2003

Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers

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I. INTRODUCTION

When government takes private property for public uses, the Constitution requires that it pay just compensation.[1] James Madison's original intent in framing the Fifth Amendment's Takings Clause[2] was to force government to be more efficient and to protect citizens from overly aggressive governmental intrusions upon their land.[3] Modern property and economic

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[1] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[2] The Fifth Amendment, at one time, was held to apply exclusively to the federal government and not to the states. The United States Supreme Court in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897), held that the just compensation requirement of the Fifth Amendment was an essential element of the Fourteenth Amendment's due process guarantees and applied to the states. *Id.* at 238-39, 241; Kenneth B. Bley, *Substantive Due Process and Land Use: The Alternative to a Takings Claim*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 291 (David L. Callies ed., 1996) (stating that there is an instant relationship between the takings and due process clauses as the Fourteenth Amendment makes the takings clause of the Fifth Amendment applicable to the states).

[3] Professor Treanor explains that James Madison, who proposed the Fifth Amendment's Takings Clause, originally intended the clause to mandate compensation when the government took property physically, as opposed to by regulation. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995). The high regard expressed by Madison and others for physical rights to private property reflected prevailing notions that land, as the most treasured form of private property, was the gateway to individual autonomy and a necessary prerequisite for full societal participation. *Id.* at 821 & n.198.

theories embrace the just compensation requirement as a fundamental principle in balancing the rights of government and private citizens.[4]

The power of eminent domain[5] and the related power of government, by exercise of its police power,[6] to take private property free of the obliga-

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[4] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 58 (1985).

> Just as two private parties should not be able by joint contrivance to increase the government's obligation to compensate for property taken, neither should the way they pool or divide their interests diminish that obligation. To adopt any other position is to demand a theory of property rights that tells *how many* things are subject to private ownership, which in turn inspires a pointless shell game each time governmental force is directed against the private owner.

Id.; William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 269 (1988) (arguing that many economists would likely claim that the purpose of the Fifth Amendment's compensation clause is to force government to be efficient by requiring it to pay for the resources it obtains when it takes private property for public use). *See also* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1087 (3d ed. 2002) (stating that the takings clause mediates between the government's exercise of its police power and its power of eminent domain by defining which attempted exercises of the police power infringe too heavily on private property interests without sufficient justification thereby resulting in an exercise of the power of eminent domain which may be achieved only by compensating the property owner for the loss of his rights to property).

[5] "Eminent domain is the power of a government to compel owners of real or personal property to transfer it, or some interest in it, to the government. Eminent domain has long been regarded as an inherent power of both the federal and state governments." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 253 (Kermit L. Hall et al. eds., 1992) [hereinafter OXFORD COMPANION]; SINGER, *supra* note 4, at 1086 (defining eminent domain in part by contrasting it with the police power).

[6] The Massachusetts case of *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851), is frequently cited as the beginning point for a discussion of the history of the police power and the state of regulation in America. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 19 (1996). Chief Justice Lemuel Shaw's decision in *Alger*, specifically his justification of the public restriction of private property rights, is often described as "one of the most famous paragraphs in the jurisprudential history of police regulation." *Id.* In *Alger*, Shaw stated:

> We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, — [sic] the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth. . . . It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise.

tion to pay just compensation for the property taken, are central powers necessary for government to function and serve the public's best interest.[7] Courts have articulated many tests for when a taking occurs that necessitates the payment of just compensation by the government.[8] For instance, in *Penn Central Transportation Co. v. New York City*,[9] the United States Supreme Court articulated a three-prong balancing test for noncategorical takings.[10] *Penn Central* has been criticized as promulgating a balancing test that is obscure and difficult to define objectively and consistently.[11] The Court subsequently described two instances of categorical takings,[12] meaning instances of government regulation that result in a per se taking.[13] First, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[14] the Court held that permanent physical occupations by government of private property constitute takings that require the government to pay the property owner compensation, regardless of the triviality of the intrusion.[15] Thereafter, in *Lucas v. South Carolina Coastal Council*,[16] the Supreme Court articulated the categorical rule that government regulation that results in a complete

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Id. at 19-20 (quoting *Alger*, 61 Mass. (7 Cush.) at 84-85); *see supra* note 4; *see infra* notes 7, 50 and accompanying text (further discussing and defining the police power and distinguishing it from eminent domain). The Supreme Court has also addressed important constitutional questions concerning the proper reach of both the state police power and the federal police power. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1 (1824) (discussing the reservation of state police powers); The Lottery Case, 188 U.S. 321 (1903) (discussing Congressional prohibition on the interstate transportation of lottery tickets).

[7] JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 682 (1998).

> Courts and commentators have long debated the relationship between the police power and the power of eminent domain. Many commentators see them as distinct. The police power is a power of regulation while the power of eminent domain, in a narrow sense, is one of the taking, seizing, or conscription of private property for use by the government. Yet, . . . the Supreme Court has read the "taking" language of the Fifth Amendment broadly to hold that exercises of the police power that go "too far" or otherwise impose an unfair burden on a landowner may be treated as exercises of the power of eminent domain.

Id.; *see supra* notes 4-6 and accompanying text.

[8] *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 & n.1 (1990) "Outside the context of traditional exercises of eminent domain, what constitutes a 'taking' is an exceptionally cloudy and complex question."

[9] 438 U.S. 104 (1978).

[10] *See infra* Part II.A.2 and accompanying footnotes (discussing the *Penn Central* balancing test and noncategorical takings).

[11] *See infra* notes 99-100 and accompanying text.

[12] *See infra* Part II.A.1 (defining the categorical takings).

[13] *See id.* and accompanying text.

[14] 458 U.S. 419 (1982).

[15] *Id.* at 434-35, 441; *see infra* note 63 and accompanying text (discussing the *Loretto* categorical takings rule).

[16] 505 U.S. 1003 (1992).

diminution in a property's value is a per se taking.[17] None of these existing tests adequately addresses the dilemma that is the subject of this article: what ought to be the nature of an owner's right to pursue a takings claim when the regulation the owner seeks to challenge was in place when the owner acquired his interest in the property?[18] Thus, a central question in takings law is whether a purchaser may challenge a land use restriction, in the form of a government regulation, as a taking pursuant to the Fifth Amendment when the purchaser's property was already impaired by the regulation at the time the purchaser acquired his interest in the property.[19]

The Supreme Court recognizes two classifications of Fifth Amendment takings: physical takings and regulatory takings.[20] Physical takings of private property by exercise of the power of eminent domain are commonplace in the United States.[21] Governments frequently take private property for myriad public uses, such as the construction of public roads and highways, the acquisition of deteriorated urban areas pursuant to slum clearance or urban renewal plans, and the purchase of privately owned buildings to house government offices.[22]

The Supreme Court first articulated the "regulatory taking" concept in *Pennsylvania Coal Co. v. Mahon*[23] when Justice Holmes, writing for the majority, stated that "if regulation goes too far, it will be recognized as a taking."[24] Thus, "[a] regulatory taking occurs when government, through

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[17] *Id.* at 1019, 1030-31; *see infra* Part II.A.1 and accompanying text (discussing the *Lucas* categorical rule and the exception to the rule).

[18] *See* Thompson, *supra* note 8, at 1449 (referencing the muddled state of the takings doctrine); *infra* notes 99-100 and accompanying text.

[19] *See infra* notes 99-100 and accompanying text.

[20] *E.g.*, Levald v. City of Palm Desert, 998 F.2d 680, 684 (9th Cir. 1993) (stating that "[t]akings claims are divided into two classes: permanent physical occupation claims and regulatory takings"), *cert. denied* 510 U.S. 1093 (1994); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."); David L. Callies & Calvert G. Chipchase, Palazzolo v. Rhode Island*: Ripeness and "Notice" Rule Clarified and Statutory "Background Principles" Narrowed*, 33 URB. LAW. 907 (2001) (disussing physical and regulatory takings as the two principal categories of takings law); Treanor, *supra* note 3, at 782 (stating that while the original understanding of the Takings Clause of the Fifth Amendment did not recognize regulatory takings, the Supreme Court extended the protection of the Fifth Amendment to include regulatory takings in Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

[21] *See infra* notes 22, 103 and accompanying text.

[22] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001) (stating that real world examples of physical takings are ubiquitous).

[23] 260 U.S. 393 (1922).

[24] *Id.* at 415; *see also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967).

> "Taking" is, of course, constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation. Whether a particular injurious result of governmental activity is to be classed as a "taking" is a question which usually arises where the nature of the activity and its

the exercise of the police or regulatory power, so burdens land, or an interest in land, with land use regulations that courts treat the action as if government had intended physically to exercise eminent domain."[25] Since *Pennsylvania Coal*, the Supreme Court has struggled to define the boundaries of the regulatory takings doctrine.[26]

Regulatory takings, in contrast to physical takings, present many unique issues.[27] Governments act through local bodies and agencies in proposing and enacting land use regulation.[28] Property owners are often unable to challenge such acts due to issues of ripeness, standing, and costs of litigation.[29] A recurring regulatory takings issue with contemporary

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> causation of private loss are not themselves disputed; and so a court assigned to differentiate among impacts which are and are not "takings" is essentially engaged in deciding when government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons.

Id.

[25] David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441, 442 (2002); *see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 n.18 (1987) (distinguishing physical takings from regulatory takings); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 n.25 (1978) ("As is implicit in our opinion, we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel.").

[26] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (stating in the context of the Fifth Amendment Takings Clause, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons") (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); *see also* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

> By far the most intractable constitutional property issue is whether certain governmental actions "take" property without satisfying the constitutional requirements of due process and just compensation. A number of property theorists have addressed this vexing issue, but they have yet to agree on the proper disposition. Instead, commentators propose test after test to define "takings," while courts continue to reach ad hoc determinations rather than principled resolutions.

Id. at 561-62; Treanor, *supra* note 3, at 782 (stating that since its decision in *Pennsylvania Coal Co. v. Mahon*, "the Supreme Court has been unable to define clearly what kind of regulations run afoul of Holmes's vague [takings] standard. Attempts to do so, including the Court's recent decisions in *Lucas v. South Carolina Coastal Council* and *Dolan v. City of Tigard*, have created a body of law that more than one recent commentator has described as a 'mess.'") (citations omitted).

