ARTICLES

THE EFFECT OF PALAZZOLO v. RHODE ISLAND ON TAKINGS AND ENVIRONMENTAL LAND USE REGULATION

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I. INTRODUCTION

The Supreme Court's decision last term in *Palazzolo v. Rhode Island*¹ is the latest in a series of cases over the past fifteen years in which the Court has ventured into the notoriously murky area of federal takings law. As has been true with most of these recent decisions,² *Palazzolo*, at least on its face, appears to be a significant victory for property owners, adding to the already growing perception that the Court is intent on expanding private property rights at the expense of environmental protection.³

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² Several recent Supreme Court takings decisions have held for property owners. See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (concluding that repeated denials of development requests constituted a taking); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (establishing "rough proportionality" standard for development exactions); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1020 (1992) (finding that a regulation depriving a landowner of all "economically viable" use of property constitutes a taking); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (requiring "essential nexus" between exactions and development impacts); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (requiring just compensation for the period between the enactment of a regulation and the final judicial determination that a taking has occurred).
³ See, e.g., Marilyn Phelan, *The Current Status of Historical Preservation Law in Regulatory Takings Jurisprudence: Has the Lucas " Missile" Dismantled Preservation Programs?,* 6 FORDHAM ENVTL. L.J. 785, 787 (1995) (Dolan and Lucas "raise questions whether the Court has indeed adopted a more expansive course" in its takings
Indeed, some initial responses to Palazzolo from the property rights movement have been near ecstatic, declaring it to be a “landmark victory,” a “vindication of past efforts,” and “terribly important” for property rights.\(^4\)

The core issue decided in Palazzolo, and the one causing the greatest environmental alarm, is whether notice of a regulation when property is acquired precludes a takings claim.\(^5\) The Rhode Island Supreme Court in Palazzolo v. State stated that regardless of the economic impact on the property, a takings claim was precluded because the claimant was aware of the restriction at the time he acquired the property.\(^6\) This decision in fact reflected a position frequently taken by lower courts, which often reject takings claims when property owners are aware of restrictions at the time the property is purchased.\(^7\) Whether viewed as an issue of notice or negating investment-backed expectations, the final result has been the same: if the challenged restriction existed when the property was acquired, the current owner could not succeed in a takings claim.

The Supreme Court rejected this position in Palazzolo, holding that notice of a regulation when property is acquired does not preclude a takings claim.\(^8\) In so holding, the Court largely emphasized the rights of the owner at the time of regulation, rather than those of the actual claimant.\(^9\) To hold otherwise
would in effect punish sellers of property who owned it when a restriction was enacted, since any purchaser would take the property subject to the restriction and be barred from a takings claim. As viewed by the Court, a contrary outcome would substantially interfere with a landowner’s right to transfer the property interest prior to regulation.¹⁰

On this core issue, Palazzolo was arguably a victory for property rights proponents, and concomitantly, a setback for protection of environmentally sensitive lands.¹¹ However, a closer reading of the decision suggests that the victory is more limited than one might first imagine and, in some respects, actually quite supportive of most environmental controls.¹² Not only does the decision clearly affirm the current two-fold regulatory takings test derived from Lucas v. South Carolina Coastal Council¹³ and Penn Central Transportation Co. v. New York City,¹⁴ but it applies that test in two ways supportive of government regulatory efforts. First, the Court affirmed in Palazzolo that categorical takings under Lucas, in which a property owner has been denied all economic viability, are limited to very extreme situations, rejecting such a claim in Palazzolo where the property suffered a large diminution in value but retained some modest economic viability.¹⁵ This holding affirms previous understandings that even extremely large economic impacts will not be a categorical taking,¹⁶ giving regulators substantial authority to pursue a variety of environmental controls.

Second, although the Court reiterated that even when economic viability remains a taking might still occur under the Penn Central test,¹⁷ a close reading of Palazzolo indicates that knowledge of a restriction—while not precluding a claim under Penn Central—can be considered in applying the investment-backed

¹⁰. See id. at 627-28.
¹¹. See Echeverria, supra note 4, at 11115.
¹². See id. (suggesting that although Palazzolo was a property rights victory, it may “come to represent an important precedent regarding the legitimacy of substantial land use restrictions”).
¹³. 505 U.S. 1003 (holding that taking occurs if regulation denies landowner all economically viable use of property).
¹⁵. See Palazzolo, 533 U.S. at 630.
¹⁷. See id. at 630-31.
expectations part of the test. While the majority opinion did not expressly state this position,\textsuperscript{18} five justices indicated that notice does not preclude a takings claim and can still be considered in evaluating investment-backed expectations.\textsuperscript{19} Since the Penn Central test is itself quite protective of government regulatory interest, the likelihood of finding a taking will only decrease over time.

Taken together, these two dimensions of Palazzolo lend substantial support to the validity of most environmental land use controls. Although knowledge of a restriction can no longer be used to preclude a takings claim, the Court signaled that the two-prong regulatory takings test should continue to be applied in a way generally supportive of government's regulatory efforts.\textsuperscript{20} Rightly understood, this test permits substantial regulation of land to further valid public interests, and Palazzolo did little to change that.

This article reviews the state of regulatory takings law after Palazzolo, with particular attention to controls on environmentally sensitive land. Part II briefly examines regulatory takings law prior to Palazzolo, first discussing development of the two-prong takings test currently used by the Court and then analyzing how the issue of notice of restrictions had been handled prior to Palazzolo.\textsuperscript{21} This analysis shows that although the Supreme Court had earlier intimated that notice should not preclude claims, lower courts typically found, on one of several alternative grounds, that notice did preclude such claims.

Part III then examines Palazzolo itself, focusing primarily on the central issue of notice.\textsuperscript{22} It demonstrates how the Palazzolo Court rejected a notice preclusion rule, predicated on two rationales: (1) regulations that are takings when enacted cannot become valid by the mere passage of time; and (2) rejection of a notice rule was necessary to protect a prior owner's right to transfer. These rationales suggest the rights of a purchaser of land taken with notice of a regulation are derived from constitutional claims of predecessors, and must be analyzed from that perspective. Moreover, a close reading of Palazzolo indicates that

\textsuperscript{18} See Palazzolo, 533 U.S. at 626-30.
\textsuperscript{19} See id. at 633-635 (O'Connor, J., concurring); id. at 636-40 (Stevens, J., dissenting); id. at 654 n.3 (Ginsberg, J., dissenting).
\textsuperscript{21} See infra Part II.
\textsuperscript{22} See infra Part III.
a majority of the Court would still permit notice to be a factor, though not a dispositive one, in analyzing interference with investment-backed expectations under *Penn Central*.

Parts IV and V examine the status of regulatory taking claims after *Palazzolo*. Part IV discusses the *Lucas* categorical taking standard in light of *Palazzolo*.23 *Palazzolo* affirms the more extreme nature of this type of taking, with the focus on remaining economic potential rather than on lost development opportunities.24 Thus, courts should find a taking only in very rare circumstances. This part also demonstrates that concerns voiced by some that rejection of a notice rule will permit landowners to "strategically manufacture" *Lucas* type claims, are unfounded. The lack of economic viability in such instances would result from landowner, rather than government action, and would therefore not qualify as a taking.

Finally, Part V explores the status of *Penn Central* takings after *Palazzolo*.25 After briefly discussing the *Penn Central* standard, the section examines three basic regulatory scenarios reflecting development potential at the time of investment and at the time of regulation: (1) where there is low development potential both when the property is acquired and regulated; (2) where there is low development potential when property is acquired, but the development potential of the land, along with its value, rises significantly prior to regulation; and (3) where someone purchases property at a price reflecting permitted development opportunities, which is then down-zoned resulting in substantial economic loss. This article argues that takings under *Penn Central* should never occur under the first scenario and only rarely under the second. Even the third scenario, which presents the strongest case for a taking under *Penn Central*, will usually not rise to the level of an unconstitutional taking. In such situations the Court has noted that landowners must anticipate newly enacted restrictions that will diminish land values, which necessarily form the reasonableness of any investment-backed expectations landowners have.26 For that reason, courts have typically required diminution in value of a property far exceeding fifty percent, and closer to ninety percent, before

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23. See infra Part IV.
25. See infra Part V.
II. REGULATORY TAKINGS PRIOR TO PALAZZOLO

A. Supreme Court Takings Jurisprudence

The Supreme Court's takings jurisprudence has taken a long, and at times, tortuous path, and still remains far from clear. The concept of a regulatory taking emerged in Pennsylvania Coal Co. v. Mahon, in which the Court struck down a state statute because it had the effect of requiring coal companies to keep a portion of coal in the ground to avoid subsidence damage to surface structures. While recognizing the government could not function if it had to pay every time its regulations reduced the value of land, the Court held that a regulation is a taking "if a regulation goes too far." The Court concluded that the regulation had "gone too far," but offered little explanation other than to state that the statute made the mining of anthracite coal "commercially impracticable." It noted, however, that "at bottom" the issue was where the burden of regulation should lie.

The Court in Pennsylvania Coal recognized the concept of a regulatory taking, yet provided little guidance to determine when the economic impact of a regulation constitutes a taking. Over the years, the Court has struggled considerably in developing a workable standard for regulatory takings cases, with which, according to academic commentators, it has not been

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27. See, e.g., Nasser v. City of Homewood, 671 F.2d 432, 438 (11th Cir. 1982) (finding that a 53% diminution in value was not a taking); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1386-90 (N.J. 1992) (finding that a 90% diminution in value was not a taking).


29. 260 U.S. 393 (1922).
30. Id. at 412-13, 416.
31. Id. at 415.
32. Id. at 414.
33. Id. at 416.
very successful. The Court itself has at times characterized its takings jurisprudence as involving ad hoc inquiries. Yet, while never abandoning the concept of a regulatory taking, the Court has made clear that most government regulations that impose economic losses are not takings, even when imposing substantial economic burdens on landowners. This standard holds true notwithstanding a number of decisions in recent years that are favorable to property owners.

The Court’s current test for regulatory takings based on economic impact comes from two cases: Penn Central Transportation Co. v. New York City and Lucas v. South Carolina Coastal Council. Penn Central involved a challenge to New York City’s Landmark Preservation Law as a taking. Through the Landmark Preservation Law, Grand Central Terminal was recognized as a “landmark,” thus requiring the Landmark Preservation Commission to approve any exterior changes to the building, even if the changes were consistent with applicable zoning regulations. Penn Central, as the owner of Grand Central Terminal, sought approval of two alternative plans to build either a fifty-three or fifty-five story addition to the building, both of which met current zoning requirements. The Commission rejected both plans on the grounds that they would aesthetically deni-

34. See supra note 28.
36. The Court has frequently noted the need for and validity of general land use regulations, even when striking down the particular regulation before it. See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 385-86, 396 (1992) (strongly affirming the validity and necessity of most land use controls). See also, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (recognizing that government could not function if it had to pay compensation whenever regulations reduced land values).
37. Prior to Palazzolo, the Court held in favor of landowners in a number of recent regulatory takings cases. See City of Monterey v. Del Monte Dunes at Monterey Ltd., 526 U.S. 687 (1999); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Comm’n, 483 U.S. 825 (1987); Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). These decisions, although advancing constitutional protection for property rights to some degree, largely concerned more extreme fact patterns, such as the loss of all economic viability in Lucas, the lack of reasonable exaction practices in Dolan and Nollan, and abusive procedural practices in Del Monte Dunes.
41. See id. at 115-16.
42. See id. at 112.
43. See id. at 116-17.
egrate the landmark, in effect eliminating or greatly reducing the previously existing and quite valuable air rights that *Penn Central* had. *Penn Central* then challenged the application of the law as a taking.

