lot in a residential neighborhood, one likely has investment-backed expectations of being able to build a residence on that land and live in that residence.

148. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (noting that the government could hardly go on if it was required to compensate for every diminution in property).

149. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

150. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 105 (1978) (incorporating the "investment-backed expectations" as a criterion for takings claims); Michelman, *supra* note 4, at 1213 (proposing the concept of "investment-backed expectations" in 1967 as a criterion for evaluating takings claims).

151. *See Palazzolo v. State ex rel Tavares*, 746 A.2d 707, 717 (R.I. 2000) (noting that regulations preventing wetland fill were in place at the time the plaintiff acquired the land), *aff'd in part, rev'd in part sub nom. Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

152. *Id.*

153. *See supra* text accompanying note 44.

One likely does not have expectations of using the land to construct a hazardous waste dump. In this simple analysis, the concept of investment-backed expectations makes sense.¹⁵⁴

As applied in *Penn Central*, for example, the Court held that the restriction on building an office tower above Grand Central Station was not a taking because it allowed the owners their expected use of the property.¹⁵⁵ The Court noted that the historic preservation law “does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel.”¹⁵⁶ The Court believed the primary use was a train terminal with limited concession and office space.¹⁵⁷ More importantly, Penn Central was allowed to earn a “reasonable return”¹⁵⁸ on the use of the property. In essence, the Court found that Penn Central was able to use the terminal for its “intended purposes” and, therefore, no taking occurred.¹⁵⁹

A. *Expectations of Government Regulation*

While the term “investment-backed expectations” originated in *Penn Central* to describe the landowner’s expected use of the property, subsequent cases expanded the term significantly beyond this conception, upholding multifarious deprivations of property that—in some sense of the word—might be “expected.” The fountainhead of this expansion is the “background principles” exception to takings enunciated in *Lucas*.¹⁶⁰ According to *Lucas*, when an alleged taking is no more than a pre-existing limitation inhering in the title, no taking will be found.¹⁶¹ But the key is that *Lucas* held that such pre-existing limitations were the same as those limitations found under the law of private and public nuisance and

154. Of course, if one’s expectations for the use of the property would constitute a nuisance, or other use of property that is not part of the “background principles” of law governing the property, that use can be prevented, even without compensation. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). But, absent a use that could be so curtailed, a landowner’s expectations are protected under this concept. *Id.*

155. *Penn Cent.*, 438 U.S. at 136.

156. *Id.*

157. *Id.*

158. See *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 883 (D.C. Cir. 1999) (noting that plaintiff’s ability to obtain a “sufficient return” on its property was a factor in denying the takings claim).

159. *Penn Cent.*, 438 U.S. at 138.

160. 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, 472–78 (2001).

161. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

the law of necessity.¹⁶² Courts, however, have ignored this caveat and have treated any previously-enacted legislation or regulatory regime as a “background principle.”¹⁶³

In *District Intown*,¹⁶⁴ for example, the court held that the plaintiffs had no reasonable investment-backed expectations for building apartments on their property because the land was “subject to an existing regulatory regime”¹⁶⁵ that the plaintiffs should have reasonably expected might prohibit such use. While *District Intown* cites *Lucas* for such a proposition, prohibiting an apartment building to preserve public values relating to national parks¹⁶⁶ is not something that can be achieved through the courts under the laws of nuisance or necessity, as required by *Lucas*.¹⁶⁷ *District Intown* thus conflated “background principles” with any law that the government might pass at any time.¹⁶⁸ After *District Intown*, if a governmental regulatory regime exists, a landowner likely will not succeed in a takings claim because the landowner should expect that the government might prohibit a particular use of the property. In this respect, *District Intown* is not unusual.

In *Kalorama Heights Partnership v. District of Columbia*,¹⁶⁹ a developer purchased a building in Washington D.C., intending to tear down the current structure and build condominiums in its place.¹⁷⁰ The building, which at one time housed the French Embassy, had been vacant for five years and had deteriorated.¹⁷¹ The new owner’s applications for a permit and variance, however, were denied because the area was subsequently designated a historical district.¹⁷² When the owner filed suit, the court held that the owner had no reasonable investment-backed expectations for development of its property

162. *Id.*

163. See Radford & Breemer, *supra* note 160, at 480–82.

164. For the facts of *District Intown*, see *supra* text accompanying notes 113–19.

165. *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 877 (D.C. Cir. 1999).

166. *Id.* at 877.