[27] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002) (stating that unlike a physical taking, where the taking is obvious, a regulatory "taking is not self-evident, and the analysis is more complex").

[28] *See* NOVAK, *supra* note 6, at 277 n.83 (noting the increased involvement of state and local governments in land use decisions in the twentieth century).

[29] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 618-21 (2001) (discussing standing to challenge the validity of a land use restriction); Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnston City, 473 U.S. 172, 186 (1985) (stating the requirement that a takings claim must be ripe); Roger Marzulla et al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 269 (1995) ("The fact is that the typical regulatory takings case brought before the Court of Federal Claims takes a decade or more to litigate and costs hundreds of thousands or even millions of dollars to pursue."). *Cf.* J. Peter Byrne, *Basic Themes for Regulatory Takings Litigation*, 29 ENVTL. L. 811, 818 (1999) (discussing the costs of litigation to the government as well).

significance concerns whether a successive interest holder who acquires land subject to a pre-existing regulation is barred from challenging the regulation as a taking.[30] Some courts have ruled that such successive interest holders do not have the right to assert takings claims.[31] The rationales articulated in the court decisions vary depending upon whether the property owner alleges (1) a complete deprivation of the property's economically beneficial use, called *Lucas* takings,[32] or (2) a partial or noncategorical impairment of a property owner's investment-backed expectations, called *Penn Central* takings.[33] Courts have rebuffed *Lucas* takings challenges by holding that because the challenged regulation predated the property owner's acquisition of title, the owner's title did not include the use prohibited by the regulation.[34] Likewise, courts have rejected *Penn Central* takings challenges by finding that the property owner's notice of pre-existing regulations divests the owner of any reasonable investment-backed expectation to use the property in a manner prohibited by the regulation.[35]

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[30] *See, e.g.*, WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 184-86 (1985) (arguing that a policy that only allows property owners to bring a takings claim if they owned the land prior to a restrictive regulation "is itself a restraint on alienation of property and a taking").

[31] *See* Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997), *cert. denied*, 521 U.S. 1132 (1997); Kim v. City of New York, 681 N.E.2d 312, 314, 319 (N.Y. 1997), *cert. denied*, 522 U.S. 809 (1997), *reh'g denied*, 522 U.S. 1008 (1997); Brotherton v. New York Dep't of Envtl. Conservation, 675 N.Y.S.2d 121, 122-23 (App. Div. 1998); Gazza v. New York Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1039 (N.Y. App. Div. 1997), *cert. denied*, 522 U.S. 813 (1997); Palazzolo v. Rhode Island, 746 A.2d 707, 715 (R.I. 2000), *rev'd in part*, 533 U.S. 606 (2001).

[32] *See infra* Part II.A.1 and accompanying footnotes (discussing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and the categorical takings rule when a regulation deprives property of all economically beneficial use).

[33] *See infra* Part II.A.2 and accompanying footnotes (discussing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), and its balancing test, including the reasonable investment-backed expectations inquiry, to be applied when the takings challenge is other than the *Lucas* or *Loretto* categorical taking).

[34] *See Anello*, 678 N.E.2d at 871 (holding that the owner's takings claim failed as she purchased the property two years after the ordinance's enactment and therefore "never acquired an unfettered right to build on the property free from the steep-slope ordinance"); *Kim*, 681 N.E.2d at 314, 319 (finding that property owners' obligation to provide lateral support existed prior to owner's acquisition of property, property owners were on constructive notice of this obligation under the state's property law when they acquired the property, and therefore, enforcement by the locality of this legal obligation did not result in a compensable taking); *Brotherton*, 675 N.Y.S.2d at 123 (stating that petitioner's takings claim failed because he could not show that when he acquired the property he had the right to use it in the manner he proposed); *Gazza*, 679 N.E.2d at 1039-41 (stating that successive purchasers may challenge previously enacted land use restrictions as unconstitutional, illegitimate and beyond the legitimate police power of government, but may not pursue a compensatory takings claim); *Palazzolo*, 746 A.2d at 715 (finding that pre-existing regulations indicate that the government may avoid paying compensation because such regulations evidence "that the proscribed use interests were not part of [the property owner's] title to begin with").

[35] *See Good*, 189 F.3d at 1360. Good acquired the subject property after federal and state regulations, as well as local approval processes, were already in place imposing significant development

Other courts have held that successive interest holders may challenge pre-existing regulations.[36] These courts tend to (1) emphasize the impact of the regulation on the property itself, as opposed to emphasizing the status of the title, and (2) affirm the right of the owner at the time of the regulatory imposition to transfer the takings claim, as a property interest, to successive interest holders.[37]

The United States Supreme Court, in *Palazzolo v. Rhode Island*,[38] considered the relevance of a property owner's notice of pre-existing regulations on his ability to pursue a takings challenge under *Lucas* and *Penn*

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restrictions. *Id.* at 1360. This led the court to conclude that Good had both constructive and actual knowledge of the pre-existing regulatory environment. *Id.* at 1362. The court considered the issue of reasonable investment-backed expectations to be dispositive and cited authority for the proposition that "[t]he requirement of investment-backed expectations 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.'" *Id.* at 1360 (citing Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994), *motion denied, partial summary judgment granted*, 33 Fed. Cl. 590 (1995)). The *Good* court then held that given the regulatory climate that existed at the time Good obtained his interest in the subject property, he could have "no reasonable expectation that he would obtain approval to fill . . . in order to develop the land." *Id.* at 1361-62; *Anello*, 678 N.E.2d at 871. The property owner who acquired property after the passage of a "steep-slope" ordinance did not experience a taking because "if property owners were permitted to assert compensatory takings claims based on enforcement of preexisting regulations, the traditional takings analysis . . . and its inquiry into 'the extent to which the regulation has interfered with distinct investment-backed expectations,' would be rendered hopelessly circular." *Id.* (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124); *Palazzolo*, 746 A.2d at 717. The Rhode Island Supreme Court found notice dispositive of a *Penn Central* takings claim and held that notice of the pre-existing regulation divested Mr. Palazzolo of any reasonable expectation that he could fill and develop the property in contravention of the regulation at issue. *Id.*

[36] *See* Andrus v. Allard, 444 U.S. 51, 64 n. 21 (1979); Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545, 561 (Md. 2002); East Cape May Assocs. v. New Jersey Dep't of Envtl. Protection, 693 A.2d 114, 120 (N.J. Super. Ct. App. Div. 1997), *cert. denied*, 785 A.2d 439 (N.J. 2001); Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517, 520-21 (N.Y. 1954).

[37] *See Andrus*, 444 U.S. at 64 n.21. The Secretary of the Interior contended that the Eagle Protection and Migratory Bird Treaty Acts permitted the government to prohibit individuals from engaging in commerce in the parts of protected birds regardless of when the protected birds were originally taken. *Id.* at 55-56. The Secretary also raised the issue of whether the appellees, who were engaged in the sale of Indian artifacts partly composed of feathers from protected birds, had standing to assert a takings claim. The Secretary asserted that appellees had not clearly pled that they acquired their property interest prior to the date the ban had come into force. *Id.* at 64 n.21. The Court held that "[t]he timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations, but it does not erect a jurisdictional obstacle at the threshold." *Id.*; *See also Richard Roeser Prof'l Builder, Inc.*, 793 A.2d at 547. The court considered the fact that the purchaser knew, prior to purchasing the land, that her intended use would require a variance and inquired whether this knowledge compelled a finding that the purchaser's hardship was self-created, thereby requiring that the variance be denied. The court held that, in the case of variances, "if the prior owner has not self-created a hardship, a self-created hardship is not immaculately conceived merely because the new owner obtains title." *Id.* at 561; *East Cape May Assocs.*, 693 A.2d at 120 (holding that subsequent property owners retain the rights of their predecessors in title); *Vernon Park Realty*, 121 N.E.2d at 520 ("Purchase of property with knowledge of the restriction does not bar the purchaser from testing the validity of the zoning ordinance since the zoning ordinance in the very nature of things has reference to land rather than to owner.").

[38] 533 U.S. 606 (2001).

Central.[39] The Court unanimously agreed that notice of pre-existing regulations does not, per se, prevent a successive interest holder from pursuing a takings claim.[40] The Court split, however, on the question of whether notice of pre-existing regulations and subsequent transfers of title should factor at all into a court's determination of whether a *Penn Central* taking has occurred.[41] The Court held that notice of a pre-existing regulation was not dispositive of Mr. Palazzolo's right to bring a *Penn Central* regulatory takings claim, rejecting a contrary decision by the Supreme Court of Rhode Island.[42]

The thesis of this article is that a potential takings claim materializes at the moment government regulates property because the takings claim is a distinct and recognizable form of property that exists independent of the property owner.[43] Thus, the land use restriction, in the form of the government regulation, should be evaluated as a restriction on the property itself and is unrelated to the ownership status of the property.[44] A rule that limits or bars successive interest holders from asserting the full takings claim effectively eviscerates the takings clause for many forms of regulatory takings.[45] The Supreme Court correctly keeps takings claims revived

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[39] *See id.* at 626-27.

[40] Justice Kennedy, writing for the plurality in *Palazzolo*, rejected the lower court's holding that Mr. Palazzolo's prior knowledge of legal restrictions barred his regulatory takings claim as a matter of law. *Id.* At least in principle, the entire Court held that an owner's prior knowledge of regulatory restrictions will not automatically bar the owner from bringing a regulatory takings claim. *Id.* at 627, 632-33, 637, 655. Justice Scalia concurred in the judgment but said that notice was not dispositive because it was irrelevant to the *Penn Central* takings analysis. *Id.* at 636-37 (Scalia, J., concurring) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992)). With the exception of the *Lucas* background principles of the state law of property and nuisance, "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." *Id.* at 637. Justice O'Connor concurred as well but suggested that notice, although not determinative in a *Penn Central* takings analysis, might be relevant and could militate against a finding of a regulatory taking. *Id.* at 632-36. Thus, according to Justice O'Connor, notice of regulations pre-dating one's ownership would not necessarily deprive a property owner of the right to challenge the regulation as a taking, although in some instances it would be a considerable factor. Justices Ginsburg, Souter, Breyer, and Stevens dissented, with Justice Stevens dissenting in part. While they dissented on various grounds, all stated that they concurred in Justice O'Connor's understanding of the relevance of the notice rule to subsequent acquires of title. *Id.* at 643, 645, 654; *see infra* Part III (further detailing the positions of each of the Justices).