The Supreme Court began its analysis by noting that it had previously eschewed any "set formula" for determining takings, preferring instead to "engage in essentially ad hoc inquiries." It then identified three relevant factors used in deciding takings cases: the character of the government action, the economic impact of the regulation, and most importantly, the degree of interference with investment-backed expectations. On that latter basis, the Court held that the Landmark Preservation Law did not constitute a taking as applied to *Penn Central*'s property, because the regulation still permitted a "reasonable return" on the investment of the land.

Particularly significant in determining that the interference with *Penn Central*'s investment-backed expectations did not constitute a taking was that the Landmark Law did not prevent *Penn Central* from using the property for its original purpose. Grand Central terminal had been used for the previous sixty-five years as a railroad terminal containing office space and concessions. For that reason the Landmark Law did not "interfere with what must be regarded as *Penn Central*'s primary expectation concerning the use of the parcel." Thus, even though the Landmark Law in effect eliminated more intensive development opportunities previously permitted by applicable zoning, the assurance of a reasonable return and continuation of previous uses that formed earlier expectations negated any takings claim.

In *Lucas v. South Carolina Coastal Council*, the plaintiff purchased two undeveloped beachfront lots for $975,000, both of which were zoned for residential development at the time of acquisition. Subsequently a coastal preservation law was passed that had the effect of prohibiting any development on the prop-

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44. See id. at 116-18.
45. See id. at 119.
47. See id.
48. See id. at 136.
49. See id. at 121.
50. See id. at 115-16.
51. Id. at 136.
53. See id. at 1007.
erty, and *Lucas* challenged the restriction as a taking.\(^{54}\) The trial court found that the restriction rendered the property "valueless" and therefore constituted a taking.\(^{55}\) The South Carolina Supreme Court reversed, reasoning that even if the regulation left the property valueless, it was not a taking because of the important public interests served.\(^{56}\)

Justice Scalia, writing for the majority of the Court, reiterated that the Court had generally avoided any "set formula" in deciding taking cases, instead preferring to engage in essentially ad hoc inquiries.\(^{57}\) Nevertheless, he noted that the Court had previously recognized two types of categorical takings. The first type involves physical invasions, in which the government invades or grants the right to other parties to physically intrude upon the property.\(^{58}\) In these situations, a compensable taking is almost automatically triggered, irrespective of the economic impact caused by the restriction.\(^{59}\)

The second type of categorical taking recognized in *Lucas* is "where the regulation denies all economically beneficial or productive use of the land."\(^{60}\) In justifying this type of categorical taking, the Court noted that "in the extraordinary circumstance" when the land has lost all economic viability, "it is less realistic to indulge in our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.'"\(^{61}\) How-

\(^{54}\) See id. at 1006-09.

\(^{55}\) See id. at 1009.

\(^{56}\) See id. at 1009-10.

\(^{57}\) See id. at 1015 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977)).

\(^{58}\) See *Lucas*, 505 U.S. at 1015.

\(^{59}\) See 505 U.S. at 1015. The Court cited several examples of this type of categorical taking, including *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (law requiring landlords to allow cable companies to place cables in rental properties) and *United States v. Causby*, 328 U.S. 256 (1946) (physical invasion of airspace).

\(^{60}\) 505 U.S. at 1015. In recognizing this category of taking, the Court pointed to a number of cases which in dicta recognized that a taking occurs when a regulation "denies an owner economically viable use of his land." *Id.* at 1015-16. The Court used the phrase in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), stating that a zoning law will be a taking if it "does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Id.* at 260. The Court used that same articulation of the standard in a series of decisions in the 1980s. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981). In none of the decisions was there a finding of "no economic viability."

\(^{61}\) *Lucas*, 505 U.S. at 1017-18.
ever, the Court also stated that the loss of all economic viability would not constitute a taking where the regulation was part of the background principles of law, most notably where it is merely preventing a common law nuisance. In such an instance the prohibited land use is not part of the landowner’s property interest to begin with.

In recognizing that the loss of economic viability in the land at issue constituted a categorical taking, the Court was careful not to preclude the possibility of finding a taking when a restriction reduces, but does not altogether eliminate economic viability. In a footnote the Court stated that such a restriction might still constitute a taking under the analysis established in *Penn Central.* It did not clearly define how such a test might work, but stated that “the economic impact of the regulation on the claimant and . . . the extent to which the regulation interfered with distinct investment-backed expectations are keenly relevant” to its general takings analysis.

Thus, in *Lucas* the Court established what might be viewed as a two-prong test for analyzing whether the economic impact of a taking constitutes a taking. First, if the regulation leaves a property owner with no economic viability, it is a categorical taking, absent a finding that the prohibited use was precluded by background principles of law. Second, if some economic viability remains, a court is to analyze the restriction under the *Penn Central* factors, with particular attention to the regulation’s economic impact and interference with investment-backed expectations.

Although the Court had established this general framework for regulatory takings, it had not clearly addressed how landowner notice of restrictions prior to acquisition of property affected its takings analysis. Lower courts, however, were forced

62. *See id.* at 1029.
63. *See id.* at 1029-31.
64. *See id.* at 1019 n.8.
65. *See id.*
66. *id.* Justice Stevens’ dissent criticized the majority for adopting a rule that provides relief for a total loss of economic viability, but no relief when the diminution in value is 95%. In response, the majority emphasized that the “no economic viability” standard is a categorical taking, but that even when some economic viability remains a taking still might be found under the Court’s balancing test previously established in *Penn Central.* *See id.*
67. *See Lucas,* 505 U.S. at 1019 n.8.
68. *See id.* at 1027.
69. *See id.* at 1019 n.8.
to address this issue frequently. The next subsection examines how the notice issue had been addressed prior to Palazzolo.

B. The Notice Issue Prior to Palazzolo

Despite a significant increase in deciding takings cases over the past two decades, the Supreme Court itself had only once, prior to Palazzolo, given brief attention to the notice issue. In that case, Nollan v. California Coastal Commission, the Court briefly discussed the issue in a footnote, essentially giving a preview of what it would later say in Palazzolo. Nollan dealt with the primary issue of whether a taking occurs when approval for development is conditioned on a landowner first providing a physical dedication of land, where that dedication is unrelated to any impact resulting from the development. Emphasizing the Court’s longstanding concern for physical invasions of property, the Court held that such exactions would be valid only if there is an “essential nexus” between the required dedication and the asserted state interest that would justify denial of the development in the first instance.

In dissent, Justice Brennan argued that even if such a rule were generally adopted, it should not apply to the Nollans because exactions previously had been required of forty-three other similar properties. These exactions put the Nollans on notice of the restriction, thereby precluding any taking claim they might otherwise have. The majority rejected this argument in a footnote, stating that if the policy when first imposed would constitute a taking, then “the prior owners must be understood to have transferred their full property rights in conveying the lots.” This rationale seems inconsistent with a “notice” rule, indicating that a right to challenge the restriction as a taking attaches to the land and passes to subsequent purchasers.

This aspect of Nollan, although apparently establishing that notice of a restriction does not preclude a taking, received little attention from lower courts, especially as it might apply to takings based on economic impact only. There are arguably sev-

71. See id. at 834 n.2.
72. See id. at 834.
73. See id. at 837.
74. See id. at 857-58 (Brennan, J., dissenting).
75. Id. at 834 n.2.
76. See infra note 80 and accompanying text.
eral reasons for this oversight. First, the notice issue was not central to the Court’s analysis in *Nollan*, which explains why it was only addressed in a footnote. Second, despite its significance to exactions, *Nollan* was predicated on physical appropriation of an easement, a highly sensitive area of the law, making the case’s applicability to takings based on economic impact alone uncertain.78

For whatever reason, the majority of lower courts both before and after *Nollan* have held that notice precluded or was a significant factor in precluding a takings claim, in situations where the claimant acquired property after a restriction was in place.79 In doing so, such courts almost inevitably ignored the *Nollan* footnote,80 instead basing their reasoning on one of several grounds. First, courts frequently held that prior notice of a regulation fatally undermined any investment-backed expectations under *Penn Central*.81 As these courts found that interfe-

77. The Court has frequently emphasized that greater scrutiny is required when the government physically invades or grants permission to others to physically invade private property, since the right to exclude is one of the most essential sticks in the bundle of property rights. See, e.g., *Dolan* v. City of Tigard, 512 U.S. 374 (1994); *Loretto* v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979). The Court in *Nollan* also emphasized that the exaction involved a physical invasion of private property, noting the highly sensitive nature of such a requirement. See *Nollan*, 483 U.S. at 831.


80. See Radford & Breemer, supra note 79, at 499 (noting that most post-*Lucas* cases have ignored the *Nollan* majority and followed Brennan’s dissent).

ence with investment-backed expectations was an important dimension of takings law, they reasoned that knowledge of a restriction necessarily limited any expectation that might exist.\(^8\)

In other words, the owner's expectations were necessarily informed by the existence of the restriction when the property was acquired.

For example, in *Claridge v. New Hampshire Wetlands Board*, the New Hampshire Supreme Court upheld wetlands restrictions by emphasizing that the restrictions were in place prior to purchase and therefore the landowner had notice.\(^8\)

Stating that the extent of interference with investment-backed expectations is particularly relevant in takings analysis, the Court stated that "[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights."\(^8\)

Second, prior to *Palazzolo* some lower courts held that restrictions on property existing at the time of purchase constituted "background principles of law" under *Lucas*, and therefore a landowner's "bundle of rights" was necessarily limited by such restrictions.\(^8\)

For example, in *Hunziker v. State*,\(^8\) the Iowa

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84. Id. at 291. A number of cases from the federal circuit court of appeals have similarly emphasized notice as undermining investment-backed expectation, blending it with the *Lucas* analysis. This was first stated in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994), in which the court stated the post-*Lucas* state of takings law as requiring a showing of both a denial of economic viability and an interference with investment-backed expectations. Although *Loveladies* itself found a taking where there was a 99% diminution in value and no notice, subsequent federal circuit court decisions applied this standard so as to preclude, or at least limit, takings claims when a landowner acquired property with notice of the restrictions, reasoning that there were no reasonable investment-backed expectations in such situations. *See* Good v. United States, 189 F.3d 1355, 1357 (Fed. Cir. 1999); Forest Props., Inc. v. United States, 177 F.3d 1360, 1367 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 951 (1999); Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994).


Supreme Court rejected a takings claim to a state statute that had the effect of prohibiting any development on plaintiff's land after a Native-American burial mound was discovered there. The court rejected a takings claim under *Lucas*, saying that irrespective of the law's economic impact, the statute was in effect prior to the claimant's purchase of the property. As such, the statute became part of Iowa's property law prior to the claimant's purchase of the property, and thus the "bundle of rights" acquired did not include the right to continue development of the land once the burial mound was discovered.

Although the majority of lower courts prior to *Palazzolo* adopted one of the above rationales to preclude takings claims when there was landowner notice, a few of them rejected a per se notice rule, reasoning that takings claims survived transfer of title. In doing so at least one court cited *Nollan* as rejecting a notice rule and making irrelevant restrictions on property pre-dating a claimant's acquisition in takings claims. More fundamentally, several decisions reasoned that a notice rule would undermine the ability to freely transfer property.