167. See Radford & Breemer, *supra* note 160, at 472.

168. In other words, the government could pass legislation at any time that would become a background principle. But, as *Lucas* noted, background principles cannot be “newly legislated.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). The court in *District Intown* stated that if the authority of the Commission on Fine Arts was “not sufficient [to establish expectations of a regulatory regime], after 1979, D.C.’s historic landmark laws additionally limited expectations of development.” *Dist. Intown*, 198 F.3d at 883.

169. 655 A.2d 865 (D.C. Cir. 1995).

170. *Id.* at 867.

171. *Id.* at 867 n.1.

172. *Id.* at 867–68.

because it should have been aware of “strong preservationist trends in the area.”¹⁷³

In *Mock v. Department of Environmental Resources*,¹⁷⁴ the Mocks owned a parcel of land that fronted a main traffic artery in a commercially zoned area where all of the adjacent properties had been developed.¹⁷⁵ They wanted to “fill .87 acres of wetlands on their property” to construct an auto service shop, in an area where such shops were permitted by ordinance.¹⁷⁶ In upholding the denial of a permit to construct the shop, the court held that while the Mocks had not presented evidence of their reasonable expectations for the property,¹⁷⁷ the court stated that “expectations are reasonable only if they take into account the power of the state to regulate property for the public interest.”¹⁷⁸ While, arguably, *Mock* is correctly decided because the Mocks failed to show that other uses of the property that were equally valuable did not exist,¹⁷⁹ the idea that investment-backed expectations include any regulation that the government may pass suggests no limiting principle. Thus, if government regulation is in any sense expected, then the landowner will have no defense when government regulation appears. In the extreme, this theory undercuts the Fifth Amendment protections.¹⁸⁰

B. Criticisms of Investment-Backed Expectations

The first criticism of the investment-backed expectations analysis is that it is unclear why a landowner's expectations are relevant to the takings calculus at all. If someone purchases Texas farmland expecting to build a ranch to raise cattle, but then discovers oil on the land, this discovery is certainly not in accordance with the person's expectations. But it would seem beyond the pale for the government to take the oil without compensation, simply because the landowner did not expect to find the oil on the property. Indeed, such would be the case for any unexpected result from the land—whether it is finding a deposit of gold or diamonds, or the rapid and unexpected

173. *Id.* at 872 (discussing that the counsel knew that the owners were aware that there was only a fifty percent chance of obtaining zoning variance).

174. 623 A.2d 940 (Pa. Commw. Ct. 1993), *aff'd*, 667 A.2d 212 (Pa. 1995).

175. *Id.* at 942.

176. *Id.*

177. *Id.* at 949.

178. *Id.*

179. *Id.*

180. See generally Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 (2002) (stating that the notice rule leads to a “vicious circuitry” whereby one's rights become only what the state says they are).

appreciation in the value of the property. In fact, the Court of Appeals for the Federal Circuit has noted that “[t]he expectations of the individual, however well- or ill-founded, do not define for the law what are that individual’s compensable property rights.”¹⁸¹ The Supreme Court has indeed held that the amount of compensation that must be paid to a landowner in a takings claim is not determined solely by the use to which the landowner put the property.¹⁸² Instead, the compensable value also depends upon a “just consideration of all the uses for which it is suitable.”¹⁸³ If compensation for land is determined irrespective of expectations, then the determination of whether to find a taking should be made irrespective of expectations as well.¹⁸⁴

Such a principle is just because it allocates the risk and the reward to the same party. The government will not, in most cases, compensate landowners for unmet expectations, such as farmland that produces less than planned or oilfields that run dry.¹⁸⁵ The risk of making a worse bargain than expected accompanies the potential windfall; owners possess both the risk and the reward. But, by limiting the landowners’ “taking” rights to only the expected uses of the property, the government removes the potential upside of the property from the landowner, leaving only the downside. For instance, the landowner would bear the costs of any natural disaster but would lose any upside potential, such as a rise in price due to a change in zoning. Such a framework is at odds with the constitutional demand of “just compensation.”

The second criticism of investment-backed expectation analysis is that the conception is essentially meaningless. When one deconstructs the phrase, it is apparent that the term “investment-

181. *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996).

182. *Olson v. United States*, 292 U.S. 246, 255 (1934).

183. *Id.*

184. The discussion in *supra* notes 89–94 and accompanying text indicates that there is an equivalence between physical and regulatory takings from the perspective of the landowner. This reasoning has been the impetus for treating regulatory takings like physical takings. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017–18 (1992). But this equivalence argument is not intended to instill subjectivity into the takings analysis, rather it is merely to demonstrate the inconsistency in treating physical and regulatory takings differently; cf. Epstein, *supra* note 74, at 1374 n.25 (noting the difficulty in distinguishing regulatory from physical takings in certain contexts). Thus, this does not conflict with the advocacy of an objective analysis relating to expectations, which holds that the landowner’s expectations at the time of purchase are not relevant in the takings calculus. See *supra* note 181 and accompanying text.