[41] *Id.* at 632-37 (O'Connor & Scalia, JJ., concurring).

[42] *Id.* at 632.

[43] *See* discussion *infra* Part II.

[44] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 n.2 (1987):

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

[45] *But cf.* Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 757 & n.182 (2002) (citing

under the *Penn Central* analysis for successive interest holders by holding that such individuals or entities are not per se barred from challenging pre-existing restrictions.[46] However, *Palazzolo* still raises more questions than it resolves, leaving certain property owners and courts with imprecise standards and guidelines to apply in these types of disputes.[47] The Supreme Court is divided on how courts should consider the effect of a successive owner's notice of a pre-existing regulation.[48] The failure to articulate a clear rule may result in a situation in which the takings claim is significantly reduced or eliminated for successive interest holders.[49] This result is contrary to both property and economic theories.[50] Further, it undermines both the notion that government should compensate for takings, whether physical or regulatory, and the predictability that landowners need to realize full value from their property.

Part II of this article presents a brief history of regulatory takings, investment-backed expectations, and the notice rule. More specifically, Part II discusses foundational concepts inherent in the above three doctrines, an understanding of which is important to appreciating the significance of the Supreme Court division on the notice issue. In this regard, Part II serves as a backdrop to the *Palazzolo* case. Part III examines the *Palazzolo* decision and some of the difficulties with applying the notice rule to the investment-backed expectations doctrine. Part III focuses on the critical aspect of the Court's opinion as it relates to the notice rule, which is the divergence between Justices O'Connor and Scalia on the application of the notice rule to the takings analysis. Part IV analyzes the notice rule in light of modern theories of property and economics. It presents three examples of property ownership and development and uses these examples to examine the consequences of the current Supreme Court's position as to the role of the notice rule in regulatory takings challenges. Finally, I apply my thesis to the same examples. Part V concludes by summarizing the policies underlying a clear rule by which successive interest holders may assert the full takings claims that arose during the prior ownership.

Palazzolo, 533 U.S. 606, and stating that a substantive due process analysis, not the Takings Clause, should be used to review claims by landowners "that new public policies are fundamentally unfair or arbitrary").

[46] *Palazzolo*, 533 U.S. at 626-32.

[47] *See infra* note 157 and accompanying text.

[48] *See infra* Part III.

[49] *See infra* notes 70, 94, and 164 (discussing how the investment-backed expectations prong of the *Penn Central* analysis is increasingly used to reject regulatory takings claims).

[50] *See infra* Part IV.B-C.

II. AN INTRODUCTION TO REGULATORY TAKINGS, INVESTMENT-BACKED EXPECTATIONS, AND THE NOTICE RULE

A. *Regulatory Takings*

It is well established that government may regulate, by exercise of its police power,[51] in a way that burdens the individual's use and enjoyment of his private property.[52] Pursuant to such powers, state governments have enacted numerous types of regulations, including zoning restrictions.[53] Notwithstanding the essential nature of the police power to government,

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[51] *See* Pa. 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. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."); Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 540 (1914) (discussing dangerous activities and recognizing that states may properly exercise their police powers in regulating inherently dangerous businesses such as coal mining); Ambler Realty Co. v. Village of Euclid, 297 F. 307, 314 (N.D. Ohio 1924) (suggesting that, although the police power is not susceptible to exact definition, if it is to be properly exercised it must be for the purpose of maintaining and preserving "the public peace, public order, public morals, or public safety"), *rev'd*, 272 U.S. 365 (1926); *see also* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928) (discussing the police power in the context of "health, safety, convenience, and general welfare of the [subject] inhabitants"); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (stating that the police power is one of government's most essential powers and one least susceptible to limitation); U.S. DEP'T OF COMMERCE, ADVISORY COMMITTEE ON CITY PLANNING AND ZONING: A STANDARD CITY PLANNING ENABLING ACT 7 n.8 (1928) [hereinafter STANDARD CITY PLANNING ENABLING ACT] (empowering municipalities to implement a municipal plan and acknowledging that city governments should seek to promote "the public health, convenience, safety, and welfare"); U.S. DEP'T OF COMMERCE, ADVISORY COMMITTEE ON ZONING: A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 4 n.3 (rev. ed. 1926) [hereinafter STANDARD STATE ZONING ENABLING ACT] ("The main pillars on which the police power rests are these four, viz, health, safety, morals, and general welfare. It is wise, therefore, to limit the purposes of this enactment to these four.").

[52] Professor Steven J. Eagle rightly warns that the sloppy interchange of the concepts of "property," "parcel" and "land" as synonymous when engaged in the takings analysis is a recipe for disaster. Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 351 (1998). This article uses the meaning of the term "property" as expressed by the United States Supreme Court in *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.6 (1980) (citing United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945)):

> The term "property" as used in the Takings Clause includes the entire "group of rights inhering in the citizen's ownership." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." Instead, it denotes the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it.

(citations omitted).

[53] STANDARD STATE ZONING ENABLING ACT, *supra* note 51, at 1. "Zoning is undertaken under the police power and is well within the powers granted to the legislature by the constitutions of the various States." *Id.*; Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 370-71 (1994).

> Zoning may be defined, in general, as action by the state, or by a city under authority of the state, to control, under the police power: (a) The heights to which buildings may be erected; (b) The area of lots that must be left unbuilt upon; and (c) The uses to which buildings and lots may be put.

Id. (citation omitted).

the United States Supreme Court maintains that limitations exist on a sovereign's ability to regulate the uses to which private citizens may put their property.[54] Thus, to the extent courts have restricted government's exercise of its police power, attempted regulations of property through use of the police power have been (1) invalidated as unconstitutional because they were not enacted pursuant to legitimate state interests;[55] (2) classified as possessory takings either because the government's actions were tantamount to a "permanent physical occupation"[56] or because they were tantamount to a "temporary physical invasion;"[57] or (3) characterized as regulatory takings, requiring exercise of the power of eminent domain and the payment of just compensation, because they left the regulated property with little if any economic viability.[58]

The cases have essentially divided takings into two types, categorical

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[54] *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 473 (1987) (stating that the extent of diminution in value resulting from a regulation is one consideration in determining the limits of police power regulation). The Court considered two issues when deciding whether the state of Pennsylvania exceeded its police power authority when enacting the Kohler Act. *Id.* at 485. First, the Court considered whether the Act furthered a legitimate state interest as opposed to primarily an interest private in nature. *Id.* Second, the Court considered the extent of the economic impact resulting from the Act and whether it destroyed the economic viability of the property. *See id.* (indicating that the Supreme Court later articulated its analysis in *Pennsylvania Coal* as a two-part regulatory takings test in *Agins v. Tiburon*, 447 U.S. 255 (1980)).

[55] *See, e.g.*, Lawrence Berger, *Public Use, Substantive Due Process and Takings—An Integration*, 74 NEB. L. REV. 843 (1995). Professor Berger observes that the Fifth Amendment contains a substantive due process component such that a government regulation could be "so substantively illegitimate" as to deprive a property owner subject to the regulation of his property without the benefit of due process. *Id.* at 843-44. The remedy available for substantive due process violations in this context "has been to grant specific relief—in this case to void the regulation or regulatory activity at the option of the person harmed by it. In addition damages under § 1983 [of the Civil Rights Act] have been available for the harm done while the government imposition has been in effect." *Id.* at 852.

[56] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-33 (1982). *Loretto* established the categorical takings rule that "permanent physical occupations" are takings regardless of the police power objectives served whereas mere "temporary physical invasions" are subject to the *Penn Central* balancing test to determine whether or not they rise to the level of compensable Fifth Amendment takings. *See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (stating that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good").

[57] *See supra* note 56.

[58] *E.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). The extent of the diminution in value is relevant in assessing whether the government has exceeded the limitations on the police power. *Id.* "When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id. See also Loretto*, 458 U.S. at 430 ("More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property."); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (articulating a per se regulatory takings rule when regulations deprive an owner of all economically beneficial use of property with the exception that government shall not be required to compensate owners in such situations if the state could have achieved an identical result through resort to the state's "background principles of nuisance and property law").

and noncategorical takings.[59] Categorical takings refer to regulatory actions that are compensable, per se, and "without case-specific inquiry into the public interest advanced in support of the restraint."[60] Noncategorical takings require comparing the public benefits obtained by the regulatory restraint to the burden on the private property owner to determine whether the regulatory action is compensable.[61] If a taking is categorical, courts apply either *Lucas*[62] (if the regulation deprives the property of all economically beneficial use) or *Loretto*[63] (if the regulation constitutes a permanent physical occupation of the property).[64] If a taking is noncategorical, then *Penn Central* applies.[65]

Penn Central marked the beginning of the modern era of takings law as applied to regulatory takings that partially impair the use of private property.[66] The Court addressed the takings problem by articulating a set of three factors for consideration in the as-applied,[67] noncategorical takings challenges: (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with distinct investment-backed expectations; and (3) the character of the government action.[68] Practically since

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[59] DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 87-88 (2002).

[60] *Lucas*, 505 U.S. at 1015.

[61] *Id.*; *Penn Central*, 438 U.S. at 124-25; *see Loretto*, 458 U.S. 419. The decision does not affect the "multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* at 440.

[62] 505 U.S. 1003 (1992).

[63] 458 U.S. 419 (1982).

[64] *Lucas*, 505 U.S. at 1015. The *Lucas* Court identified two types of categorical takings. "The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Id.* (referencing *Loretto*, 458 U.S. 419 at 435-40, for the first proposition).