In the most significant of these decisions, *Palm Beach Isles Associates v. United States*, decided less than a year before *Palazzolo*, the Court of Appeals for the Federal Circuit appeared to modify its previous position and held that notice does not preclude a takings claim under *Lucas*. In response to a petition for rehearing, which the court denied, it then issued a second opinion analyzing in-depth the role of notice in the takings doctrine. It affirmed its earlier statement, stating that although notice remains relevant as a factor in analyzing investment-backed expectations under *Penn Central*, it is not relevant in evaluating whether there is a categorical taking under *Lucas*. Although

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87. See id. at 368-70.
88. See id. at 371.
89. See id. at 370-71.
91. See, e.g., Store Safe Redlands Assoc., 35 Fed. Cl. at 735.
92. See id.; Lopes, 629 N.E.2d at 1314-15.
93. 208 F.3d 1374 (Fed. Cir. 2000), rehearing en banc denied, 231 F.3d 1354 (Fed. Cir. 2000).
94. See supra note 79 and accompanying text.
95. See 231 F.3d at 1358-61.
96. See id. at 1354.
97. See id. at 1363-64. The court justified this distinction by noting that in the
this holding appears contrary to other Federal Circuit cases, the Palm Beach Isles court distinguished the relevant statements in those cases as dicta instead of central holdings of the cases.98

Palm Beach Isles, issued just several months before the Supreme Court heard oral arguments in Palazzolo, was in some ways a precursor to Palazzolo, anticipating the general direction the Supreme Court was to take. At the time, however, it represented a distinct minority position among lower courts on the notice issue, with the majority of courts holding that notice of restrictions in effect precludes takings claims.99 The next part discusses the Supreme Court's decision in Palazzolo v. Rhode Island, with special attention to the Court's rejection of the notice rule.

III. PALAZZOLO V. RHODE ISLAND100

A. Facts and Background

In 1959, Anthony Palazzolo formed a small corporation, SGI, for the sole purpose of acquiring three undeveloped and contiguous parcels of land on the Rhode Island coast.101 The property in question consisted of eighteen acres of coastal wetlands and several adjoining uplands acres.102 Any development of the wetlands portion required substantial fill before any building could occur, which in turn required a dredge and fill permit from the state.103 Palazzolo became the sole shareholder of the corporation shortly after the purchase, and three times between 1962 and 1966 applied to the state for permission to fill the land.104 His first application was turned down because it lacked essential information.105 The second and third applications were referred to the Rhode Island Department of Natural

98. See id. at 1358-61.
99. See supra note 90 and accompanying text.
100. 533 U.S. 606 (2001).
101. See id. at 613.
102. See id.
103. See id. at 613-14.
104. See id. at 613.
105. See id. at 614.
Resources, which ultimately disapproved the fill applications because of adverse environmental impacts.\textsuperscript{106}

SGI and Palazzolo made no further attempts to get permission to fill the wetlands for more than fifteen years.\textsuperscript{107} In the meantime, however, several significant events occurred. First, in 1971, Rhode Island created the Coastal Resources Management Council, which was given authority to regulate coastal wetlands.\textsuperscript{108} In 1977, the Council enacted regulations which, in effect, prohibited any development on the property without prior approval of the Council.\textsuperscript{109} Second, in 1978 the state revoked SGI's corporate charter for failure to pay taxes.\textsuperscript{110} As a result, the property passed to Palazzolo as the corporation's sole shareholder, who thereafter owned the property personally.\textsuperscript{111}

Palazzolo made new applications in 1983 and 1985 to fill and develop the property.\textsuperscript{112} The 1983 application, which requested permission to fill all eighteen acres of wetlands, was rejected on several grounds, including vagueness and its potential impact on surrounding wetlands.\textsuperscript{113} The 1985 application was less ambitious, seeking to fill and develop eleven acres for use as a beach club.\textsuperscript{114} The Council again rejected the application, stating that the proposal conflicted with the standards for a special exception as required under the Council's regulations.\textsuperscript{115} The Council noted that granting a special exception for the proposed development required a "compelling public purpose," which the beach club proposal had not established.\textsuperscript{116}

Palazzolo then initiated a takings claim in state court, arguing that the wetlands regulations as applied to his property constituted a taking under the federal Constitution.\textsuperscript{117} The com-

\textsuperscript{106} See Palazzolo, 533 U.S. at 613-14.
\textsuperscript{107} See id. at 614.
\textsuperscript{108} See id.
\textsuperscript{109} See id.
\textsuperscript{110} See id.
\textsuperscript{111} See id.
\textsuperscript{112} See Palazzolo, 533 U.S. at 614-15.
\textsuperscript{113} See id. at 614. The 1983 application sought permission to build a bulkhead and fill the entire wetlands. The Council said the application "was 'vague and inadequate for a project of its size and nature.'" Id. It also said the project would have a significant effect on the waters and wetlands of Winnapaug Pond nearby and conflict with the Coastal Resources Management Plan in effect. See id.
\textsuperscript{114} See id.
\textsuperscript{115} See id.
\textsuperscript{116} See id.
\textsuperscript{117} See id.
plaint alleged a loss of all economic viability under the standard established in *Lucas*, and sought damages in the amount of $3,150,000, which Palazzolo claimed was the lost profit from not being able to develop seventy-four residential lots.\(^{118}\)

The Rhode Island Supreme Court affirmed the trial court holding that there was no taking on three grounds: (1) the takings claim was not ripe; (2) any takings claim that might exist was precluded by Palazzolo's notice of the restriction when he acquired the property in 1978; and (3) the property was still economically viable, because the uplands portion was worth $200,000 for development and the wetlands retained $153,000 value as a conservation gift.\(^{119}\)

**B. Holding and Analysis**

The United States Supreme Court reversed the Rhode Island Supreme Court's holding on the first two points above, finding that the case was ripe for review and that notice of the regulation did not preclude a takings claim under either the *Lucas* or *Penn Central* standards.\(^{120}\) However, it agreed that under the facts, Palazzolo had not been denied all economically viable use of the land, since he would still be allowed to put a residence on the uplands portion of the property.\(^{121}\) The Court therefore remanded the case back to the lower court to determine if the state's action constituted a taking under *Penn Central*.\(^{122}\)

The Court began its analysis by affirming the two-part test for regulatory takings established earlier in *Lucas* and *Penn Central*, stating that subject to certain qualifications a regulation that denies an owner "all economically beneficial or productive use of land" will be a categorical taking under *Lucas*.\(^{123}\) It affirmed, however, that a regulation that falls short of eliminating all economic viability might still be a taking under *Penn Central*, and thus must be separately analyzed under what it labeled the "complex of factors" from that decision.\(^{124}\) These factors include

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118. See *Palazzolo*, 533 U.S. at 614.
120. See *Palazzolo*, 533 U.S. at 630-31.
121. See *Palazzolo*, 533 U.S. at 631.
122. See *Palazzolo*, 533 U.S. at 615, 624.
123. See *Palazzolo*, 533 U.S. at 615. The qualifications alluded to by the Court concerned the observation in *Lucas* that a landowner cannot recover for a loss of all economic viability where the restriction constitutes a "background principle" of law. See *id.* at 622-23, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).
124. See *Palazzolo*, 533 U.S. at 617-18.
"the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." 125 Importantly, the Court stated that this analysis is to be "informed by the purpose of the Takings Clause," which "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." 126

The Court then proceeded to discuss each of the grounds relied on by the Rhode Island Supreme Court, beginning with and giving the most attention to the ripeness issue. 127 Here the Court stated that the central inquiry under its precedents was whether Palazzolo had "obtained a final decision from the Council determining the permitted use of the land." 128 The Court stated Palazzolo had, based upon what it called "the unequivocal nature of the wetlands regulations at issue." 129 The relevant state regulations prohibited any fill or development next to a "Type 2" body of water, which a pond adjacent to Palazzolo’s land happened to be, without a "special exception" from the Council. 130 "Special exceptions" could be granted only where a "compelling public purpose" was established, and the state Coastal Management Resources Council specifically held that Palazzolo’s proposal did not constitute a compelling interest. 131

Therefore, as reviewed by the Court, the Council had essentially interpreted its regulations and applied them to Palazzolo’s property so as to eliminate the possibility of any development of the wetlands. As seen by the Court, even a proposal to fill a smaller area would be rejected, since it would still not meet the "compelling public purpose" standard required for special exceptions. 132 On that basis the Court distinguished the case from those in which denial of one substantial project still left the state

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125. Id. at 617.
127. *See Palazzolo*, 533 U.S. at 618.
128. Id.
129. Id. at 619.
130. *See id.*
131. *See id.*
132. *See id.*
with the discretion to allow a more modest project. By contrast, application of the regulations here indicated there was no discretion to approve any project on the wetlands, leaving only $200,000 development value on the uplands property. As such, the case was sufficiently ripe for review.

The Court next turned its attention to the central issue in the case, which was whether notice of a regulation when property is acquired precludes a takings claim. The Court held it did not,

133. See Palazzolo, 533 U.S. at 619-21. The Court noted earlier cases indicating that "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." Palazzolo, 533 U.S. at 620. This requires that government be able to first exercise variances and other discretionary devices. Moreover, rejection of one development proposal does not meet the finality requirement if the state could exercise its discretion to grant permission for a more modest proposal. This stands for the fundamental principle that a court cannot determine whether a taking has occurred until it knows the "extent of permitted development" on the land. On that basis, the Court in a series of cases held that the takings issue was not ripe. See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (deciding that a denial of a 476-unit subdivision proposal was not a taking because claimant did not seek variances that might have permitted development and did not seek compensation through state procedures); McDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) (finding that a denial of 159 home residential subdivisions was not a taking because there was still the possibility that a less ambitious proposal would be approved); Agins v. City of Tiburon, 447 U.S. 255 (1986) (finding that the situation in question was not ripe for a taking analysis because no development plans were submitted). See also Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 736, 738 (1997) (finding it difficult to establish a taking by mere enactment of regulations since land use officials typically have substantial discretion to soften regulations). But see Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (holding that a state cannot use repetitive and unfair procedures and denials to avoid final decision).

134. The Court noted that Palazzolo had not submitted an application to develop the uplands property, but said that was not problematic. It stated that the purpose of submitting applications is to determine how far regulatory restrictions extend, and therefore the obligation to explore development opportunities is necessary "only if there is uncertainty as to the land's permitted use." Palazzolo, 533 U.S. at 622. The state had previously agreed that the uplands property had an estimated worth of $200,000, which the Court said was well-founded in the trial court record, and therefore rejected ripeness arguments by the state based on lack of development applications for the uplands property. See id. at 621-23.

135. The Court also rejected the state's argument that the takings claim was not ripe because Palazzolo had never submitted a development proposal for a seventy-four lot subdivision, which was the basis for the damages sought. The state argued that at a minimum prior approval for such an extensive development was necessary from local zoning authorities before a takings claim could be brought against the Council for a taking based on a seventy-four lot subdivision. The Court said the level of development that other regulations would permit would be relevant in assessing the amount of damages, but was irrelevant in determining whether a taking occurred. See id. at 623-25.

136. See id. at 626-27.
reversing the Rhode Island Supreme Court and rejecting the position taken by a majority of lower courts. In doing so, the Court stated that notice neither constituted a background principle under *Lucas* nor involved a negation of investment-backed expectations under *Penn Central* so as to preclude a takings claim.

The Court relied on two principal rationales for rejecting the position that notice bars a taking. First, the Court rejected the argument that by prospective legislation the state can shape and define the extent of property rights, in essence the argument that such restrictions become background principles of law under *Lucas*. The Court stated that "[t]he State may not put so potent a Hobbesian stick in the Lockean bundle." Although it acknowledged that the state may put reasonable restrictions on land uses, including prospective enactments that diminish land value, restrictions that are unreasonable when imposed do not become less reasonable over time. Otherwise the state could in effect put an expiration date on takings, no matter how unreasonable.