185. See *Olson*, 292 U.S. at 255 (“The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner’s bargain.”).

backed” is a misnomer, as no real investment is required; donees and devisees are as equally protected by the Takings Clause.¹⁸⁶ People also purchase property for a variety of reasons other than investment (to preserve it in its natural state, for example) and thus the phrase ends up as merely “expectations.” Courts have expanded this phrase to “reasonable expectations,” to add some objectivity to the phrase,¹⁸⁷ but what constitutes a reasonable expectation for the use of land certainly is not obvious.¹⁸⁸ In practice, the phrase limits the intended function of the Takings Clause and permits virtually any regulation of property.¹⁸⁹

C. *Transferability Conflicts with Investment-Backed Expectations*

Aside from the general criticisms of the investment-backed expectations analysis, such analysis is particularly problematic because it conflicts with the transferability of takings claims. The transferability of takings claims was implicit in the case of *Nollan v. California Coastal Commission*¹⁹⁰ and then made explicit in *Palazzolo*.¹⁹¹

In *Nollan*, a husband and wife sought a permit to demolish a small home that they owned on the California coast and to build a larger home in its place. The California Coastal Commission (“Commission”) required that the Nollans grant the city an easement¹⁹² in exchange for granting them a building permit. Even though the Commission had begun requiring easements of other nearby landowners¹⁹³ before the Nollans acquired their property, thus putting the Nollans on notice that this might happen, the Supreme

186. *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O'Connor, J., concurring) (“We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a post-enactment acquirer of property, such as a donee, heir, or devisee.”); see also Epstein, *supra* note 74, at 1370 (noting that an investment is not required for investment-backed expectations).

187. Radford & Breemer, *supra* note 160, at 460.

188. To see that the potential value of land is not obvious, look at the swampland that became Disney World and the deserted mining town that became Aspen.

189. *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 884 (D.C. Cir. 1999) (Williams, J., concurring).

190. 483 U.S. 825, 833 n.2 (1986). The taking in *Nollan* occurred after the Nollans acquired the property. While the California Coastal Commission had announced a policy of conditioning permits upon the grant of an easement and was generally conditioning permits in this manner, there was no requirement that the Commission do so. Thus, until the Nollan’s permit was so conditioned, there was not a taking. *Id.* at 829.

191. *Palazzolo*, 533 U.S. at 629.

192. The easement would allow people to walk along the beach property that the Nollans owned. *Nollan*, 483 U.S. at 828.

193. The easements were given in exchange for building permits. *Id.*

Court held that the Commission's actions constituted a taking.¹⁹⁴ Thus, although the Nollans could reasonably be said to have "expected" the regulation, they were not bound by it as they acquired all rights, including any potential takings claim, that the previous owner possessed.¹⁹⁵ Under this conception, what room does investment-backed expectations have in the analysis?

Even if the *Nollan* rule did not apply, it is difficult to understand how investment-backed expectations would apply to transfers of property. Different owners will likely have entirely different expectations relating to a particular piece of realty.¹⁹⁶ By the time land has been transferred several times, there will have been a variety of expectations concerning the land. And because everyone is entitled to the same constitutional protections, it is unhelpful to consider such expectations in a takings calculus.

IV. TRANSFERABILITY OF TAKINGS CLAIMS

While the transferability of takings claims was implicit in *Nollan*,¹⁹⁷ it became explicit in *Palazzolo*¹⁹⁸ where the Court held that such claims can be transferred from one owner to another.¹⁹⁹ In *Palazzolo*, Rhode Island argued that Palazzolo's claim was barred because he acquired his land after the enactment of the regulation that prohibited filling the wetlands and, thus, he was "on notice" that he could not build on that part of the land.²⁰⁰ The United States Supreme Court flatly rejected that rule:

Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a

194. *Id.* at 830.

195. *Id.* at 833 n.2 ("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.") While it may be said that *Nollan* applies only to physical takings, the Court applied that rule in *Palazzolo*. *Palazzolo*, 533 U.S. at 628-29.

196. *Eagle*, *supra* note 39, at 560-61.

197. *Nollan*, 483 U.S. at 833 n.2.

198. *Palazzolo*, 533 U.S. at 629.