[65] *Penn Central*, 438 U.S. at 104; *see* Palazzolo v. Rhode Island, 533 U.S. 606, 630-31 (2001) (applying *Penn Central* and its balancing test after finding no *Lucas* categorical taking).

[66] *Penn Central*, 438 U.S. at 104; TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 7 (Thomas E. Roberts ed., 2002); JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 643 (2001). After a series of cases that the United Supreme Court heard in the late 1920's, "the Supreme Court did not revisit the takings clause in a significant way until 1978 in the foundational case of *Penn Central Transportation Co. v. City of New York*." *Id.*

[67] The typical as-applied takings claim asks whether a permit denial works a taking, a fact-specific question that cannot be answered until the owner applies for the permit and receives a final rejection. The as-applied takings claim is contrasted with the facial takings claim in which the property owner contends that the regulation as written, under all circumstances, and independent of any fact specific inquiry is unconstitutional or creates a taking. *E.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 318 (2002); Yee v. City of Escondido, 503 U.S. 519, 534 (1992); Phillip Morris, Inc. v. Reilly, 312 F.3d 24, 52 (1st Cir. 2002) (Lipez, J., dissenting).

[68] *Penn Central*, 438 U.S. at 124. Courts subsequently modified the second prong of the *Penn Central* analysis and substituted the adjective "reasonable" for "distinct" and thus the concept of "distinct investment-backed expectations" has fallen into virtual disuse. R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?* 9 N.Y.U. ENVT'L L.J. 449, 460 (2001) (citing Kaiser Aetna

the inception of this three-factor balancing test, courts have conceded that the *Penn Central* compensation scheme is inexact.[69] They have struggled to create a "more correct" compensability test, meaning one that, with predictability, passes society's test of fairness: "is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted?"[70]

1. *The* Lucas *Categorical Takings Analysis*

Categorical takings are defined as government activities that are reviewed according to a per se test as opposed to ad hoc, fact-intensive inquiries.[71] When government works a permanent physical occupation of property[72] or deprives property of all economic value,[73] the courts must apply the categorical takings standards developed in *Loretto*[74] or *Lucas*,[75]

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v. United States, 444 U.S. 164 (1979)). For a discussion of the evolution of adjectives associated with investment-backed expectations, see *infra* Part II.A.2.

[69] Rose, *supra* note 26, at 561-62; *infra* Part II.A.2, note 95 and accompanying text.

[70] Michelman, *supra* note 24, at 1171-72. During the developmental stages of the regulatory takings doctrine, courts articulated various tests for analyzing when a regulation results in a taking of property requiring compensation. For example, in *Penn Central*, the Court recognized the difficulty inherent in improving the balancing test:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So . . . is the character of the governmental action.

Penn Central, 438 U.S. at 124 (citations omitted); *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922) (extent of diminution in value is one factor in determining whether an exercise of the police power "goes too far" so as to implicate the Takings Clause and require compensation); Michelman, *supra* note 24, at 1183-84:

> Examination of judicial decisions and of legal commentary focused on them indicates that one of four factors has usually been deemed critical in classifying an occasion as compensable or not: (1) whether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.

Some contend that these variations reflect either "a gradual degradation in the Court's understanding of the concept from its original foundation in Michelman" or, alternatively, the Court's changing view of when government's decision to regulate entitles an owner to compensation under the Takings Clause. Radford & Breemer, *supra* note 68, at 460.

[71] *E.g.* SINGER, *supra* note 66, at 648; *see supra* Part II.A and accompanying text (defining categorical takings).

[72] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1130 (5th ed. 2002) (discussing Loretto v. Teleprompter Manhattan CATV Corp.). "*Loretto* represents little more than the U.S. Supreme Court's endorsement of a rule of long standing. If government action is pictured as having worked a permanent physical occupation, it appears that there is always a taking, no matter how inconsequential or trivial the invasion." *Id.*

[73] *See supra* note 64 (discussing the *Lucas* categorical takings rule).

[74] *Loretto*, 458 U.S. 419.

[75] *Lucas*, 505 U.S. 1003.

respectively.[76] If the government's activity does not pass the per se test, the government's attempted interference with the property owner's property is invalid, absent the payment of compensation.[77]

In *Loretto*, New York authorized a "minor but permanent physical occupation" of certain owners' properties pursuant to a New York state statute that allowed cable television providers to locate their equipment on property owners' buildings and prohibited affected property owners from demanding payment from the cable companies in excess of a "reasonable" amount, determined by the State Commission.[78] The United States Supreme Court articulated a categorical physical takings test and held that a "permanent physical occupation" of private property by the government is a per se taking (with the exception of nuisance controls).[79]

Ten years later, the Court considered *Lucas v. South Carolina Coastal Council* involving South Carolina's Beachfront Management Act, which prohibited Mr. Lucas, the owner of two residential lots on the barrier islands in South Carolina, from building any permanent structures on his property.[80] Mr. Lucas contended that even if the Act was a lawful exercise by South Carolina of its police power, the effect of the regulation was to totally deplete the value of his property, and that the total elimination of all of his property's value entitled him to compensation for a taking, regardless of whether the state was acting in furtherance of valid police power objectives.[81] The Court promulgated a categorical regulatory takings test pursuant to which government regulations that "deprive[] land of all economically beneficial use" are per se takings except that government shall not be required to compensate owners in such situations if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[82] Thus, the *Lucas* case expresses not only a categorical test, but also an exception to the test for those regulations that, over time, become so engrained in the society's fabric as to be considered to be general principles of the society's

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[76] *See* DUKEMINIER & KRIER, *supra* note 72, at 1149 (articulating that *Pennsylvania Coal* is a classic example of a test different from that of the categorical takings cases); SINGER, *supra* note 66, at 648; *supra* Part II.A.1 (discussing *Lucas* and *Loretto* generally).

[77] *E.g.*, SINGER, *supra* note 66, at 648.

[78] *Loretto*, 458 U.S. at 421, 423.

[79] *Id.* at 432; DUKEMINIER & KRIER, *supra* note 72, at 1140. *Loretto* is a physical takings case as opposed to regulatory takings case. Physical takings have received significantly different treatment by the courts compared with regulatory takings. *See generally infra* Part II.A (distinguishing physical and regulatory taking treatment). This article confines its analysis of the interplay between the notice rule and takings claims to the realm of regulatory takings.

[80] *Lucas*, 505 U.S. at 1007.

[81] *Id.* at 1009.

[82] *Id.* at 1027.

property law.[83]

2. *The* Penn Central *Noncategorical Takings Analysis*

In 1978, the United States Supreme Court addressed a noncategorical regulatory taking issue in *Penn Central*.[84] New York City, as part of its comprehensive program to preserve certain designated city landmarks, enacted New York City's Landmark Preservation Law, thereby restricting the development of certain designated historic landmarks, including Grand Central Terminal.[85] Penn Central applied for permission to develop above Grand Central Terminal; its applications were denied, and Penn Central sued the City of New York, alleging that the regulation effected a taking of its property without payment of just compensation in violation of the federal Constitution.[86] The Supreme Court adopted Professor Frank I. Michelman's investment-backed expectations view, as articulated in his 1967 article entitled *Property, Utility, and Fairness*;[87] it added the adjective "distinct" and promulgated a three-factor balancing test to be applied when a regulation does not rise to the level of a *Loretto* permanent physical invasion or a *Lucas* total deprivation of a property's economic viability.[88] Pursuant to *Penn Central*, courts deciding noncategorical, regulatory takings cases may properly consider (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations; and (3) the character of the regulation.[89] The Court modified the investment-backed expectations doctrine yet again in *Kaiser Aetna v. United States*,[90] a regulatory takings case, when it announced that the earlier *Penn Central* balancing test required consideration of the extent of a regulation's "interference with reasonable investment[-]backed expectations."[91] "Whether

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[83] Marla E. Mansfield, *"By the Dawn's Early Light:" The Administrative State Still Stands After the 2000 Supreme Court Term (Commerce Clause, Delegation, and Takings)*, 37 TULSA L. REV. 205, 301 (2001).

[84] 438 U.S. at 104.

[85] *Penn Central*, 438 U.S. at 107-09.

[86] *Id.* at 118-19. Grand Central Terminal was owned by the Penn Central Transportation Co. and its affiliates (collectively "Penn Central"). *Id.* at 115.

[87] Professor Frank I. Michelman is widely credited with first articulating the concept of "investment-backed expectations." Michelman, *supra* note 24, at 1231 (applying utilitarian property theory to determine when government action requires compensation and articulating, for the first time, the investment-backed expectations doctrine); Eagle, *supra* note 52, at 402.

[88] *Penn Central*, 438 U.S. at 124; *see supra* Part II.A.1 (discussing the *Lucas* and *Loretto* cases).

[89] *Penn Central*, 438 U.S. at 124; Eagle, *supra* note 52, at 402; Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 216 (1995).

[90] 444 U.S. 164, 175 (1979).

[91] *Id.* This article will not discuss reasonable versus distinct investment-backed expectations because the Court in *Palazzolo* applied the reasonableness test; thus, the proper framework at present is the reasonableness of investment-backed expectations. *Palazzolo*, 533 U.S. at 617. "Reasonable investment-backed expectations" later become "reasonable expectations" in the dissent in Nollan v.

the formulation is 'distinct expectations' or (as is more often employed today) 'reasonable expectations,' it is clear that the degree to which the government action reflects a sharp and unanticipated change in the permissible uses of property is today a recognized element in *ad hoc* takings analysis."[92]

The investment-backed expectations requirement plays a significant role in regulatory takings claims.[93] A temptation arises to dismiss investment-backed expectations as merely one of several factors rightly considered by the courts as part of the *Penn Central* balancing test when deciding regulatory takings cases.[94] But courts have used the investment-backed expectations test to impede regulatory takings claims.[95] Moreover, the *Penn Central* Court labeled this test the most important factor, and the investment-backed expectations test seems to work strongly against a property owner who was aware of the restriction when the property was purchased.[96] The Supreme Court's regulatory takings doctrine, as expressed in *Penn Central,* states that before a property owner can establish a regulatory taking, he must prove, among other things, that the regulation interferes

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California Coastal Comm'n, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting). *See also* Eagle, *supra* note 52, at 402 (noting the treatment of investment-backed expectations by the dissent in *Nollan*); Radford & Breemer, *supra* note 68, at 460 (From *Kaiser Aetna* to the present, "the takings inquiry shifted to whether restrictive land-use regulations frustrated an owner's '*reasonable* investment-backed expectations.'") (emphasis in original).