Second, and perhaps even more fundamental, the Court emphasized that rejection of the notice rule was necessary to protect owners at the time a restriction was imposed; otherwise, they would essentially lose their right to sell the property for any reasonable value. According to the Court, this would be "a critical alteration of the nature of property," since it would effectively deprive the owner of the right to transfer the property. Thus, rejection of the notice rule is necessary not so much to protect the interests of the current owner, as to secure full protection for the rights of the owner when the restriction was imposed.

The Court also noted that it previously rejected the notice rule in *Nollan*, which established that takings claims passed with

137. See id. at 628.
138. See id. at 627, 630.
139. See id. at 627-28.
140. See Palazzolo, 533 U.S. at 627.
141. See id. at 627.
142. See id. at 625-27.
143. See id. at 627.
144. See id.
145. See id.
146. Indeed, this seems to have been the primary focus of the Court's rejection of the notice rule in *Nollan*. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987).
the transfer of title.\textsuperscript{147} It rejected the state's argument that \textit{Lucas} limited \textit{Nollan} by making newly enacted restrictions background principles of law that cannot be challenged by subsequent purchasers.\textsuperscript{148} The Court stated that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of law by mere virtue of the passage of title."\textsuperscript{149} To hold otherwise would make regulations background principles for some landowners and not for others, rather than basing the standard on "common, shared understandings of permissible limitations derived from a state's legal tradition," as contemplated by \textit{Lucas}.\textsuperscript{150}

Finally, after rejecting the notice rule, the Court briefly considered whether Palazzolo had shown a denial of all economic viability to establish a taking under \textit{Lucas}.\textsuperscript{151} On this point, the Court agreed with the Rhode Island Supreme Court, finding that under the facts as presented, Palazzolo's property still retained economic viability and, therefore, the regulation was not a categorical taking under \textit{Lucas}.\textsuperscript{152} The Court noted that the parcel still retained $200,000 in development value and permitted the building of a "substantial residence" on the property.\textsuperscript{153} The Court acknowledged that the state could not avoid a \textit{Lucas} type taking by leaving only a token interest, but stated that it was certainly not a token interest where the state permitted the building of a residence.\textsuperscript{154} The Court remanded the case, however, for determination of whether a taking might still be found under the \textit{Penn Central} standard, which was not considered by the court below.\textsuperscript{155}

Justices O'Connor and Scalia wrote concurring opinions, while Justices Stevens, Souter, Ginsburg and Breyer dissented.\textsuperscript{156} Most critical in this regard was O'Connor's concurrence, which provided an important qualification to the majority's rejection of the notice rule.\textsuperscript{157} Although O'Connor joined in the majority

\begin{itemize}
\item \textsuperscript{147} See Palazzolo, 533 U.S. at 627-29.
\item \textsuperscript{148} See id. at 629-30.
\item \textsuperscript{149} Id. at 629-30.
\item \textsuperscript{150} Id. at 630.
\item \textsuperscript{151} See id. at 630-31.
\item \textsuperscript{152} See id. at 630-32.
\item \textsuperscript{153} See Palazzolo, 533 U.S. at 631.
\item \textsuperscript{154} See id.
\item \textsuperscript{155} See id. at 632.
\item \textsuperscript{156} See id. at 632-55.
\item \textsuperscript{157} See id. at 632-36.
\end{itemize}
opinion, she stated that notice of a restriction can continue to play a role in assessing the degree of interference with investment-backed expectations under *Penn Central*. To O'Connor, it would be equally wrong to either make notice dispositive, as the Rhode Island Supreme Court did, or to ignore it altogether. Rather, she interpreted the majority opinion as simply "restor[ing] balance" to the inquiry regarding investment-backed expectations, in which notice of restrictions, although no longer dispositive, remains a relevant factor.

Justice Scalia's concurrence rejected this reading of the majority opinion, stating instead that notice should be irrelevant in the takings analysis, including consideration of investment-backed expectations under *Penn Central*. However, a close reading of the dissenting opinions shows that all four dissenting justices agreed with O'Connor, stating that at a minimum, notice should be relevant under *Penn Central*. Justice Stevens, while concurring in the majority's ripeness analysis, dissented from the judgment, and in particular from the Court's rejection of the notice rule. Justice Ginsburg, joined by Justices Souter and Breyer, dissented on ripeness grounds, but in a footnote at the end stated that if the claim were ripe, she would "at a minimum agree with Justice O'Connor . . . that transfer of title can impair a takings claim." Justice Breyer also wrote a short, separate dissent expressing his agreement with Justice O'Connor on the principle that notice should neither preclude a claim on the one hand, nor be altogether irrelevant on the other.

Thus, five justices are on record as indicating that, "at a minimum," notice can continue to play some role in assessing

158. See id. at 632-36.
159. See Palazzolo, 533 U.S. at 633.
160. See id. at 635.
161. See id. at 637-38.
162. See infra notes 163-66.
163. See Palazzolo, 533 U.S. at 634-45.
164. See id. at 645-55. Justice Ginsburg primarily argued that the takings claim was not yet ripe because Palazzolo had never submitted a plan to develop the uplands portion of the property, thus making it uncertain how much development might be permitted. See id. at 645-54. She disagreed with the majority's position that the uplands property was determined to have $200,000 development value, saying that the record was ambiguous and that the state conceded that value amount only for purposes of a *Lucas* type of taking. See id. at 651-54.
165. Id. at 654 n.3.
166. See Palazzolo 533 U.S. at 654.
takings claims under *Penn Central*. As a practical matter, therefore, the effect of *Palazzolo* on the critical issue of landowner notice is as follows. Notice is irrelevant for categorical takings claims under *Lucas*; once a denial of economic viability is established, it does not matter whether the landowner knew of the restrictions or not. Notice also does not preclude a taking under the *Penn Central* test, but it remains relevant, as one factor, in analyzing the degree of interference with investment-backed expectations. The Court was not clear just how notice should factor into the analysis, although common sense indicates that it would diminish investment-backed expectations, and thus to some degree, make the finding of a taking less likely.

The Court's decision in *Palazzolo* therefore represents a substantial, though perhaps not complete, renunciation of the notice rule. It clearly overturned the position taken by most lower courts, which treated notice as dispositive, but it reinforced notice as a relevant factor under *Penn Central*.

**IV. THE LUCAS STANDARD AFTER PALAZZOLO**

As noted above, the Court in *Palazzolo* affirmed the basic two-prong test for regulatory takings established in *Lucas* and *Penn Central*. This test provides that if a regulation denies a landowner all economic viability, it is a categorical taking under *Lucas*. If some economic viability remains, the regulation might still constitute a taking under the *Penn Central* balancing test, in which a court considers the economic impact of the regulation, the degree of interference with investment-backed expectations, and the character of the government action.

The Court's elucidation of the *Lucas* standard itself was rather modest in *Palazzolo*. For the most part the standard remains "ambiguous" at best, with a number of questions never answered by the Court. In particular, commentators have noted that any analysis of economic viability must first be based

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167. See Echeverria, supra note 4, at 11113-14 (stating that O'Connor's concurring opinion, together with dissenting opinions, represents the Court's treatment of the notice issue).

168. See *Palazzolo*, 533 U.S. at 632-36.

169. See id. at 630-33.

170. See id.

171. See id. at 633.

on some relevant "base price," but the Court's opinions have given no guidance on how that price is determined.\textsuperscript{173} To the extent the Court in \textit{Lucas} gave any signals, it was that loss of economic viability would typically occur where property had to be left in its natural state, precluding development altogether.\textsuperscript{174}

For the most part \textit{Palazzolo} did not clarify the uncertainty regarding how the "economically viable" test is to be applied. It did, however, affirm several broad characterizations about the test. Perhaps most significant, the Court affirmed what it had suggested in \textit{Lucas}: categorical takings based on denial of economic viability are limited to highly unusual and extreme facts, and cannot be based on mere diminution in value, no matter how substantial.\textsuperscript{175} \textit{Palazzolo} had tried to make the case for a "total taking" by comparing the profit potential of the property, $3,150,000, with the minimum residual value, $200,000.\textsuperscript{176} He argued that in that context the state "cannot sidestep" \textit{Lucas} "by the simple expedient of leaving a few crumbs of value."\textsuperscript{177} The Court rejected that comparison, however, focusing on what was left rather than on what was taken.\textsuperscript{178} It acknowledged that the state cannot escape a categorical taking under \textit{Lucas} by leaving just a "token interest" in the property, but said "a regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"\textsuperscript{179}

Not too much should be made of this admittedly cursory treatment of the "economic viability" standard in \textit{Palazzolo}. Yet, if nothing else, it affirms several important points. First, the standard is limited to extreme situations, not simply where there has been a significant economic impact. Second, the focus is not so much on what has been taken, but on what remains. Thus, the loss of significant profit potential is irrelevant; rather, the focus under \textit{Lucas} is on what can still be done with the property. Third, "token interests" do not qualify as economic viability,  

\textsuperscript{174} See \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1018 (1992) (finding that a loss of all economically beneficial or productive uses "typically" occurs when land must "be left substantially in its natural state").
\textsuperscript{175} See \textit{Palazzolo}, 533 U.S. at 630-32.
\textsuperscript{176} See id. at 630-31.
\textsuperscript{177} Id. at 640.
\textsuperscript{178} See id. at 631.
\textsuperscript{179} Id.
thus indicating that retention of some de minimus value alone does not insulate a restriction from being a categorical taking.

This analysis is consistent with Lucas, where the Court characterized loss of all economic viability as an "extraordinary circumstance" that would typically occur when land is "left substantially in its natural state."\(^{180}\) The Court's sole focus in its discussion in Lucas was on the absence of any beneficial, economic, or productive uses, in several instances italicizing words to make its point.\(^{181}\) There was no suggestion in Lucas that severe economic impact itself could create a categorical taking. Indeed, the Court indicated in a footnote that even a 95% loss in property value would not constitute a denial of all economic or productive use, noting that this percentage might, although not necessarily constitute a taking under Penn Central.\(^{182}\) Thus, the gist of Lucas was that categorical takings are based on a complete absence of productive uses remaining, which will only occur in highly unusual circumstances.

This understanding of Lucas has also generally been followed by lower courts, which have typically rejected Lucas-type categorical takings whenever at least some minimal economic viability remains.\(^{183}\) Some courts have gone so far as to suggest


\(^{181}\) See id. at 1017 ("[s]urely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted"); id. at ("[t]here are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses").

\(^{182}\) See id. at 1019 n.8. In this footnote the Court responded to an argument in Justice Stevens' dissenting opinion, in which he criticized the majority rule as "wholly arbitrary" because a "landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." Id. at 1064. The majority appeared to agree that a 95% diminution in value would not constitute a categorical taking, but was quick to note that a taking might still be found under Penn Central. It further noted, however, that "at least in some cases" even a 95% diminution in value will not be a taking. Id. The footnote makes clear that a 95% loss is not a categorical taking because it is not, in the Court's own words, "a complete elimination in value." Id.