199. Not all takings claims are transferable. *See supra* note 30.

200. *Palazzolo*, 533 U.S. at 626.

right to challenge unreasonable limitations on the use and value of land.²⁰¹

Justice Scalia, in a concurring opinion, wrote that the post-enactment acquisition of title should have “no bearing” upon whether or not there was a taking.²⁰² He noted that the investment-backed expectations that are taken into account in a takings analysis do not include the notice of a regulatory scheme that was in fact so burdensome as to be unconstitutional.²⁰³

But no other members of the Court joined Justice Scalia in his concurrence. Justice O'Connor specifically took exception to Justice Scalia's view that the post-enactment acquisition would never prevent a takings claim.²⁰⁴ Her view was merely that it was error for the Rhode Island Supreme Court to raise the issue of post-enactment acquisition to “dispositive status,” but that it was still a factor for consideration.²⁰⁵

A. *Justifications of Transferability*

There are several justifications for the rule that the post-enactment acquisition of title does not bar a takings claim:²⁰⁶ (1) the rule is required so as not to discriminate against older landowners or those with fewer resources; (2) the rule is consistent with the notion that all property interests are transferred by sale; (3) the rule encourages the alienability of land; (4) the rule allows future generations to challenge regulations; and (5) the rule prevents the arbitrary expiration of takings claims.²⁰⁷

The first of these justifications is that a current owner may not live long enough to litigate a takings claim, and the claim would

201. *Id.* at 627.

202. *Id.* at 637 (Scalia, J., concurring).

203. *Id.* (Scalia, J., concurring).

204. *Id.* at 635 n.* (O'Connor, J., concurring).

205. *Id.* at 633 (O'Connor, J., concurring) (“[I]t would be just as much error to expunge [the] consideration [of transferability] from the takings inquiry as it would be to accord it exclusive significance.”).

206. This Comment does not discuss what is, perhaps, the most straightforward issue regarding the transferability of takings claims: the actual intent of the parties. In most situations, the parties to a contract do not specify whether any takings claims are to be transferred to the new owner. The arguments discussed in this Comment deal with the *public policy* of whether transferability is or is not consistent with Fifth Amendment protection, regardless of, or in fact despite, the intention of the parties in any given transaction. For a discussion of a proper default rule in cases in which the parties do not specify, see Amicus Brief, *supra* note 25, at 11–12. But see *supra* note 30 (indicating that some takings claims are not transferable).

207. *Palazzolo*, 533 U.S. at 609.

otherwise expire on her death. A takings claim, like any claim, cannot be brought until that claim is ripe.²⁰⁸ And in the case of property regulations, that ripeness is not achieved until governing authorities reach a “final decision” on the permitted use of the land.²⁰⁹ In *Palazzolo*, a final decision was not reached for twenty-three years after the first proposal and even then, the Rhode Island Supreme Court believed that the claim was not yet ripe.²¹⁰ Many landowners may be limited in their pursuit of a development proposal for twenty-three years by age, finances, interest, or a variety of other reasons. The effort and expense of pursuing a takings claim, in addition to the development proposal process, may simply be beyond the capacity of many landowners.²¹¹ Limiting transferability in this way would certainly cut against the elderly and those with limited resources.²¹² Limiting takings claims to the young and well-financed, the Court in *Palazzolo* held, is simply “too blunt an instrument”²¹³ to be wielded against this constitutional guarantee.

A second justification for transferability is that it is an inherent part of the nature of property rights. It has often been said that the right to property is actually “a ‘bundle of rights’ that may be exercised” with respect to that property.²¹⁴ Such rights include the right to possession, the right to use, the right to transfer one’s interests, and the right to exclude others.²¹⁵ One of those rights, in particular, is the right to make a takings claim against the government for any unconstitutional encroachments the government makes on the land.²¹⁶ Advocates of the non-transferability rule would essentially give the landowner a choice as to which of two rights inherent in their property they would like to keep: the right to alienate the property or the right to make a takings claim against the government. But it is

208. *Id.* at 618.

209. *Id.* (quoting *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)).

210. *Palazzolo v. State ex rel Tavares*, 746 A.2d 707, 716 (R.I. 2000), *aff’d in part, rev’d in part*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

211. *Palazzolo*, 533 U.S. at 609. Notice that *Palazzolo*’s first proposal was submitted in 1962. As of the date of this Comment—forty years later—the permissible uses of the property are still unknown. See *supra* note 24.

212. *Id.* at 628.