[92] DANA & MERRILL, *supra* note 59, at 157.

[93] *See Penn Central,* 438 U.S. at 146-48 (Rehnquist, J., dissenting).

> Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired. . . . The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

Id. (internal citations omitted).

[94] *See Palazzolo,* 533 U.S. at 633 (O'Connor, J., concurring) (stating that investment-backed expectations "is one of a number of factors that a court must examine" as set forth in *Penn Central*).

[95] Robert Meltz, *What Role Does the Law Existing When a Property is Acquired Have in Analyzing a Later Taking Claim?: The "Notice Rule"*, 64 A.L.I.-A.B.A. 381, 393 (2001) (summarizing the status of law prior to the *Palazzolo* decision as follows: "Though often characterized as a 'balancing' test, the three *Penn Central* factors reduce to a categorical no-taking rule, in the view of most courts to address the matter, when reasonable development expectations are found totally lacking.by virtue of a pre-existing regulatory regime."); Radford & Breemer, *supra* note 68, at 449-50 (stating that in recent years, the judiciary has relied upon the poorly defined doctrine of investment-backed expectations to deny plaintiffs' regulatory takings claims).

[96] *See* Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions,* 22 N. ILL. U. L. REV. 419, 432 (2002) (stating that *Penn Central* itself labeled investment-backed expectations as the most important of the three balancing factors, and citing to *Penn Central,* 438 U.S. at 124); Meltz, *supra* note 95, at 381, 388 (citing *Ruckelshaus v. Monsanto,* 467 U.S. 986 (1984), in articulating that, under certain circumstances, the reasonable investment-backed expectations factor could be determinative of the takings inquiry); Radford & Breemer, *supra* note 68, at 449 (calling *Penn Central* investment-backed expectations a "'significant' factor in determining whether the measure has taken private property").

with his investment-backed expectations.[97] The requirement of demonstrating thwarted investment-backed expectations is critical because regulatory takings occur when a government constraint so diminishes the individual's property value as to compel the exercise of eminent domain and the payment of compensation.[98] Courts engage in the investment-backed expectations inquiry to define the nature of the individual's property interest affected by government regulation.[99] Despite the importance of investment-backed expectations in takings law, lower courts, both federal and state, are divided on how the doctrine of investment-backed expectations applies, and the Supreme Court has not clearly defined the meaning of the term.[100] "The doctrine of investment-backed expectations, originally a benign and potentially useful tool for identifying compensable property interests, has become a hopelessly circular and indeterminate paradigm that extinguishes constitutionally protected rights in deference to newly enacted regulations that may be pretextual or even illegal."[101] The greater the foreseeability of the invasion of property rights to the owner, the less likely the courts are to find a regulatory event worthy of compensation applying the

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[97] *Supra* Part II.A.2 (discussing the *Penn Central* test).

[98] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (defining the permissible reaches of the police power); JUERGENSMEYER & ROBERTS, *supra* note 7, at 682 (distinguishing the power of eminent domain and the police power and stating that when the government attempts to regulate past the permissible reaches of its police power, it may be compelled to reach its intended goals through the exercise of its power of eminent domain).

[99] Radford & Breemer, *supra* note 68, at 449; *see also* Michelman, *supra* note 24, at 1231 (applying utilitarian property theory to determine when government action requires compensation and articulating, for the first time, the investment-backed expectations doctrine).

[100] Mandelker, *supra* note 89, at 249; *see, e.g.*, Radford & Breemer, *supra* note 68, at 449 ("[N]either courts nor commentators have been able to agree on the meaning or applicability of investment-backed expectations in takings law."). Every purchaser, transferee, devisee, in other words, every successive owner of property retains certain expectations regarding the potential uses of the property. The expectations may pertain to the short term or to the long term; they may be fanciful or grounded in sound economic analysis that incorporates externalities and unanticipated costs associated with pursuit of the expectations. Property owners form these expectations independent of the taking and each owner is similarly situated in his disappointment when a previously existing entitlement is regulated away. The distinction resides solely in the valuation of that property interest remaining in the owner after the regulation attaches. Surely government prefers a conservative notion of the nature of regulations that amount to a compensable taking. The higher the bar for establishing a compensable taking, the narrower the opportunity for a property owner to bring an inverse condemnation action. Thus, some make the argument that removing the consideration of the reasonableness of investment-backed expectations from the takings analysis runs the risk that regulations will more readily be found to constitute takings and that government will be unduly burdened with having to defend and pay for land use regulation, so much so that government would be effectively barred from regulating for the benefit of the public. *But cf.* Radford & Breemer, *supra* note 68, at 518 ("Rather than providing one ground (among several) for recovery under the Takings Clause, as initially conceptualized, the notion of investment-backed expectations has been turned into a pleading requirement, the function of which is to bar aggrieved property owners from bringing their claims to court.").

[101] Radford & Breemer, *supra* note 68, at 530.

Penn Central balancing test.[102]

B. *The Effect of Notice*[103] *and Transfers Upon the Takings Claim*

Physical takings are obvious and open; they occur at a discrete point in time and are therefore more readily discernable and identifiable by the involved parties.[104] In contrast, regulatory takings are less obvious.[105] They are often part of a land use agency's rule-making process.[106] The nature of regulatory takings creates ambiguity as to when a taking has occurred and as to the extent of the regulation's effect on the owner's property.[107] Further, ripeness and standing rules may limit a current owner's ability to challenge a regulation.[108] A problem unique to regulatory takings is the

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[102] *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984) (holding that the Environmental Protection Agency's disclosure of a pesticide manufacturer's trade secrets in connection with the manufacturer's registration application did not constitute a taking, and that since Monsanto was on notice that the EPA was authorized to disclose the data in the manner that it did and that in consideration of this fact, Monsanto's reasonable investment-backed expectations were not disturbed); *see also* Meltz, *supra* note 95, at 399 (suggesting that when a buyer has actual awareness of a property characteristic that subsequently triggers a land use restriction (contrasted with constructive knowledge), the role of the expectations analysis becomes more dominant and the government's defense is strengthened).

[103] The notice rule is a government asserted defense to takings claims. Meltz, *supra* note 95, at 383. Specifically, the basis of the notice rule defense is that an owner's notice of land use restrictions pre-dating the owner's acquisition of property prevents the owner from having any reasonable expectation to use the property in a manner prohibited by the regulation. *Id.* Thus, an aggressive application of the expectations notice rule would weigh against a finding of a compensable taking.

[104] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use."); *see, e.g.*, *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322 n.17 ("When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed."); Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. HAW. L. REV. 589 (2002) (stating that "[A] *physical* taking constitutes actual physical intrusion or regulations mandating that owners make physical improvements to property"); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 108 (2002) ("Physical invasion is the clear takings rule."); Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. HAW. L. REV. 623, 626 (2002) (stating that the physical invasion itself establishes, in the context of the physical taking, exactly what has been taken).

[105] *Compare* note 104 *with* Part II.A (discussing the various tests applied to determine the existence and extent of regulatory takings).

[106] *See supra* note 28.

[107] *See supra* note 104.

[108] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (stating that a takings claim challenge to a land use regulation as-applied to a particular piece of property has not been ripened unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue"). The *Palazzolo* Court stated that a final decision is important to both *Lucas* and *Penn Central* regulatory takings because only by having a final decision can a court know whether the regulation has deprived property of all of its economically beneficial use under *Lucas* or whether it has so defeated the property owner's reasonable investment-backed expectations that a *Penn Central* taking has occurred. *Palazzolo*, 533 U.S. at 618. The Court then clarified the final decision ripeness requirement articulated by Williamson County and stated that "once it becomes clear that the agency lacks the discretion to

intersection between the flexible manner in which governments adopt regulations and the effect of the notice of such actions upon current and future property owners.[109] Government regulatory schemes for real property are often executed through local planning commissions, zoning boards of adjustment, and special zoning units or preservation commissions.[110] These bodies act over long periods of time, often allowing variances[111] and special exceptions[112] to the applicable regulations and sometimes trading pri-

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permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Id.* at 620. Dissenting in part, Justice Stevens contended that Mr. Palazzolo lacked standing to challenge the regulation. *Id.* at 642 (Stevens, J., concurring in part and dissenting in part). The Court responded to Justice Stevens's contention:

> In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. . . . A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.

Id. at 628 (citations omitted). *See also* Roberts, *supra* note 104, at 623 ("Establishing ripeness and determining the appropriate forum in regulatory takings litigation requires sorting through a confusing body of law.")

[109] *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988). Although Professor Radin favors a balancing approach to takings inquiries she explains the concerns that some express with ad hoc judicial inquiries into the takings process as follows:

> The fear of "essentially ad hoc" inquiries—the fear of pragmatism—is a fear of *arbitrariness*. How can we achieve consistency—or at least perceived consistency—and how can we achieve fairness by deciding like cases alike, unless some general rule by force of its own formulation can carve out a whole category of cases that we can be sure fall together under the rule? How can we give citizens notice of what they may or may not do under the law if we cannot lay down hard and fast rules?

Id. at 1681.

[110] STANDARD CITY PLANNING ENABLING ACT, *supra* note 51, at 7. This enabling act proposes model legislation to cover developing a city plan, organizing a city planning commission, promulgating and controlling subdivision growth and development, and directing regional growth planning. It also suggests authorities that should be designated and empowered by municipalities and localities to carry out these various missions. *Id.* at 4 & n.4. The enabling act suggests a procedure to accomplish the creation and implementation of an orderly zoning plan. *Id.* at 7. It suggests the creation of various bodies and commissions to fulfill this purpose and suggests the authority and power that should be conferred upon them individually. *Id.* at 8-12.