\(^{183}\) See, e.g., McAssociates v. Town of Cape Elizabeth, 773 A.2d 439, 443-44 (Me. 2001) (finding that in order to establish a Lucas categorical taking, one must show that the property is "substantially useless and stripped... of all practical value"); K & K Constr., Inc. v. Dept' of Nat'l Resources, 575 N.W.2d 531, 539 n.13 (1998) (stating that there is no categorical taking, thus under Lucas it must deny all or substantially all practical uses of the property). See also Glen P. Sugameli, Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the Rule, 29 ENVTL. L. 939, 948-53 (1999) ("[m]any courts have applied Lucas to deny compensation for anything less than a total (or virtually total) elimination of value and use"); Ronald H. Rosenberg, The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State
that the only basis for finding a taking is loss of all economic viability, a position inconsistent with *Lucas* and *Palazzolo*. All lower courts have consistently followed the *Lucas* lead and limited categorical takings to extreme instances. Importantly, severe economic impact has never been a basis for finding a loss of all economic viability.

None of this, of course, gets environmental land use regulations off the *Lucas* hook. Although *Lucas* "total takings" are limited to extreme situations, the one instance in which they might conceivably arise is where the totality of one's property is required to be left in its natural or near-natural state. Few land use controls go that far, but those that might are controls designed to protect environmentally sensitive lands, such as wetlands, farmland, coastal zones, habitats for endangered species, and open space. Protection of such land often precludes development, and if the totality of a parcel is so limited, this raises

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*Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 546-48 (1995) (surveying state courts after *Lucas* and concluding that "they rarely find" the no economic viability condition to be met).

184. Such decisions have stated or suggested that a taking required loss of all economic viability, thus ignoring the possibility of a taking under *Penn Central* when some economic viability remains. See, e.g., Tex. Manufactured Housing Ass'n v. City of Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996); Burnham v. Monroe County, 738 So. 2d 471, 472 (Fla. Dist. Ct. App. 1999); JWL Investors, Inc. v. Guilford County Bd. of Adjustments, 515 S.E.2d 715, 719 (N.C. Ct. App. 1999). See also John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 53 LAND USE L. & ZONING DIG. 10 (Jan. 2000) (stating that most lower courts, with exception of the federal circuit and court of federal claims, require total economic loss for a taking).

185. See supra note 184.

186. *Lucas* itself makes this clear when it states that even a 95% diminution in value would not constitute a loss of all economic viability so as to constitute a categorical taking. See *Lucas*, 505 U.S. at 1019 n.8.

187. See id. at 1018-19.

188. This raises the issue of what is the relevant property for analysis when some, but not all of a parcel is restricted. Frequently referred to as the "denominator" issue because it concerns what the relevant denominator is for assessing a regulation's economic impact, courts and commentators have often noted that how the relevant parcel is defined for purposes of analysis can greatly affect the degree of economic impact. See, e.g., Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 184 (1995); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967).

Although the Supreme Court in a footnote in *Lucas* suggested there are still questions regarding how property is to be defined, see *Lucas*, 505 U.S. at 1016-17 n.7, the Court in other contexts has made clear that the relevant parcel is the parcel as a whole and not just the segment being regulated. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497-99; *Penn Central Transp. Co.*
the specter of "no economic viability." Moreover, the Court in Palazzolo indicated that "token interests" do not qualify as economic viability,\textsuperscript{189} suggesting that just because de minimus value is retained, which is almost always the case, a Lucas-type taking might still exist.

For this reason the basic Lucas standard retains some viability, especially as it concerns environmentally sensitive lands. Yet, as a general matter it is clear that categorical takings under Lucas will be very rare—a point made clear in Lucas itself and consistently affirmed by lower courts.\textsuperscript{190} Therefore, Palazzolo did not change the Lucas standard, but highlighted its very limited application.

The second, and more certain impact of Palazzolo on the "economic viability" standard, is its rejection of the notice rule. The case firmly holds that in those rare instances in which a regulation eliminates all economic viability, notice of the regulation when the property is acquired does not preclude a takings claim.\textsuperscript{191} As a practical matter, if government regulations deprive the property of all economic viability, notice is irrelevant and apparently not a factor in the analysis. This is in contrast to the continued relevancy of notice under Penn Central, which Palazzolo indicates can still be considered under the "expectations" prong of the analysis.\textsuperscript{192} There is no comparable "expectations" factor under Lucas, however, that would even make notice relevant.\textsuperscript{193} Thus, once a loss of all economic viability is established, it makes no difference that the regulation was in place when the property was acquired.

There is no doubt that this aspect of Palazzolo poses a modest setback to environmental land use controls. Indeed, this is

\textsuperscript{189} See Palazzolo, 533 U.S. at 616.


\textsuperscript{191} See Palazzolo, 533 U.S. at 627-30.

\textsuperscript{192} See id. at 626-28.

\textsuperscript{193} Unlike Penn Central, which invites inquiry into a landowner's "investment-backed expectations," Penn Central, 438 U.S. at 124, the Lucas standard only concerns what productive uses, if any, are left with the property. Thus, once the notice rule is rejected, there is no room under the Lucas standard for a landowner's knowledge of a restriction to be relevant. See Lucas, 505 U.S. at 1071.
the one instance in which Palazzolo might truly have some impact. Although regulations will rarely result in a loss of all economic viability, to the extent they do occur, such regulations will usually be environmental land use controls. Prior to Palazzolo there was the possibility that, as time passed and property changed hands, the notice rule would gradually eliminate what would otherwise be takings under the "no economic viability" rule.194 This would be particularly true of wetlands regulations, which began to emerge with force in the 1970s and in very limited settings, might be a categorical taking under Lucas.195

Palazzolo eliminated the possibility that the mere passage of time and title would gradually eliminate categorical takings, making clear that claims "attach to and run with the land," in the words of Nollan.196 This possibility presents some vexing issues, especially with regard to a long-term analysis.197 Yet, at least as to the relative short-term, the mere passage of title, with its attendant notice to the purchaser, will not eliminate a prior takings claim. As such, Palazzolo increases the potential vulnerability of environmental land use regulations in a way that did not previously exist.

However, in recognizing that Palazzolo expands takings vulnerability where it might have previously been limited by the notice rule, it is important to emphasize that Palazzolo does not empower the seller of property to, in effect, create takings where none previously existed. What Palazzolo holds is that if a regulation, when enacted, results in a taking, then a subsequent transfer of the property to a purchaser with notice of the regulation does not change that.198 In other words, the proper focus for analysis is the state of conditions at the time the regulation is en-

194. See supra note 184.
195. The Federal Clean Water Act, which requires that landowners get a permit before filling and developing wetlands, was passed by Congress in 1972 and is the basis for federal restrictions on the use and development of wetlands. See 33 U.S.C. § 1344 (1972).
197. If the passage of "time and title" does not eliminate takings claims, then the state of property interests arguably become locked into a particular time. Although perhaps in the short-term this makes some sense, it presents the problem that understandings of private and public rights become frozen in time. Scholars have frequently noted that the relative balance of private and public interests in land changes over time, responding to emerging societal interests. See, e.g., Carol M. Rose, A Dozen Propositions on Private Property, Public Rights and the New Takings Legislation, 53 WASH. & LEE L. REV. 265, 281 (1996).
198. See Palazzolo, 533 U.S. at 626-32.
acted, and not those subsequently created by action of the parties. For that reason the concerns voiced by some that rejecting a notice rule "could allow property owners to manufacture such claims by strategically transferring property until only a non-useable portion remains" are misplaced.\(^{199}\)

This can be illustrated by a simple example, similar to the facts of *Palazzolo*. Assume that a wetlands regulation is enacted and applied to a twenty-acre parcel of land, with the effect that development is prohibited on almost all of the parcel, but a substantial residence is permitted on one acre that can be developed. According to *Palazzolo*, this is not a categorical taking under *Lucas*, since the regulation permits some economic viability.\(^{200}\) If the owner were then to sell the unusable portion of the land to a purchaser with notice of the restriction, there would still be no taking, even if the acquired property had no economic viability. The reason is simple: unlike *Lucas*, in this instance the lack of economic viability is due not to the restriction, which when enacted, permitted economic viability, but rather results from the actions of the property owner, who sold the property in such a manner as to create the lack of economic viability.

Any reasonable interpretation of *Lucas* and *Palazzolo* suggests that there is no taking in the above scenario, even if the purchaser's land lacks all economic viability. The Court has never indicated that property owners themselves can create takings where none previously existed, and indeed, has suggested they cannot. In particular, the Court has been consistently resistant to attempts to segment property interests when analyzing takings claims.\(^{201}\) For example, in *Penn Central* the Court refused to treat the air rights above the terminal as separate from the underlying estate, stating that "[t]akings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."\(^{202}\) The Court in *Keystone Bituminous Association v. DeBenedictis*\(^{203}\) similarly rejected an attempt to treat only

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199. *Id.* at 655 (Breyer, J., dissenting) (stating that several amici had warned that rejection of a notice rule would permit landowners to manufacture takings claims by strategic transfers of "property until only a nonuseable portion remains").

200. *See supra* note 184 and accompanying text.

201. *See infra* notes 202-04.


the regulated portion of property as relevant for takings analysis, stating that the property as a whole must be considered.204

The Court’s refusal to segment property for purposes of takings analysis in these cases is understandable.205 To permit seg-

204. In Keystone, the Court reviewed a statute, similar to that in Pennsylvania Coal, which required that coal be kept in the ground to avoid subsidence problems. Although the regulated coal companies attempted to segment the property by defining the relevant unit of property as only that coal subject to regulation, the Court construed the relevant unit of property as including coal that could be mined. In doing so, it again emphasized that property is not to be segmented for purposes of takings analysis, but instead treated as a whole. See id. at 497-99.

205. The question of whether to segment property for takings analysis is often referred to as conceptual severance or the denominator issue. See, e.g., ROBERT ELLICKSON & VICKI BEEN, LAND USE CONTROLS 215-16 (Aspen Law & Business 2d ed. 2001); Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667, 1676 (1988); Michelman, supra note 188, at 1192. The issue is an important one, since if property is segmented for purposes of a takings analysis, almost every land use restriction might be potentially considered a taking. For this reason the issue has generated a significant amount of academic commentary in recent years. See, e.g., John E. Fee, Uneartthing the Denominator in Regulatory Takings Claims, 61 U. CHI. L. REV. 1535 (1994); Note, Federal Circuit’s Holding Introduces Subjective Factors into Takings Clause “Denominator” Analysis, 114 HARV. L. REV. 926 (2001); Laura M. Schleich, Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel, 8 J. LAND USE & ENVT'L L. 381 (1993).

Dicta in Palazzolo suggested that the issue of how to define the relevant parcel, remains a “difficult, persistent question.” See Palazzolo v. Rhode Island, 533 U.S. 606, 631, (2001), citing to a footnote in Lucas where the Court suggested the issue was unresolved. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016-17 n.7 (1992). As a practical matter, however, the Court has consistently rejected attempts to segment property for purposes of analyzing economic impact. In addition to Penn Central and Keystone, both of which clearly rejected segmenting property for takings analysis, the Court in Concrete Pipe & Products v. Constr. Laborers Pension Trust of Southern Cal., 508 U.S. 602, 644 (1993), stated that property was to be viewed as a whole and not broken into discrete segments. For a discussion of the Court's rejection of segmentation, see Michael C. Blumm, The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit, 25 ENVTL. L. 171, 184-85 (1995).