213. *Id.*

214. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 509 (Cal. 1990) (Monk, J., dissenting); see also *United States v. Gen. Motors*, 323 U.S. 373, 378 (1945) (referring to property rights as a “group of rights inhering in the citizen’s relation to the physical thing”); *DUKEMINIER & KRIER*, *supra* note 57 at 80 (referring to property as a “bundle” of rights).

215. *DUKEMINIER & KRIER*, *supra* note 57, at 80.

216. *Palazzolo*, 533 U.S. at 627.

precisely this sort of uncompensated appropriation of rights against which the Takings Clause is meant to guard.²¹⁷

Third, limiting the transferability of takings claims would hinder the alienability of land, reducing the productivity of property. Such a rule, if nothing else, would restrain the real estate markets. As an example, suppose that A owns land that is worth \$100 to him, but is worth \$150 to B. The efficient use of the land would be for A to sell it to B, thereby realizing a social and financial benefit of \$50, less transaction costs. If, however, any takings claim is automatically barred by the passage of title, then it can only be litigated so long as the property is still owned by A. This results in a disincentive to sell the property and the property will be kept in a use that is less socially desirable.²¹⁸

Further, the non-transferability rule creates a general systemic disincentive to challenge government takings. Suppose, to continue the above example, that B has far greater resources, ability, or interest in challenging the takings claim than does A, but B also knows that once he acquires the property, he will be prevented by law from challenging the taking. B will be in a quandary: if he does not acquire the property, he will have no monetary incentive to challenge the claim; if he does acquire the property, he will be prevented by law from doing so. Thus, the non-transferability rule would introduce a general bias into the system whereby takings claims will not be litigated by those with the most interest, skill, or resources. This disadvantages the citizens who do challenge government action.

A fourth justification for transferability is that future generations should have the right to challenge unreasonable limitations on the use and value of land. Based upon the principle of "one person, one vote,"²¹⁹ the United States is a country that believes in the right of every person to have a say in government. Our country also believes that people should be able to govern themselves and not be bound by erroneous decisions made in the past. Thus, new generations should be able to challenge existing law. If claims were not transferable,

217. *Id.* at 628 ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation." (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980))).

218. It is less socially desirable because the property and money is not in the hands of those who value it most. This analogy is taken from the Institute for Justice amicus curiae brief. See Amicus Brief, *supra* note 25, at 7 n.2.

219. *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

states could, in effect, transform a new regulation into a “background principle” of law that would be essentially unchallengeable.²²⁰

A fifth justification for transferability is that non-transferability is discriminatory. As an example, suppose that there are two identical parcels of land adjacent to one another, parcel C (owned by Cathy) and parcel D (owned by Doug). Suppose that one day, the government decides to prevent, unconstitutionally, any further development on both of their lots. Further, suppose that shortly after the regulation is imposed, Cathy dies and her land passes to her daughter, Elizabeth. Without transferability of takings claims, Doug would be allowed to challenge the regulation, but Elizabeth would not, as her acquisition of the property was after the passing of the regulation. Such arbitrary results should have no place in takings jurisprudence.²²¹

While six justices in *Palazzolo* agreed that the post-enactment acquisition does not automatically bar a takings claim, it is not clear that a majority of the Court believes that it would never prevent a claim.²²² No justice joined Justice Scalia in his concurrence, which stated that post-enactment acquisition would never bar a claim.²²³ Additionally, Justice O'Connor wrote a separate concurrence indicating that the time of acquisition should always be a factor to be considered, but that it should not be dispositive.²²⁴ It is not clear, however, the extent to which Justice O'Connor would apply the principle of transferability. She notes that it is part of the *Penn Central* analysis,²²⁵ but *Penn Central* does not apply to total regulatory takings or to physical takings. Thus, at most, transferability becomes an issue only in partial regulatory takings. While post-enactment acquisition will never prevent a claim, it may weigh in the analysis of whether a partial taking occurred.

220. *Palazzolo*, 533 U.S. at 626.

221. *Id.* at 630 (“A regulation or common-law rule [that would prevent a takings claim] cannot be a background principle for some owners but not for others.”). This principle should apply to voluntary transfers as well as involuntary ones. If it does not, the state would be securing a windfall for itself. *Id.* at 627.

222. Justice Kennedy, Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas clearly support the proposition. *Id.* Justice Breyer wrote a dissenting opinion, but specifically agreed with the transferability principle in some circumstances. *Id.* at 654–55 (Breyer, J., dissenting). Justice O'Connor would not “expunge” the issue of transferability from the analysis. *Id.* at 633 (O'Connor, J., concurring).

223. *Id.* at 637 (Scalia, J., concurring).