[111] "The variance is an administratively authorized departure from the terms of the zoning ordinance, granted in cases of unique and individual hardship, in which a strict application of the terms of the ordinance would be unconstitutional." DANIEL R. MANDELKER & JOHN M. PAYNE, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 424 (5th ed. 2001).

[112] In contrast to the variance, *supra* note 111, the special exception "is a use permitted by the ordinance in a district in which it is not necessarily incompatible, but where it might cause harm if not watched. Exceptions are authorized under conditions which will insure their compatibility with surrounding uses." MANDELKER & PAYNE, *supra* note 111, at 424.

vate property interests for relaxation of regulatory rules.[113] Flexibility and subjectivity are inherent and necessary attributes of zoning and planning decisions.[114] As a consequence of this flexibility and subjectivity, only a more predictable and stricter application of the notice rule will lead to just, or at least consistent, results by courts.[115]

Palazzolo afforded the Supreme Court an opportunity to examine the issue of notice and pre-existing regulations on a subsequent owner's right to challenge regulatory takings under both the *Lucas* and *Penn Central* regulatory takings tests. The Court affirmed the Rhode Island Supreme Court's holding that the regulation at issue did not result in a *Lucas* taking; however, it did not do so based upon the Rhode Island Supreme Court's principal ground, that the *Lucas* challenge failed because Mr. Palazzolo's title post-dated the regulation's enactment and that the right to develop the property was therefore never part of Mr. Palazzolo's estate in the property.[116] Instead, it did so based upon the Rhode Island Supreme Court's alternative grounds, that the regulations did not deprive Mr. Palazzolo of all economically beneficial use of his property.[117]

Although the Rhode Island Supreme Court did not make Mr. Palazzolo's notice of the pre-existing regulation an issue for purposes of its *Lucas* analysis,[118] it did consider the notice issue in disposing of his *Penn*

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[113] *E.g.*, STANDARD CITY PLANNING ENABLING ACT, *supra* note 51, at 11.

[114] ZONING AND THE AMERICAN DREAM 349-50 (Charles M. Haar & Jerold S. Kayden eds., 1989).

[115] *But cf.* Poirier, *supra* note 104, at 150-60 (discussing "The Virtue of Muddy Rules in Property Law").

[116] The United States Supreme Court held that transfer of title did not preclude Mr. Palazzolo's takings claim and, after considering the alternative grounds relied upon by the Rhode Island Supreme Court, found that this was not a situation in which Mr. Palazzolo was left with only a token interest, that the property was not left economically idle, and that therefore, the regulation did not create a *Lucas* taking. Palazzolo v. Rhode Island, 533 U.S. 606, 630-31 (2001). The Rhode Island Supreme Court decided the *Lucas* takings issue based upon its finding that Mr. Palazzolo acquired the property after the enactment of the regulations that he challenged as takings. Palazzolo v. State, 746 A.2d 707, 715-17 (R.I. 2000), *rev'd in part*, 533 U.S. 606. The Rhode Island Supreme Court did not address the issue of whether Mr. Palazzolo knew of the regulations; the court disposed of the Lucas claim based solely upon the fact that Mr. Palazzolo's title postdated the regulation, holding only that when Mr. Palazzolo acquired the property, the State of Rhode Island, by regulation, had already limited his ability to develop the property in the manner he proposed. *Id.* at 715. Consequently, such a right was never part of the title he acquired and therefore, because he never possessed the right, there could not be a government taking of the right warranting compensation. *Id.* at 716. The United States Supreme Court framed the *Lucas* takings issue in terms of background principles of state law and held that change of title alone cannot transform a regulation into a background principle of law for purposes of defeating *Lucas* takings challenges. *Palazzolo*, 533 U.S. at 630. *See* Meltz, *supra* note 95, at 390 (reminding the reader that some contend that *Lucas*'s background principles of state law doctrine applies strictly to laws whose duration is longstanding).

[117] *See supra* note 116.

[118] *Palazzolo*, 746 A.2d at 714-17; James Burling, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 U. HAW. L. REV. 497 (2002). Mr. Burling discusses the significance of the notice rule to the question of when an existing regulatory scheme

Central challenge.[119] Regarding a possible *Penn Central* claim, the state court held that, considering the regulations, Mr. Palazzolo could not reasonably have expected to engage in the proposed development plans and that his "lack of reasonable investment-backed expectations [was] dispositive in [the] case."[120] Upon review, the Supreme Court found that the Rhode Island Supreme Court's joint treatment of the *Lucas* and *Penn Central* claims "amount[ed] to a single, sweeping, rule: A Purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."[121]

Under the notice rule approach, the temporal relationship between the date of a regulation's enactment and the date title transfers is relevant to the investment-backed expectations prong of the *Penn Central* takings analysis.[122] The government typically asserts such a relationship as a defense pursuant to which "[n]o regulatory taking occurs when the government restricts a property use under a law existing when the property was acquired—or under law whose adoption after acquisition was foresee-

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becomes a background principle of state law for purposes of avoiding a *Lucas* per se taking and the duty to pay just compensation. *Id.* at 517. Mr. Burling observes two competing notions on the impact of the existence of a regulatory regime on background principles. *Id.* One view finds that successive titleholders "stand in the shoes" of their predecessors. *Id.* The competing view finds that successive titleholders take property "with the knowledge of preexisting regulatory constraints and cannot complain about those limitations." *Id.* He observes, "[t]he difficulty with the latter syllogism is that if the right to develop property is a fundamental right, and a challenge to a permit scheme can be made only upon an application for a permit, then the right to develop the property could devolve to the government at no cost when it is transferred from one owner to the next." *Id.* (footnotes omitted); *supra* Part II.A.1 and accompanying text (describing the *Lucas* per se rule and the background principles exception).

[119] *Palazzolo*, 746 A.2d at 717.

[120] *Id.*

[121] *Palazzolo*, 533 U.S. at 626.

[122] Meltz, *supra* note 95, at 383. In its most general form, the "notice rule" is the doctrine limiting the regulatory takings claim of property owners who acquire their interests after governmental restrictions are promulgated or deemed foreseeable. *Id.*

> One form of the doctrine, the "positive notice rule," bars such claims absolutely. Another form, the "weak notice rule," treats notice of a pre-acquisition governmental restriction as a factor militating against, although not precluding, judicial vindication of the owner's regulatory takings claim.
>
> The notice rule, in both its positive and weak forms, is derived from two sources. The first is the regulation's effect upon the property right itself, the "background principles notice rule." The second is the regulation's effect upon the subsequent purchaser's expectations, the "expectations notice rule." The "background principles" and "expectations" branches together constitute the notice rule. They also may be asserted separately, in either their positive or weak forms, as bases for denial of an owner's regulatory takings claim. . . .
>
> In its recent decision in *Palazzolo v. Rhode Island*, the United States Supreme Court rejected the positive notice rule, limited in dicta the scope of the background principles notice rule, and effectively endorsed the expectations notice rule in some unspecified form.

Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 533-34 (2001).

able."[123] For example, under the notice rule, strictly applied, if a property owner purchased a tract of land when the property was subject to a use restriction, the successive interest holder could not bring a claim for a regulatory taking arising out of the use restriction.[124] In those instances when the property owner knew of the pre-existing restriction, supporters of the notice rule believe that a *Penn Central* taking would be unusual to find.[125] The alternative rationales underlying the rule are that (1) because the restriction pre-existed the buyer's acquisition of title, the "proscribed use interests" were never part of the title the buyer acquired, and thus, the subject regulation does not deprive the buyer of any interest he ever possessed (the "'background principles notice rule'");[126] or (2) notice of the pre-existing use restriction deprived the subsequent-in-time buyer of any investment-backed expectation that the property could be used in a manner prohibited by the regulation (the "expectations notice rule").[127]

Recently, federal and state courts have considered whether property owners have the right to bring *Penn Central* regulatory takings claims when they acquire title to property with notice of pre-existing regulations limiting the use of their property.[128] Specifically, the question before the courts has been whether such notice divests owners of their investment-backed expectation, as formulated by *Penn Central*, to engage in the pro-

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[123] Meltz, *supra* note 95, at 383.

[124] *See supra* note 116 (discussing the Rhode Island Supreme Court's strict application of the "notice rule" in Palazzolo v. State, 746 A.2d 707 (R.I. 2000)); *supra* note 122 and accompanying text (defining the notice rule and distinguishing its positive and weak forms).

[125] Cordes, *supra* note 96, at 432. By applying the expectations notice rule, courts have limited the ability of successive interest holders with notice of pre-existing regulations successfully to pursue regulatory takings claims and courts have engaged in the judicial transfer of valuable property interests to the detriment of private property owners.

[126] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-30 (1992) (discussing the background principles doctrine); Eagle, *supra* note 122, at 533 (designating *Lucas* as the originating source for the name "background principles notice rule").

[127] *See supra* note 87 and accompanying text (discussing *Penn Central*, 438 U.S. at 124, as the Court's first articulation of Professor Michelman's investment-backed expectation doctrine and considered as the originating source for the name "expectations notice rule").