Lower courts have generally also refused to segment property for takings analyses. Although the Federal Circuit appeared to segment property in two early decisions, see Loveladies Harbor, Inc., v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), in other cases, including more recent ones, the Circuit has rejected segmentation. See Forest Properties, Inc. v. United States, 177 F.3d 1360, 1365-66 (Fed. Cir. 1999); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993). Other cases have also consistently rejected segmentation. See, e.g., Walcek v. United States, 49 Fed. Cl. 248, 258-61 (2001); Clajon Production Corp. v. Petera, 70 F.3d 1566, 1577 (10th Cir. 1995); K&K Constr. v. Dep’t of Natural Resources, 575 N.W.2d 531 (Mich. 1997); Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996). For a general discussion of the caselaw, see Glen Sugameli, Lucas v. South Carolina Coastal Council: The Categorical and Other “Exceptions” to Liability for Fifth Amendment Takings of Private Property Far Outweigh the Rule, 29 ENVTL. L. 939, 948-53 (1999).
mentation would essentially turn every restriction into a taking, since there would always be some portion of the property that, standing alone, has no economic viability.206 Further, it would be inconsistent with the Court's longstanding recognition that government can regulate land use for the public good.207 Yet to allow landowners to strategically sell the unusable portion and create takings claims would amount to the same thing, permitting them to accomplish with the mere transfer of property what the Court has already indicated cannot occur when the parcel is owned by one person. As indicated by Justice Breyer in Palazzolo, "to reward . . . such strategic behavior" hardly comports with the takings clause purpose of "fairness and justice."208

Nor is there anything in Palazzolo that suggests that the mere transfer of property can be used to create takings in that way. What Palazzolo says is that a purchaser, who buys property already lacking economic viability, cannot be made worse off by the act of transfer.209 It is a far different matter to permit landowners to use the act of transfer to increase rights, which Palazzolo does not even suggest.

This conclusion finds further support in both of the rationales used by the Court in Palazzolo to reject the notice rule. First, the Court emphasized that invalid enactments of regulations cannot become valid by passage of time or title, nor can there be an expiration date on the Takings Clause.210 The point, therefore, was that regulations that are invalid when enacted, cannot somehow become constitutional by mere passage of time. This is quite different from saying that regulations that are valid when enacted can become invalid by mere passage of title.

Second, the Court rejected the notice rule as necessary to protect the original landowner's right to transfer, which would be adversely affected if subsequent purchasers with notice lost

206. The Supreme Court emphasized this concern in Keystone, where it stated that if property can be segmented for a takings analysis, such commonly accepted zoning practices as setback requirements would constitute takings, since they prohibit building on a distinct portion of the property. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987).


208. Palazzolo, 533 U.S. at 643 (Breyer, J., dissenting). See also Echeverria, supra note 4, at 11118-19 (stating that fears of strategic manufacture of takings claims is unwarranted).

209. See supra note 208 and accompanying text.

210. See Palazzolo, 533 U.S. at 626.
the right to challenge restrictions as takings.\textsuperscript{211} This rationale suggests that the appropriate frame of reference is a regulation's impact when first enacted, and that subsequent transfers do not diminish rights. Viewed another way, a purchaser's takings claim is derivative of the owner's at the time the regulation is enacted. Therefore, although the act of transfer cannot diminish rights, neither can it expand rights beyond those held by the owner when the restrictions were enacted. As such, rejection of the notice rule in no way empowers landowners to manufacture takings by strategic transfer.

In summary, \textit{Palazzolo}'s main impact with regard to \textit{Lucas}-type takings is in situations where the property, having no economic viability, is transferred to a purchaser with notice. Whereas prior lower court cases suggested notice precludes a taking claim, \textit{Palazzolo} establishes that notice in such situations does not preclude such a claim.\textsuperscript{212} At the same time, \textit{Palazzolo} does not open the door to new takings claims arising from property transfers themselves. In particular, a purchaser of property with no economic viability does not have a claim under \textit{Palazzolo} if the transfer itself created the problem, or if the seller had previously sold off the developable portion. In both of these instances, it would have been the landowner's action, and not the government action, which resulted in the loss of economic viability.

V. THE \textit{PENN CENTRAL} STANDARD AFTER \textit{PALAZZOLO}

As indicated in the previous section, very few land use regulations will constitute categorical takings under \textit{Lucas}, a fact affirmed in \textit{Palazzolo}. At the same time, \textit{Palazzolo} made clear that even if a regulation falls short of denying all economic viability, it might still constitute a taking under \textit{Penn Central}.\textsuperscript{213} Moreover, even though notice can remain a relevant consideration, notice in and of itself does not preclude a taking under \textit{Penn Central}, as previously suggested by some lower courts.\textsuperscript{214} As a practical matter, therefore, the Court's decision in \textit{Palazzolo} requires that all land use restrictions be analyzed under the \textit{Penn Central

\begin{footnotes}
211. See id. at 627.
213. See Echeverria, \textit{supra} note 4, at 11114.
214. See \textit{supra} note 212 and accompanying text.
\end{footnotes}
Despite this apparent mandate, the Court itself has never provided much guidance on how the test is to operate or be applied.\textsuperscript{216} \textit{Penn Central} acknowledged that the Court's takings jurisprudence has involved essentially ad hoc, factual inquiries, but then noted that several factors . . . have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the government action. A "taking" may be more readily found when the interference can be characterized as physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.\textsuperscript{217}

Stated as such, \textit{Penn Central} seems to equate the third factor, the character of the government action, with physical invasions, which the Court has come to characterize as a form of categorical taking.\textsuperscript{218} It also suggests, however, that broadly applicable regulatory programs will only be takings in extreme situations, depending on the other two factors. With regard to those factors, the Court gave limited guidance on what they mean, engaging in a lengthy discussion of previous cases, but in the end, applying the principles with surprisingly little analysis.\textsuperscript{219}
Nonetheless, several basic propositions emerge from the context of *Penn Central* regarding the economic impact and investment-backed expectations analysis. First, it is clear that restricting pre-existing rights does not in and of itself create a taking, even when resulting in the loss of a valuable property interest. *Penn Central* itself involved such a situation, where prior to the Landmark Law Penn Central possessed quite valuable air rights, removed by the Landmark Law. 220 The fact that Penn Central was deprived of such preexisting rights was of little consequence in the Court’s analysis. Further, the Court cited with approval cases also involving deprivation of previously existing developmental rights. 221

Second, the Court also emphasized in its discussion that substantial diminution in value is not enough by itself to constitute a taking. 222 As an example, it cited the 75% diminution in value in *Euclid v. Ambler Realty Co.*, 223 in which the Court nonetheless sustained the validity of zoning restrictions. 224 Although *Euclid* is generally not considered a takings case, the Court’s discussion of it in *Penn Central* suggests that broadly applied land use restrictions can impose substantial economic loss and still not be a taking. 225

The Court gave less insight into the meaning of interference with investment-backed expectations, 226 although it suggested this was the most important factor. 227 In upholding the Land-
mark Law, however, the Court emphasized that the law did not interfere with the original purpose for which the terminal was built nor with how it had been used for more than sixty-five years. Rather, the new law interfered with only prospective, albeit previously permitted, uses. This arguably suggests that if a regulation does not interfere with the original purpose for which the property was acquired and permits a reasonable return, there is no taking, no matter what changes might have occurred in the interim. Thus, although retention of property over a period of time can easily be seen as re-investment, *Penn Central* focused more on the original purpose for which the property was acquired.

Prior to *Palazzolo* the Court gave little attention to the *Penn Central* test, notwithstanding the Court in *Lucas* affirming the test’s continued relevance. This gave only minimal guidance to lower courts, which for the most part themselves have given only scant attention to developing and applying the *Penn Central* analysis. Although a few courts have attempted to flesh out *Penn Central* in some meaningful fashion, most lower courts have applied it in only a generalized fashion or ignored it altogether. This is in part explained by the Court’s less-than-precise articulation of what role the *Penn Central* factors were to play, and how this role relates to the economic viability test.

with distinct, investment-backed expectations are, of course, relevant considerations."

228. See id. at 136.
229. See id.
230. See id. at 115, 135-36.
232. See Fl. Rock Industries, Inc. v. United States, 45 Fed. Cl. 21, 32-43 (1999); Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992) (listing eight types of questions that should have been answered for a meaningful application of *Penn Central* to the facts of the case, then remanding to trial court).
233. See, e.g., Palazzolo v. State, 746 A.2d 707 (R.I. 2000); Tex. Manufactured Housing Ass’n v. City of Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996); Burnham v. Monroe County, 738 So. 2d 471, 472 (Fla. Dist. Ct. App. 1999); JWL Investors, Inc. v. Guilford County Bd. of Adjustment, 515 S.E.2d 715, 719 (1999); Zealy v. City of Waukesha, 548 N.W.2d 528, 532 (Wis. 1990). See also Echeverria, supra note 184, at 944-45 (stating that many courts limit takings to total economic loss).
234. Not only are the *Penn Central* factors ambiguous, but shortly after *Penn Central*, in *Agins v. City of Tiburon*, the Court articulated a two-part taking test, stating that a taking occurs if a restriction “does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.” *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Court repeated this two-part formulation in a number of taking decisions in the 1980s. See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S.
Despite the continued uncertainties that surround *Penn Central*, *Palazzolo* made clear that all land use regulations are subject to it. In doing so, it added very little to any overall understanding of the test, but did arguably provide two illuminations. First, while holding that notice of restrictions does not preclude a takings claim, a majority of the Court, viewed such notice as a relevant factor in analyzing the degree of interference with investment-backed expectations. This position suggests that the likelihood of a taking under *Penn Central* diminishes, but does not expire altogether, as property is transferred subject to restrictions.

Second, the Court stated that application of the *Penn Central* factors is to be informed by the purpose of the Takings Clause, which is to "prevent 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." This language, originally stated in *Armstrong v. United States*, has often been quoted in takings cases, and thus its use in *Palazzolo* is not surprising. Yet it highlights that the ultimate purpose of the Takings Clause generally, and the *Penn Central* test specifically, is to reach a "fair and just" accommodation between the rights of the public and the rights of individual landowners.

That being said, *Penn Central* and other cases indicate that most land use regulations are valid, and it is only the exceptional case that should constitute a taking. The Court has consistently affirmed the principle that private property interests are necessarily held subject to broader public interests, which will often result in economic loss to landowners. As fre-
quently noted, such economic loss is part of the cost of doing business in a regulated society.\textsuperscript{243} In \textit{Palazzolo}, the Court was careful to affirm the general validity of land use restrictions, even when they result in economic losses to landowners.\textsuperscript{244} Thus, from a broad perspective the Court's regulatory takings jurisprudence, including the \textit{Penn Central} test, suggests that most land use restrictions are constitutional, even when imposing substantial economic losses.

Keeping in mind the guiding principle of a "fair and just" accommodation, the rest of the article briefly reviews the three basic regulatory scenarios under the \textit{Penn Central} factors, which concern the timing of regulation as it relates to development opportunities. Although the fact sensitive nature of the inquiry and the need for "fairness and justice" in any particular case make this analysis subject to some qualification, the following subsection suggests that the first two scenarios below should never be a taking under \textit{Penn Central}. Only in the third scenario, in which property is bought at a price reflecting full development potential, and is subsequently restricted, resulting in substantial economic loss, might a taking occur under \textit{Penn Central}. Even in this third scenario, most restrictions would be constitu-

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v. Mahon, 260 U.S. 393, 413 (1922) ("[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power"); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (explaining that private property interests must at times "yield to the good of the community" for the sake of "progress"); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (private property limited by other public interests, including exercise of police power "to protect the atmosphere, the water and the forests"); Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."). A substantial amount of academic commentary has also documented how the American legal tradition has long recognized that private property rights are not absolute, but are limited by broader public interests. See, e.g., Leslie Bender, \textit{The Taking Clause: Principles or Politics}, 34 \textit{BUFF. L. REV.} 735, 751-52 (1985); Myrl L. Duncan, \textit{Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis}, 26 \textit{ENVTL. L.} 1095, 1133-37 (1996); Rose, \textit{supra} note 197, at 274-82.