224. *Id.* at 634 (O'Connor, J., concurring).

225. *Id.* at 635 (O'Connor, J., concurring).

B. Criticisms of Transferability of Takings Claims

1. No Standing

The first criticism of the transferability of takings claims is that the new owner of property that was previously subject to a taking simply lacks standing to bring the claim.²²⁶ A taking, according to Justice Stevens in his dissent in *Palazzolo*, is a “discrete event”²²⁷ that injures the particular owner at that particular time. Whoever owns the land at another time is simply irrelevant.²²⁸ Arguably, a future owner has no cognizable injury that deserves compensation because nothing was taken from her. Likening a taking to adverse possession, Justice Stevens notes that “[a] new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner’s orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property.”²²⁹

2. Windfalls/Unfairness

Another criticism of the transferability of takings claims is that such transferability may, in some circumstances, result in a windfall to subsequent owners who are able to make a takings claim on property that the seller of the property did not realize was possible.²³⁰ As Justice O’Connor noted in *Palazzolo*, “if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.”²³¹ In other words, if the existence of restrictions on property at the time of

226. *Id.* at 641–42 (Stevens, J., concurring in part, dissenting in part). In eminent domain cases, a taking is usually a “discrete event,” meaning that the new owner has no standing to make a claim. *See supra* note 30. In regulatory takings cases, however, the taking is less often a discrete event, as the ripeness of the claim can take decades. For a discussion of ripeness in *Palazzolo*, see *supra* notes 9–21. The requisite ripeness of a constitutional takings claim has two components. First, the plaintiff must receive a final determination regarding the permissible use of the property. *Palazzolo*, 533 U.S. at 618. Second, the plaintiff must be denied relief in state court. *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnston City*, 473 U.S. 172, 194 (1985). Only then may the claim be brought in federal court. For a further discussion of these requirements, see, e.g., Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL’Y 99, 103 (2000) (discussing the ripeness issue and its effect on landowners); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 39 (1995) (noting the confusion that generally exists as to the issue).

227. *Palazzolo*, 533 U.S. at 644 n.7 (Stevens, J., concurring in part, dissenting in part).

228. *Id.* at 641–42 (Stevens, J., concurring in part, dissenting in part).

229. *Id.* at 642 (Stevens, J., concurring in part, dissenting in part).

230. *Id.* at 635 (O’Connor, J., concurring).

231. *Id.* (O’Connor, J., concurring).

transfer does not prevent a new owner from challenging those restrictions, some purchasers of property will secure windfalls. Those new owners will be able to challenge regulations that everyone, perhaps including the seller of the property, thought were valid and thereby be able to purchase more valuable property for a lesser consideration. As Justice Scalia notes in his concurrence in *Palazzolo*:

The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naïve landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.²³²

But, such a profit or windfall is no more than that which occurs everyday in the financial markets, where the “knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse).”²³³ Indeed, the Supreme Court, in discussing the law dealing with insider trading in the stock markets, has specifically “rejected the notion that insider trading regulation is premised on the quest for all investors to have the same access to information.”²³⁴ Thus, “there are many instances in which the law condones a party’s purchasing or selling shares [and presumably the profit that results] on the basis of information not available to the other investors.”²³⁵ There is no reason why the law of real property should be any different; it should not be concerned with one party getting a better deal through greater knowledge or courage.

In fact, the law of real property is not any different. For years, speculators have purchased property containing clouded titles with the belief that they can secure a profit on the transaction if they are

232. *Id.* at 636 (Scalia, J., concurring).

233. *Id.* (Scalia, J., concurring).

234. JAMES D. COX ET AL., CORPORATIONS 273 (1997) (citing *Chiarella v. United States*, 445 U.S. 222, 233–34 (1980)).

235. *Id.* The primary justification for the laws prohibiting insider trading is that they are designed to preserve the integrity of American capital markets. Other justifications include the fact that they speed the release of information from companies and are in accord with fundamental ideas of fairness. *Id.* at 273–74. But insider trading laws do not go so far as to create a “parity-of-information” rule. *Chiarella v. United States*, 445 U.S. 222, 233 (1980). Thus, someone who, by study or diligence, improves his odds in the market, is not, without more, guilty of violating insider trading laws. Likewise, one who, by study or diligence, realizes the probability of a successful takings claim in regards to property should not be prohibited from profiting from that advantage.

able to clear the title through appropriate legal means.²³⁶ If this sort of speculation is permitted, the essential difference between a clouded title and a disputed takings claim is negligible.