[128] *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (discussing the legal effect of the fact that Nollan acquired the property well after a regulatory body had begun to implement its policy); Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (holding that a buyer's knowledge of existing regulations diminished his "investment backed expectations," so he did not have a takings claim); Kim v. City of New York, 681 N.E.2d 312, 313 (N.Y. 1997) (holding that the owners had constructive notice of a regulatory problem when they acquired title to their property, so they did not have a takings claim); Gazza v. New York Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1036 (N.Y. 1997) (holding that the owner did not have a takings claim because she acquired her property after the enactment of the ordinance in question); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997) (denying variance from steep slope ordinance does not constitute a taking entitling property owner to compensation, in part because property owner, who purchased property two years after enactment of ordinance, never acquired unlimited right to build in a manner inconsistent with the ordinance); Callies & Chipchase, *supra* note 20, at 908 (discussing the Supreme Court's application of the notice rule in *Palazzolo* v. Rhode Island, 533 U.S. 606 (2000)).

scribed use.[129] Analyzing *Penn Central's* investment-backed expectations rule reveals cogent arguments for revisiting the *Penn Central* analysis, at least to the extent of abandoning the investment-backed expectations prong of the initial takings test in favor of a more reliable and utility-maximizing test.[130] The Supreme Court in *Palazzolo* was faced with this precise question given the Rhode Island Supreme Court's resolution of the notice issue.[131]

III. UNDERSTANDING *PALAZZOLO*

In 1959, Mr. Palazzolo, along with two partners, formed a corporation, Shore Gardens, Inc. ("SGI").[132] SGI purchased approximately eighteen acres of marshlands and wetlands and a few additional acres of uplands, many of which were and continue to be susceptible to tidal flooding.[133] In 1963 and again in 1966, SGI sought approval to fill in submerged portions of the property but was ultimately never successful in securing final approval.[134] In 1971, the State of Rhode Island created the Rhode Island Coastal Resources Management Council (the "Council") whose mission was to protect state coastal properties.[135] The Council promulgated coastal wetland protection regulations limiting development on such properties.[136] In 1978, SGI failed to pay corporate income taxes, and the Rhode Island

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[129] Burling, *supra* note 118, at 525. Burling states that relying on a lack of investment-backed expectations to justify the notice rule "lacks a legitimate pedigree." *Id.* He cites to Professor Frank Michelman's article titled *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1103 (1981), as support for his proposition that "expectations are not the exclusive way of defining property." Burling, *supra* note 118, at 526.

[130] *See* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 107 (1995) (discussing problems with the "investment backed expectations" test).

> The difficulties associated with the concept of investment-backed expectations are legion: what does "expectation" mean? what does "investment-backed" mean? what types of property interests are affected by such an analysis? . . . [T]hese problematic issues alone ought to be enough to ring the death knell for the investment-backed expectations test. When the inefficacy of the concept in evaluating a regulatory taking claim is also considered, it becomes difficult to understand how the factor ever came into being, much less why its use has persisted.

Id.

[131] *Palazzolo*, 533 U.S. at 626-627.

[132] *Id.* at 613; Petitioner's Brief on the Merits at 2, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

[133] *Palazzolo*, 533 U.S. at 613; Petitioner's Brief on the Merits at 2-3, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

[134] *Palazzolo*, 533 U.S. at 614-615. The 1966 application was approved in 1971 but the approval was revoked within a few months of being granted. Petitioner's Brief on the Merits at 5, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

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

[136] *Id.*

Secretary of State revoked its charter.[137] Title to SGI's property devolved to Mr. Palazzolo, in his individual capacity, as SGI's then-sole shareholder.[138] Thereafter, Mr. Palazzolo sought to develop the property for various purposes. His initial application requested approval to construct a wooden bulkhead and to fill the marshland portion of the property.[139] In a subsequent application, he requested approval to build a private beach club.[140] He filed an action for inverse condemnation when his applications were denied, and he sought $3,150,000 in damages.[141] In a 1997 bench trial, the court held that Rhode Island's actions did not constitute regulatory takings.[142] The Rhode Island Supreme Court affirmed the decision of the trial court and the United States Supreme Court granted certiorari on three questions:

> 1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.
>
> 2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.
>
> 3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.[143]

The Supreme Court reversed the Rhode Island Supreme Court's holding that Mr. Palazzolo, per se, lacked the right to challenge regulations predating his acquisition of title and that the matter was not ripe for review; the Court affirmed the State court's finding that Mr. Palazzolo could not recover on his *Lucas* claim; and it remanded the case back to the State for consideration of the issue of whether a *Penn Central* taking existed.[144]

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[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* at 615.

[141] *Id.* at 615-616. Mr. Palazzolo re-initiated the permitting process in 1983, seeking various forms of development approval and after failed attempts, initiated suit against the State of Rhode Island. *Id.* at 614-615. Mr. Palazzolo asserted that the State's wetlands regulations, as the Council applied them to his property resulted in a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *Id.* at 615.

[142] *Id.* at 616; Palazzolo v. Rhode Island, 746 A.2d 707, 711 (R.I. 2000).

[143] Petitioner's Brief on the Merits at 2, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047).

[144] *Palazzolo*, 533 U.S. at 616.

The Court rejected the Rhode Island Supreme Court's holding that acquisition of title after the date of a regulation was fatal to a property owner's *Lucas* takings claim[145] and held that notice of regulations that pre-exist a property owner's acquisition of title is not an absolute bar to a *Penn Central*[146] takings challenge.[147] The following statement by the Court summarizes its rationale for rejecting the Rhode Island Supreme Court's understanding of the impact of the notice rule on successive interest holders:

> Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A state would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.
>
> Nor does the justification of notice take into account the effect on owners at the time of enactment, who are prejudiced

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[145] *Id.* at 626-30. Once a *Lucas* taking occurs, the only way the State can avoid the duty to pay compensation is by demonstrating that the same result could be reached pursuant to the State's law of property and nuisance. *See supra* Part II.A.1 and accompanying notes (stating the *Lucas*, categorical, total taking rule and the limitation on the rule). The *Lucas* case is noted for articulating a per se takings rule when a regulation deprives property (and its property owner) of "all economically beneficial uses. . . ." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992). In such cases, a finding of a per se taking can only be avoided if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. And, "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629-630. Thus, changes of title ownership subsequent to the date of a regulatory enactment are not dispositive of the right to challenge a regulation as a taking in the *Lucas* context. *Id.* at 630.

[146] As for the *Penn Central* regulatory takings test which applies when less than a property owner alleges less than a total taking, notice of pre-existing regulations is just one factor to be considered as part of the balancing test, according to the Court. *Palazzolo*, 533 U.S. at 628, 632-633 (O'Connor, J., concurring) (summarizing the plurality holding on the notice issue and stating that the more difficult task is that of defining the nature of the role of the temporal relationship between regulatory enactment and acquisition of title in the *Penn Central* analysis).

[147] *Id.* at 630. The Court found that this holding was based upon two theories, the first being in terms of background principles of Rhode Island's property law and the second being in terms of Mr. Palazzolo's reasonable investment-backed expectations. *Id.* at 626. The Court summarized this portion of the State supreme court's ruling as one which would allow a state to redefine property rights by aggressive and prospective legislation with the end result being a complete prohibition on injury claims by property owners who acquire title after the date of the subject regulation. *Id.*

> The theory underlying the argument that post enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

Id. (citations omitted).

> as well. Should an owner attempt to challenge a new regulation, but not survive the process of ripening his or her claim (which, as this case demonstrates, will often take years), under the proposed rule the right to compensation may not be asserted by an heir or successor, and so may not be asserted at all. The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.[148]

The division that separates the Justices on the notice issues does not occur among the plurality and the concurring or dissenting justices. The Court was absolutely united in its holding that notice of prior in time regulations does not, per se, prohibit a successive interest holder from challenging the regulation as a taking.[149] Rather, the division exists between Justices O'Connor and Scalia and their understanding of the consequence of notice of pre-existing regulations on successive interest holders' ability to challenge pre-existing regulations as takings.[150]

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[148] *Id.* at 613.

[149] Justice Kennedy wrote the plurality opinion and Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas joined in that portion of the opinion pertaining to the notice question. *Id.* at 611. Justice Ginsburg, dissenting, disagreed with the plurality's finding that Mr. Palazzolo's claim was ripe for adjudication. *Id.* at 645-647 (Ginsburg, J., dissenting). She noted that, had she found Mr. Palazzolo's claim ripe, she would agree with Justice O'Connor's view regarding the ability of transfer of title to impair a takings claim. *Id.* at 654 n.3 (Ginsburg, J., dissenting). Similarly, Justices Souter and Breyer, who joined with Justice Ginsburg in her dissent, agreed that they concurred in Justice O'Connor's understanding of the transfer of title issue. *Id.* at 645 (Ginsburg, J., dissenting), *Id.* at 654 (Breyer, J., dissenting). Justice Stevens's dissent from the plurality's treatment of the issue of the impact of notice of pre-existing legal restrictions on Mr. Palazzolo's takings claims focused on the Justice's finding that the regulatory event creating the taking occurred prior to Mr. Palazzolo's acquisition of title and therefore Mr. Palazzolo lacked the right to bring a takings claim. *Id.* at 638-642 (Stevens, J., dissenting in part).

> To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted. Given the trial court's finding that petitioner did not own the property at that time, in my judgment it is pellucidly clear that he has no standing to claim that the promulgation of the regulations constituted a taking of any part of the property that he subsequently acquired.

Id. at 641-642 (Stevens, J., dissenting in part). Justice Stevens indicated, however, that if the regulatory event that created the regulatory taking had occurred after transfer of title, he would agree with Justice O'Connor's opinion of the relevance of the notice of the pre-existing regulation to the owner's takings claim. *Id.* at 643 n.6 (Stevens, J., dissenting in part):

> In cases such as *Nollan*—in which landowners have notice of a regulation when they purchase a piece of property but the regulatory event constituting the taking does not occur until after they take title to the property—I would treat the owners' notice as relevant to the evaluation of whether the regulation goes 'too far,' but not necessarily dispositive.

[150] *Id.* at 632-37; Callies & Chipchase, *supra* note 20, at 921.

Justice O'Connor wrote a concurring opinion for the express purpose of clarifying how she believed that the Rhode Island State Supreme Court should analyze the *Penn Central* takings issue on remand.[151] According to Justice O'Connor, Mr. Palazzolo's knowledge of the existing regulatory regime at the time he acquired his property was relevant to the reasonableness of Mr. Palazzolo's investment-backed expectations, pursuant to the *Penn Central* takings analysis, and was therefore relevant to the question of whether the restrictions on his property were so substantial as to constitute a *Penn Central* taking.[152] Justice O'Connor cautioned that the extent of the impact of existing regulations in the investment-backed expectations analysis was not susceptible to being "reduced to any 'set formula.'"[153] Instead, she advocated an ad hoc approach under which courts must consider individual cases and afford the fact of the owner's knowledge of prior existing regulations the weight required by fairness.[154]

Justice Scalia disagreed with Justice O'Connor and contended that, other than the *Lucas* background principles exception, notice of a land use restriction that pre-dates an owner's acquisition of title should be irrelevant to a determination of whether the substantiality of the restriction results in a taking.[155] He observed that the relevant *Penn Central* investment-backed expectations "do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional."[156] Additionally, Justice Scalia was concerned that Justice O'Connor's solution, which would allow a successive interest holder's notice of prior-in-time regulations to be weighed as a factor in the *Penn Central* takings analysis on the reasonableness of his investment-backed expectations, would confer an undeserved benefit on the State by further insulating it from takings claims.[157]

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[151] *Palazzolo*, 533 U.S. at 632.