\textsuperscript{243} The Court recognized this in \textit{Pennsylvania Coal} where, in the context of introducing the concept of regulatory takings the Court stated that government could hardly go on if it had to pay every time a regulation reduced the value of land. See \textit{Pennsylvania Coal}, 260 U.S. at 413. The Court has reiterated that concept, either explicitly or implicitly, in more recent cases. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (explaining that the landowner "necessarily expects the uses of his property to be restricted, from time to time," by newly enacted regulations).

\textsuperscript{244} \textit{Palazzolo}, 533 U.S. at 620 ("[a] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned").
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tional, but depending on the totality of circumstances, a taking might be found.

A. Low Development Potential Land Restricted After Purchase

Probably the easiest case for analysis under *Penn Central* is where restrictions are placed on property with low development potential, resulting in modest diminution in value. This might occur where the property is only marginally suitable for development, or even if eventually suitable, has no current or anticipated development pressure that might inflate land value. As such, the land is relatively inexpensive, and any restrictions have minimal or modest economic impact.

Absent highly unusual circumstances, this scenario would rarely, if ever, result in a taking. The Court has consistently stated that reasonable regulations resulting in some adverse economic impacts are not takings. Moreover, the interference with reasonable, investment-backed expectations is virtually nil here. Thus, where environmentally sensitive lands are identified at an early stage, prior to significant development potential, takings concerns should be minimal as long as some economic viability remains. In the case of agriculturally restricted land, farming activity itself would be enough to ensure economic viability. Other restrictions, such as limiting land to wetlands, might require minimal development opportunity. In either instance, however, the fact that the restriction greatly limits future development opportunities poses virtually no problem if imposed at a time when such opportunities were limited.

Importantly, even if subsequent events greatly enhance the development potential of the land, there is still no taking if the restrictions were in place prior to such enhancement. This scenario might occur where the restrictions were imposed prior to when the land appreciated in value, and the owner is subsequently seeking an “upzoning” to a more intensive land use. Although refusal to upzone in such a situation might result in significant loss of potential appreciated value for the landowner, this loss can hardly be viewed as a significant interference with

245. *See supra* note 171.

246. Courts have consistently held that farming is an economically viable use of property so as to avoid a categorical taking under *Lucas*. *See, e.g.*, Christensen v. Yolo County Bd. of Supervisors, 995 F.2d 161, 165 (9th Cir. 1993); Jafay v. Bd. of County Comm’rs of Boulder County, 848 P.2d 892 (Colo. 1993); Bell River Assocs. v. Charter Township of China, 565 N.W.2d 695, 700 (Mich. Ct. App. 1997).
investment-backed expectations.

This conclusion likewise would be true if the restricted property were subsequently sold to a purchaser at a price reflecting the potential for more intensive development. Although notice of a restriction does not preclude a taking claim, notice is quite relevant in a takings analysis. In such a situation purchase of the property with the restriction in place is just speculation on a possible zoning change, which is certainly not the type of investment for which compensation is required. This assessment is particularly true if the seller had no valid takings claim under the above scenario. As discussed in Part IV, rejection of the notice rule in *Palazzolo* means that landowners may not be put in a worse situation through land transfers, but does not mean that landowners can strengthen takings claims by strategic transfers.247 As a general matter, therefore, the *Penn Central* analysis would rarely result in a taking when the regulation is enacted and the property has low development potential, even if subsequent events greatly enhance the property's potential value.

B. Low Development of Land When Acquired, High Development When Restricted

A second and somewhat more difficult scenario is when property is acquired with low development potential, which then substantially appreciates in value before restrictions are enacted. Unlike the first scenario, a likely consequence of the restrictions in this scenario is a substantial diminution in property value. Moreover, such a restriction would create a deprivation of pre-existing and quite valuable development opportunities. Taken together, these factors might at first appear to make a strong case for a taking under *Penn Central*.

Despite the substantial diminution in value such a scenario might cause, a substantial interference with investment-backed expectations so as to constitute a taking is unlikely. As in *Penn Central*, the original investment reflects low development potential; the down-zoning only interferes with opportunities subsequent to the investment. The lost appreciated value does not so much reflect the investment of the landowner as a fortuitous windfall from advancing development, much of it even created by government itself through provision of infrastructure.248 Al-

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247. See supra text accompanying notes 187-97.
248. See E. George Rudolph, *Let's Hear It for Due Process—An Up to Date Primer on
though down-zoning in such a situation clearly has an economic impact on the affected landowner, it likely does not amount to the degree of interference with investment-backed expectations contemplated by *Penn Central*. Indeed, *Penn Central* itself essentially involves this same scenario, in which previously permitted development was eliminated, resulting in significant economic impact, but not interfering with what had been the original expectation of the property owner.249

*Penn Central*’s minimization of takings concerns in this situation might be criticized on several grounds. In particular, commentators have suggested that *Penn Central* incorrectly focused on the original investment, rather than the development potential and value immediately before the restriction was imposed.250 The argument goes that, by choosing to retain rather than sell such assets, the landowner has in essence re-invested in the land at the higher value.251 Thus, the determination of interference with investment-backed expectations should use a later, rather than earlier time frame.252

There is some force to this argument, but it is far from compelling when seen from a broader perspective. As suggested above, much of the appreciated value in such situations is typically not the result of actual investments by the landowner, but from fortuitous windfalls from advancing development. This trend is particularly true of environmentally sensitive land, such as farmland, coastal zones, and wetlands, which often becomes valuable because of its development potential totally apart from any initiative by the landowner. For example, prime farmland is often under significant development pressure, with consequential increases in land value due to these development pressures

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249. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1997) (stating there was no interference with investment-backed expectations because property could be used as it had been for the previous 65 years). For a more recent case applying a similar analysis, see *Fl. Dep’t of Envtl. Prot. v. Burgess*, 772 So. 2d 540, 543-44 (Fla. Dist. Ct. App. 2000) (holding that denial of a dredge and fill permit for wetlands did not constitute a taking, since the wetlands in question were purchased in 1956 for recreational purposes, and denial of the permit did not interfere with continued recreational use of the property).


251. See id. at 301.

252. See id. ("[T]he appropriate measure of economic injury is the opportunity foreclosed as a result of unforeseen regulation prohibiting the planned economic use, not the cost of the land.").
and unrelated to any action by the landowners themselves.253

Especially significant is the role of government in creating the development value of such land. As suggested by various commentators, government givings often add significant development value to private land.254 For example, the very scheme of restricting land use adds significant value to neighboring property by minimizing the harms that might otherwise affect landowners.255 Specifically, the increased value of environmentally-sensitive lands in alternative, more intensive land uses, in part exists because residential development would be protected from conflicting commercial and industrial development.256 Any takings arguments based on diminution in value necessarily reflect property values largely enhanced by protective government regulatory schemes.

Even more significant are government “givings” through basic infrastructure support that makes land developable in the first place. Through roads and other infrastructures, government in effect heavily subsidizes development, which in turn results in substantial appreciation of land value.257 The increased value of property between the time it is originally purchased and when later development opportunities arise is often largely attributable to such subsidies.258

For these reasons, the Penn Central focus on original investment, rather than subsequent development potential, makes sense. “Fairness and justice” hardly require compensating landowners for loss of appreciated land value that is typically fortuitous to begin with, and, more often than not, is the result of government actions. In such a situation, restricting land use to what had been the original investment expectation reflects a reasonable and fair “adjust[ment] [of] the benefits and burdens of eco-

253. See A. ANN SORENSON ET AL., AMERICAN FARMLAND TRUST, FARMING ON THE EDGE 7-16 (1997) (identifying and discussing twenty leading agricultural regions of country that are under significant development pressure).


256. See id.

257. See Thompson, supra note 254 (discussing substantial ways that government “givings” in form of infrastructure enhance value of private land).

258. See id.
This analysis has particular force for protection of environmentally sensitive lands, which might have been acquired at a time of low development potential, but were later restricted after land value appreciated. Almost always such appreciation reflects government subsidies that make development both possible and attractive. Subsequent imposition of development restrictions that substantially reduce, but do not altogether eliminate economic viability, should not be viewed as unfair to landowners who fortuitously reaped appreciation after their investment. Indeed, to require compensation in such situations can be viewed as making government pay twice, once through infrastructure that enhances land value and once through payment of just compensation when government regulations diminish property value.

Furthermore, if the original owner in the above scenario would not have a viable takings claim under *Penn Central*, subsequent purchasers from that owner after restrictions are imposed also would not have a viable claim. Once again, notice no longer precludes such a claim, but it remains a relevant factor in analyzing expectations under *Penn Central*. As such, the expectations necessarily reflect that the purchaser knew of the restrictions, and thus was speculating on an upzoning. More importantly, *Palazzolo* suggests that the rights of the purchaser are derivative of the prior owner. If, for the reasons stated above, the prior owner would not have a takings claim, neither would the subsequent purchaser with notice. For the reasons stated in Part IV, a transfer with notice cannot be viewed as ever-increasing rights that did not previously exist.

C. High Development Land When Acquired and When Restricted

A third scenario for analysis under *Penn Central* is where someone purchases property at a price reflecting permitted development opportunities, which is then down-zoned resulting in substantial economic loss. Unlike the previous scenario, in


which the land appreciated in value after purchase, here the purchase price itself reflects the full appreciation. Indeed, this might occur as a simple variation on the previous scenario, with the original owner selling the property shortly before, rather than after, restrictions are imposed.

This is the strongest case for a taking under Penn Central, and presents the most difficult analysis. In such situations, the landowner’s development expectations are arguably backed by the purchase price, and the diminution in value resulting from down-zoning is an interference so as to constitute a taking. Moreover, unlike Penn Central, here the property was likely bought for the purpose of pursuing the previously permitted development, and thus the original investment expectations are frustrated by the restrictions.

The Supreme Court, however, has indicated that even this scenario will usually not constitute a taking, notwithstanding the interference with purchase expectations. The Court has consistently affirmed the need to permit newly-enacted land use regulations, despite inevitable interference with some purchase expectations. Zoning, for example, necessarily involves restricting previous development opportunities when first implemented, which inevitably will affect some recently purchased property. Yet the Court, in consistently affirming the validity of various zoning schemes, has never suggested that an interference with purchase prices in this manner would be unconstitutional.

This conclusion finds further support in the concept of “regulatory risk,” a concept that contributes to the reasonableness of any investment-backed expectations. The Supreme Court recognized this concept in Lucas, where it stated, “that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted

264. See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 384-85 (1994) (noting the authority of government to engage in land use planning even when it diminishes property values); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (landowners should reasonably expect some newly enacted regulations that affect land values); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding zoning ordinance valid despite 75% diminution in value on some land); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law”).


by the State in legitimate exercise of its police powers." This analysis builds on statements by the Court in other regulatory contexts, in which it has strongly affirmed the idea that the risk of regulation is part of economic life, including the distinct possibility of economic loss. The Court has noted that this is particularly true with regard to activities that "[have] long been the source of public concern and the subject of government regulation." This, of course, is certainly true of the land development field, which has long been subject to government regulation and, if anything, the trend is toward greater controls.

For this reason, reasonable investment expectations of property based on development potential must necessarily include the possibility that tighter restrictions might be enacted, depriving the owner of previous development opportunities and resulting in a diminution of property value. As a practical matter, purchase prices should accordingly also be discounted by the possibility of regulation. Similarly, at least with undeveloped property, any development expectations should be viewed as contingent at best, with the possibility that government might subsequently change previous zoning in order to further legitimate public interests.