As demonstrated by the above cases, the Supreme Court does not often find a taking.²³⁷ Thus, whoever purchases the land with burdensome regulations accepts the risk that he will purchase the land and litigate the claim for many years, only to be defeated. In those instances where a court finds a taking and awards compensation to the new owner, the award should be considered the deserved reward for taking the risk of litigating a claim with the chance that a taking may not be found.

Finally, as Justice Scalia notes in *Palazzolo*, there is more than one windfall at issue in such cases.²³⁸ If transferability is not allowed, there will still be a windfall, but one that instead goes to the government.²³⁹ Although some may characterize a windfall as unfair, a windfall inuring to the government seems less fair than one inuring to a risk-taking purchaser.²⁴⁰

CONCLUSION

A. *Post-Palazzolo*

The current unfairness in takings law is demonstrated by the recent case of *Rith Energy v. United States*,²⁴¹ which was reheard in light of and to resolve any conflict with the Supreme Court's decision in *Palazzolo*.²⁴² In *Rith*, the plaintiff purchased a mining lease in Tennessee. After mining for a period of time and extracting only nine percent of the coal from the site, the Department of the Interior prohibited all future mining on the leased land and the plaintiff sued for compensation, claiming a taking of the remaining ninety-one percent.²⁴³ Predictably, the government's defenses were the partial/total dichotomy and the concept of reasonable investment-

236. Patrick J. Rohan, POWELL ON REAL PROPERTY § 67.07 (Michael Allen Wolf ed., 2002).

237. See also Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 26 (1995) (noting that courts "only rarely find regulatory takings").

238. *Palazzolo*, 533 U.S. at 636–37 (Scalia, J., concurring).

239. *Id.* (Scalia J., concurring).

240. In fact, the state may not secure a windfall for itself in this manner. See *supra* note 217.

241. 270 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2660 (U.S. 2002).

242. *Id.* at 1348.

243. *Id.* at 1349.

backed expectations.²⁴⁴ Despite the fact that over ninety percent of the value of the leased land was eliminated, the court concluded that it was not a “categorical” taking and, thus, was not compensable.²⁴⁵ Further, the court found that plaintiff could have had no investment-backed expectations that the government would not intrude at some point and prohibit any further mining because mining is a “highly regulated industry.”²⁴⁶

The plaintiff, Rith Energy, had not suffered a total taking because it had already extracted nine percent of the coal from the land. However, if under *Palazzolo*, Rith Energy’s takings claim is transferable, Rith Energy could transfer the remainder of their lease to a new entity, who would then suffer a total—and hence, compensable—taking.²⁴⁷ Thus, in the future, companies like Rith Energy should be able to structure their claims in order to avoid the partial/total dichotomy and ensure just compensation.

The Court in *Rith* next addressed investment-backed expectations and noted that its “role . . . in regulatory takings cases is well settled.”²⁴⁸ This is only true, however, for *partial* regulatory takings. As mentioned above, *Palazzolo*’s transferability principle can enable claims such as Rith Energy’s to become total regulatory takings by selective transfers, thus creating “categorical takings,” which are fully compensable and do not include investment-backed expectations in their analysis. Thus, *Palazzolo*’s principle of transferability, although acknowledged by the *Rith* court,²⁴⁹ provides a means to escape the partial/total dichotomy and is incompatible with the investment-backed expectations analysis used by the court.

B. A New Theory of Just Compensation

Takings Clause jurisprudence is in need of repair. One simple rule should replace the partial/total dichotomy: the more the government takes, the more it pays, subject to the nuisance defense

244. The court also mentioned the defense of public nuisance which, if proven, would be an independent and sufficient defense. See *supra* notes 75–80 and accompanying text. This Comment analyzes *Rith* only for its defenses of the partial/total dichotomy and investment-backed expectations.

245. *Rith*, 270 F.3d at 1349. The court held that the ninety-one percent reduction in value was not a total taking, *id.*, and that Rith Energy reduced investment-backed expectations due to regulations and uncertainty of obtaining permits, *id.* at 1351.

246. *Id.* at 1350.

247. And if an after-the-fact transfer would be objectionable, certainly a before-the-fact one would not be problematic.

248. *Rith*, 270 F.3d at 1350.