For these reasons the clearest case for a taking under Penn Central would be where the investment is based on actual development expenditures, rather than speculation on future uses.

267. See id.


271. Various commentators have also recognized the concept of "regulatory risk" as playing a significant role in takings analysis. As noted by Frank Michelman, "regulation [is] an ordinary part of background risk and opportunity, against which we all take our chances . . . as investors in property." Frank I. Michelman, A Skeptical View of "Property Rights" Legislation, 6 FORDHAM ENVTL. L.J. 409, 415 (1995). See also Humbach, supra note 270, at 367; Daniel Mandelker, Investment-Backed Expectations in Taking Law, 27 URB. L. AW. 215, 233-36 (1995).

272. See Eric Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. REV. 77, 134 (1995) ("[I]n the law of takings, a considerable difference exists between a regulation that interferes with a current land use, and one that bans a pro-
In such situations there is a strong public policy that a landowner's expectations be protected. Indeed, a strong argument can be made that takings under *Penn Central* be limited to this scenario, and that interference with expectations based on future, rather than current uses, would never be a taking under *Penn Central*, since such expectations are contingent at best. Under this approach restrictions on undeveloped land would never be a taking even if the purchase price reflected previous development potential, as long as some economic viability remained.

The Supreme Court, however, has implicitly indicated that at least in some limited contexts interference with investments in even undeveloped land might constitute a taking under *Penn Central*. Yet it is clear under the totality of the Court's jurisprudence that the reasonableness of any investment-backed expectations must anticipate further restrictions on property that eliminate previously existing opportunities and substantially diminish property values. If nothing else, this strongly suggests that, at least regarding future uses on undeveloped land, takings under *Penn Central* are to be relatively rare exceptions based on compelling facts.

When might this third type of scenario result in a taking under *Penn Central*, where land is purchased at a price reflecting
then-permitted development potential, and subsequently restricted causing a decrease in value? Any definitive answer is impossible, of course, because the test itself is admittedly ad hoc in nature and based on a complex of factors, which provides significant flexibility but little predictability. Several broad outlines of what such a taking might look like might be ventured, however, bearing in mind that any actual analysis must be based on the particular facts of any case, and what "fairness and justice" would dictate.

First, as emphasized above, mere expectations based on purchase price are insufficient by themselves to establish a taking, since there is a significant element of "regulatory risk" in such situations. This is particularly true with land, which has long been a highly regulated field. Where government has made representations about development, however, beyond current zoning, then expectations about continuation of existing development opportunities are more reasonable. This would be particularly true where government invited the purchase itself. In such a situation "fairness and justice" would require that purchase expectations be protected.

Second, the economic impact of the restriction must be substantial before a taking is even possible, especially as measured by the diminution in value. Again, the Court has indicated that this alone cannot constitute a taking, and has suggested that even significant diminutions based on newly enacted restrictions should not be a taking. For this reason lower courts have consistently upheld restrictions on environmentally sensitive land, even when diminutions exceed 50% of the land value.

276. See supra notes 271-72.
277. See, e.g., A.A. Profiles, Inc. v. Ft. Lauderdale, 850 F.2d 1483, 1488 (11th Cir. 1988) (finding a taking where landowner sought and received approval of development plan prior to purchase); Wheeler v. City of Pleasant Grove, 664 F.2d 99, 100 (5th Cir. 1981) (finding a taking where the city granted a building permit before a new ordinance passed).
278. This, of course, might be a classic case of estoppel, where government would be estopped from enforcing newly enacted restrictions against a landowner that it had encouraged to make a land purchase. See Town of Largo v. Imperial Homes Corp., 309 So. 2d 571, 572-73 (Fla. Dist. Ct. App. 1975).
280. See id. (citing 75% diminution in value in Euclid Ambler Realty, 272 U.S. 365 (1926), as not constituting a taking).
281. See, e.g., Nasser v. City of Homewood, 671 F.2d 432, 438 (11th Cir. 1982) (finding a 53% diminution in value not a taking); Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1031 (3d Cir. 1987) (finding an 87% diminution in value not a taking); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d
Yet, all else being equal, a substantial diminution in value might bring a regulation closer to a *Penn Central* taking, especially where a landowner purchased land at a price reflecting its full development potential. There is no automatic cut-off, since the Court in dictum in *Lucas* stated that even a 95% diminution in value only might be a taking under *Penn Central*. It seems fair to say, however, that generally diminution in value must substantially exceed 50% before any serious consideration is given of a *Penn Central* taking, and should be closer to 90%.

This observation was made in a recent Court of Claims decision, *Walcek v. United States*, which the court held that a 59.7% diminution in value was insufficient to constitute a taking under *Penn Central*. In reaching this conclusion the court reviewed a number of decisions from the Supreme Court, Federal Circuit, and Court of Claims in which economic impact and diminution in value had been considered. It noted that the Supreme Court several times has suggested diminutions “approaching 85 to 90 percent do not necessarily” constitute a taking. Similarly, the Court of Claims had generally “relied on diminutions well in excess of 85 percent before finding a regulatory taking.” On the other hand, it noted that both the Supreme Court and Federal Circuit had rejected takings challenges based on the degree of diminution in value present in the *Walcek* case, which was about 60%.

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284. *See id.* at 271-72.
285. *See id.*
286. *Id.* at 271 (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (holding a zoning ordinance valid despite a 75% diminution in value)); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (finding no taking despite an 87.5% diminution).
287. *Id.* at 271 (citing Loveladies Harbor v. United States, 21 Cl. Ct. 153, 160 (1990) (finding a 99% diminution was taking), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994); *Bowles v. United States*, 31 Fed. Cl. 37, 48-49 (1994)) (finding a 92-100% diminution was a taking); *Formanek v. United States*, 26 Cl. Ct. 332, 340 (1992) (finding an 88% diminution was a taking). *See also Coursen, supra* note 216, at 848 (stating that federal court of claims and federal circuit “seem to have evolved a de facto takings threshold of roughly a ninety percent loss in value” in wetlands cases). *But see Fla. Rock Indus v. United States*, 45 Fed. Cl. 21, 43 (1999) (finding a taking when there was a 73.1% diminution and the court perceived landowner as being singled-out to bestow benefit to the public).
288. *See id.* at 271 (citing Concrete Pipe & Products, Inc. of California v. Constr.
These observations are supported by other court decisions that have also rejected takings challenges despite substantial diminution in value. Although, as noted earlier, a number of courts prior to Palazzolo ignored the Penn Central analysis and only applied the economic viability test, to the extent diminution in value was considered, courts typically sustained restrictions despite substantial economic impacts.

A third consideration in this balance is the final Penn Central factor, the character of the government action. As noted above, the apparent purpose of this as envisioned by Penn Central was to distinguish physical invasions, which are inevitably takings, from general regulatory measures that simply "adjust the burdens and benefits of economic life." Though more general regulatory measures might therefore still constitute takings in extreme instances, courts give more deference to such government actions, especially when they are simply adjusting benefits and burdens.

It might be argued, therefore, that implicit in the "character of the government action" factor is some consideration of the breadth or narrowness of the challenged restriction. The Court itself has frequently noted that takings are less likely to be found where restrictions are broadly applied across a class of landowners, thus ensuring some "average reciprocity of advantage." In contrast, regulations that target only a few select...
landowners are more problematic, since they tend to force a few landowners to bear disproportionate burdens, and typically lack reciprocal benefits that flow from more broadly applied regulatory schemes. Indeed, although the Court itself has not directly equated "character of the government action" with breadth of regulation, individual members of the Court, as well as lower courts, have occasionally done so.

Consideration of the breadth or narrowness of the challenged regulatory scheme also finds support in the governing principle of not forcing some people alone to bear burdens, in which in all fairness and justice, should be borne by the public as a whole. This principle extends beyond the concept of regulatory breadth, yet there is no doubt that a scheme's breadth or narrowness relates to fairness and justice. A narrow or selective regulatory scheme, which in essence targets a few landowners for disproportionate burdens, intuitively appears less fair and just than broader regulatory measures. Not only are reciprocal benefits less likely in such instances, but the perception exists that regulated parties are being "singled out" to shoulder such burdens. Conversely, broad-based regulatory programs not only provide reciprocal benefits, but also help ensure that those...
burdens that do exist are distributed among a large number of people.

Therefore, in analyzing whether restrictions in the third type of scenario constitute a taking, consideration should be given to the breadth or narrowness of the regulatory scheme. In particular, restrictions that are imposed pursuant to a broad regulatory program should require a greater economic impact before a taking is found. Conversely, where a restriction singles out a relatively small number of landowners for regulation, then some lesser, though still substantial, economic impact might constitute a taking.

What particular mix of the above factors should result in a taking when property is bought with development potential and subsequently down-zoned is, of course, not precise. It is fair to say that the less likely a regulation could have been anticipated, the greater the diminution in value, and the more limited the regulatory target, the more likely a taking. However, there is always a risk of regulation, with attendant diminution in land value, so recognition of a taking, even in such a situation, requires unusual facts. For this reason most restrictions under this third scenario, in which land is purchased at a price reflecting high developmental potential, and then is restricted, should still be constitutional.

IV. CONCLUSION

Takings law remains a mess. Indeed, if anything it is messier than ever after Palazzolo. By rejecting the notice rule, the Court eliminated what had been viewed by many as one of the "few bright lines" in an otherwise confusing area of law.\(^{296}\) Moreover, by affirming the two-prong Lucas/Penn Central test, and remanding the case for consideration under Penn Central, the Court sent a clear signal that all restrictions are subject to what the Court itself acknowledges is an ad hoc and ambiguous standard.\(^{297}\)

This state of affairs, at least on its face, also appears to create heightened vulnerability for environmental land use regulation. This fact is most apparent when property is acquired with notice of a regulation and found to have no economic viability. While previously lower courts had typically held that notice precluded

\(^{296}\) See Echeverria, supra note 4.

a takings claim, *Palazzolo* indicated that a taking could occur in these contexts.\(^{298}\) Although highly unusual, the possibility of a regulation denying all economic viability is greatest with restrictions on environmentally sensitive land, which often requires that land be left in its natural state.

Yet from a broader perspective the harm from *Palazzolo* is quite limited, and, for the most part land use regulation in general, and protection of environmentally sensitive land in particular, should remain quite stable. First, if anything, *Palazzolo* affirmed that categorical takings under *Lucas* are limited to extreme situations.\(^{299}\) The Court’s focus under this analysis was not on what had been lost, but on what remained, and it did not require much to be considered “economically viable.”\(^{300}\) Further, any concerns that rejection of a notice rule will lead to “strategic manufacture” of takings are misplaced, since in such situations the loss of economic viability would be attributable to the landowner, rather than to government actions, and therefore not compensable.

Second, most environmental land use restrictions should continue to fare well under the *Penn Central* analysis, even after *Palazzolo*. Although notice no longer precludes a taking claim, a full reading of *Palazzolo* indicates that notice can be a factor in analyzing the degree of interference with investment-backed expectations.\(^{301}\) This alone adds a layer of protection as time passes and transfers occur. More importantly, the basic *Penn Central* test itself should rarely result in a taking. As shown by an analysis of three separate development/restriction scenarios, the *Penn Central* standard permits substantial regulation of undeveloped land, even when interfering with previous development expectations and substantially diminishing value.

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298. See id. at 627-30.
299. See id. at 630-32.
300. See id.
301. See id. at 632-36.
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