249. *Id.* at 1349.

from *Lucas*²⁵⁰ and the reciprocity of advantage defense from *Penn Central*.²⁵¹

The partial/total dichotomy is problematic because it leads to uncompensated deprivation of property that is inconsistent with the purposes of the Fifth Amendment and the investment-backed expectations defense has become a means for the government to immunize future regulations from takings scrutiny.²⁵² The current Takings Clause jurisprudence “tends to strip the Clause of its potential for fulfilling the framers’ likely purposes”²⁵³ of protection of private property and restraint on government. Fortunately, in *Palazzolo*, the court acknowledged the transferability of takings claims as an inherent part of property rights. In doing so, the Court may have signaled the beginning of the end for such doctrines of property rights, for transferability undermines those doctrines.

A just application of the Takings Clause requires overruling the partial/total dichotomy. As Professor Epstein has argued, “the *Lucas* rules for total takings [should be] extended to partial takings.”²⁵⁴ The Fifth Amendment states that what is taken must be compensated.²⁵⁵ There is no justification for not compensating property owners when real and substantial loss is inflicted on them and their property for the greater public good.²⁵⁶ Eliminating this dichotomy would solve the denominator problem and much of the difficulty and uncertainty in takings law.

While the proposed rule has justification, there is strong opposition. The first and “[m]ost obvious [problem] is the cost of calculating and administering compensation, which would tend to sink many a beneficent statute.”²⁵⁷ This fear is unfounded. First, the reciprocity of advantage will be a difficult hurdle for many plaintiffs to overcome. They will need to show that no corresponding benefit is created in their property that negates the diminution in value of

250. See *supra* notes 75–80 and accompanying text.

251. Reciprocity of advantage is the concept that some regulations or takings may add value to property and that this should be considered in the takings calculus. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 139–40 (1978) (Rehnquist, J., dissenting).

252. *Dist. Intown Props. Ltd. v. D.C.*, 198 F.3d 874, 884 (D.C. Cir. 1999) (Williams, J., concurring).

253. *Id.* (Williams, J., concurring). “[M]odern interpretation of the Takings Clause . . . impairs its role as a disincentive to wasteful government activities.” *Id.* at 885 (Williams, J., concurring).

254. Amicus Brief, *supra* note 25, at 5.

255. U.S. CONST. amend. V.

256. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

257. *Dist. Intown*, 198 F.3d at 885 (Williams, J., concurring).

which they complain.²⁵⁸ Second, the plaintiffs will need to show that the nuisance exception from *Lucas* does not apply. In other words, the plaintiffs must show that the restrictions on their property were not restrictions that inhered in their title and that the government could rightly prohibit under its police power. If the plaintiff overcomes these hurdles, then the government likely has instituted a burdensome regulation that has more than a trifling effect on the plaintiff's property. In such a situation, the Takings Clause speaks loud and clear: compensation is due.²⁵⁹

A more fundamental reason why many oppose the elimination of the partial/total dichotomy is because it arguably "would lead to an exponential expansion of regulatory taking claims . . . while placing our natural environment [and other worthwhile programs] at exceptional risk."²⁶⁰ But the real worry is not about giving compensation; instead, it is that compensation will cause a reevaluation of whether or not those goods (often environmental protection measures) being purchased are in fact worth what is being paid for them. If environmental and other programs are worth the money spent, then no diminution will occur. It is only if society concludes that the programs are not worth their cost that there will be a reduction. Thus, there is no reason not to compensate those whose property is taken—whatever that level of deprivation may be.²⁶¹

Takings jurisprudence is in need of a reevaluation. When the most important constitutional protection for property owners awards full compensation for a trifling interference such as in *Loretto*,²⁶² yet ignores a ninety percent diminution in value, such as in *Rith*,²⁶³ obviously substance has taken a back seat to form. Fortunately, the explicit upholding of transferability of takings claims in *Palazzolo* is a step in the right direction. Not only does it instill fairness in the long and laborious process of challenging takings claims,²⁶⁴ it cuts away at the partial/total dichotomy and thereby the use of investment-backed expectations as a means of denying rightful compensation. In this

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

259. But see *supra* note 95 (discussing the intent of the Framers of the Constitution and the Takings Clause).

260. Coletta, *supra* note 109, at 22.

261. John E. Fee, *Of Parcels and Property*, in TAKING SIDES ON TAKINGS ISSUES, *supra* note 30, at 101, 119 ("The relevant issue is not whether . . . to preserve natural environments, but whether individual owners such as Anthony Palazzolo should bear the heavy expense of doing so . . .").

262. See *supra* notes 55–57 and accompanying text.

263. See *supra* notes 241–49 and accompanying text.

264. See *supra* notes 208–13 and accompanying text.

manner, it helps instill justice and fairness into the calculation and helps assure that future public burdens will less often be thrust on the shoulders of individuals like Anthony Palazzolo.

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