[152] *Id.* at 633-34.

[153] *Id.* at 635-36.

[154] *Id.* "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Id.* at 634. Justice O'Connor analogized the weight afforded considerations of lack of personal financial investment for purposes of the investment-backed expectations analysis to the treatment that the notice rule should receive under the investment-backed expectations prong of *Penn Central's* balancing test. *Id.* at 634-35. Although she observed that the Court has "never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property," she failed to offer any guidance or details on the weight that should be afforded such facts. *Id.* Justice O'Connor's observations on this point, combined with her understanding of the impact of notice on a property owner's investment-backed expectations, highlight the degree of uncertainty that persists in this area even after the *Palazzolo* decision.

[155] *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring).

[156] *Id.*

[157] *Id.* To illustrate his point, Justice Scalia offered up the hypothetical situation in which a land developer speculates and purchases a piece of regulated property at a depressed price from its owner who believes that the regulation is valid. *Id.* at 636-37. The land developer gambles that he can dem-

My thesis offers a takings theory and analysis that are expressly consistent with the plurality's holding and, at the very least, is not inconsistent with Justice O'Connor's implicit notions of property as evidenced by her concurring opinion.[158] The most socially beneficial and productive approach to property is to acknowledge the takings claim as property itself, distinct, recognizable, and existing independently of the property owner.[159] The takings claim is valuable private property, which the plurality acknowledges.[160] As such, it should be alienable in a manner consistent with other forms of private property; any other approach is tantamount to a judicial taking.[161] In fact, the plurality in *Palazzolo* clearly recognized the alienability of the takings claim by holding that, in Mr. Palazzolo's case, his claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[162] Likewise, Justice

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onstrate the "unconstitutional excessiveness" of the regulation, he ultimately succeeds in getting the regulation invalidated, and then either sells the property for its full value or develops it to its full value, free of the development restriction. *Id.* at 636. As between the three, the prior property owner, the developer and the government that acted unconstitutionally by encumbering the property with an invalid regulation, Justice Scalia viewed Justice O'Connor's solution as benefiting the least deserving of the three, the government, which did not lose anything it ever owned but rather wrongfully dispossessed the original property owner of development rights to which he was presumably entitled prior to the regulation. *Id.* at 636-37.

[158] *Id.* at 632-36 (O'Connor, J., concurring).

[159] *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897):

> Due protection of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty," Mr. Brown in his work on Constitutional Law says, "is that of enjoying private property without undue interference or molestation.". . . The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.

(citations omitted).

[160] *See Palazzolo*, 533 U.S. at 627. The Court stated that government cannot drastically alter the very nature of property by depriving successive interest holders of the ability to challenge regulations that pre-date their ownership and, as support for this proposition cited to its decision in Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980), for the following proposition: "A State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.* at 627-28.

[161] For purposes of this article, a judicial taking is "any judicial *change* in property rights that would be a taking if undertaken by the legislative or executive branch of government." Thompson, *supra* note 8, at 1455. *But see id.* at 1538 (Justice Stewart, in *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring), "suggested not that a 'change' in the law triggers the takings protections, but that a 'sudden change in state law, *unpredictable* in terms of the relevant precedents,' brings the Constitution into play"); *cf.* Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 HARV. L. REV. 4, 6 (2001) (stating that "the idea of judicial supremacy—the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone—has finally found widespread approbation").

[162] *Palazzolo*, 533 U.S. at 630; *e.g.*, Daniel v. County of Santa Barbara, 288 F.3d 375, 378 (9th Cir. 2002) (discussing whether the county's delayed action in response to the previous owner's compliance with an exaction amounts to a taking). "The Court's decision last term in *Palazzolo* indicates that

O'Connor tacitly recognized the potential alienability of the takings claim, at least in some circumstances.[163] However, she would dilute the strength of the takings claim as private property by insisting that its alienability depend upon ad hoc and subjective inquires into undeserved windfalls, fairness and justice concerns.[164]

IV. AN ANALYSIS OF THE EFFECT OF PROPERTY TRANSACTIONS ON THE PRE-EXISTING TAKINGS CLAIM

A. *Background*

This article considers a discrete moment in time, the point of transfer of title, and inquires what theory of entitlement to the takings claim maximizes the combined social welfare of the prior-in-time property owner and the other impacted parties, including the government.[165] "The effort to mix

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in some circumstances a purchaser may have a valid takings claim even if his or her purchase price was discounted to reflect existing land use regulations. . . ." *Id.* at 383; *see also* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1600-1601 (1988) (reconciling the Supreme Court's regulatory takings jurisprudence).

> In hindsight, the Supreme Court's takings jurisprudence seems to have moved steadily from 1922 toward a highly nonformal, open-ended, multi-factor balancing method. In all the years between 1922 and 1987, however, the Court never once clearly applied the open-ended balancing test in favor of a takings claim and against a regulating government. Towards the end of this period, the Court could perhaps be heard confessing a sense of unease about the lack of definition and rigor in its regulatory-takings doctrine.

Id. at 1621-22 (footnotes omitted); Radford & Breemer, *supra* note 68, at 449-450 (discussing the impact of *Palazzolo v. Rhode Island* on regulatory takings jurisprudence).

> Although it plausibly can be argued that the investment-backed expectations inquiry originally had the potential to 'strengthen the position of the property owner against government regulation,' interpretation and application of this concept by the Supreme Court has tended from the outset to make it more difficult for property owners to prevail on regulatory takings claims.

Id. at 460 (footnotes omitted).

[163] *Palazzolo*, 533 U.S. at 633-35. Justice O'Connor stated that the Rhode Island Supreme Court erred in concluding that Mr. Palazzolo lacked reasonable investment-backed expectations and therefore did not have a viable takings claim. She noted that the court should not have elevated investment-backed expectations to "dispositive" status as they are only one of three criteria used in the *Penn Central* analysis. She further stated: "If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title." *Id.* at 635.

[164] *See* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1396-97 (1991) (implying that employment of ad hoc factual inquires along with a high degree of judicial deference results in a significant number of defeated takings claims).

[165] *See generally* Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1371 (1993). Professor Epstein, in the context of critiquing the reasonable investment-backed expectations doctrine, analyzes the tensions that arise when government attempts, through regulation, to implement social reform while at the same time maximizing welfare for its citizens. He states the following:

> Democratic institutions are organized for instrumental reasons, the most important of which is to maximize the welfare of the citizens they govern. Therefore, the relevant

several questions—takings, justification, compensation—into a single issue necessarily brings about a loss of clarity that works to enlarge the scope of state action."[166] Thus, the essential question is this: whether allowing the prior in time owner to alienate the takings claim along with the other interests that constitute the transferor's bundle of property produces maximum social benefits. The timing of the enactment of the regulation in *Palazzolo* assumed a more prominent role in the takings analysis in light of the date of transfer of title from SGI to Mr. Palazzolo.[167] The Court grappled with its understanding of the role of reasonable investment-backed expectations in establishing entitlements to private property and relatedly, the centrality of notice of regulatory restrictions to the investment-backed expectations inquiry.[168] The plurality decision in *Palazzolo* was correct in holding that a *Penn Central* takings claim is not barred solely because the property owner acquires title after the effective date of the regulation.[169] This holding recognizes the takings claim as having a separate property interest that survives the property transfer. However, the Supreme Court did not definitively answer the role that "notice of a regulation" should play in the *Penn Central* balancing test.[170] The plurality held that notice of pre-existing regulations did not, per se, bar a successive owner from challenging the regulation as a taking.[171] Justice O'Connor moved a step beyond the plurality's express holding.[172] She explained that pre-existing regulations and successive owners' knowledge of them, although not dispositive of the takings issue, are relevant to an inquiry into the reasonableness of the successive owner's investment-backed expectations in a *Penn Central* analysis.[173] Justice Scalia also agreed with the plurality, but he, too, went further

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> question at every point should be: Does the regulation or restriction serve to maximize social welfare? If, by our choice of regulation, we can make one person better off while leaving no person worse off, then efficiency counsels us to adopt that particular strategy. Although it is often difficult to implement social reforms with this consequence, it is a mistake not even to try. And while the choice between the best and the next-best social arrangement may be difficult to make, either should be preferred over the 100th best allocation of rights, which is the arrangement that current takings law often yields us today.

Id.

[166] EPSTEIN, *supra* note 4, at 103.

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

[168] *See id.* at 632-33 (O'Connor, J., concurring) ("The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis.")

[169] *Id.* at 630. Justice Kennedy wrote the plurality opinion in which Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas joined.

[170] *See supra* Part III.

[171] *Palazzolo*, 533 U.S. at 628. "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.*

[172] *Id.* at 632-36.

[173] *Id.* at 632-33 (O'Connor, J., concurring).

than the plurality and advocated the promulgation of a dispositive rule, in contrast to Justice O'Connor's ad hoc approach, that pre-existing rules and notice of the same are irrelevant to the takings inquiry.[174]

A critique of the *Palazzolo* decision reveals that the failure to clarify the role of notice and title transfers is inconsistent with certain notions of property[175] and property theory[176] and undermines notions of utility and efficiency as applied to property.[177] Professor Richard Epstein states the

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[174] *Id.* at 637 (Scalia, J., concurring).

[175] *See* Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web Of Interests*, 26 HARV. ENVTL. L. REV. 281, 284-85 (2002). The author reminds his reader that property is most frequently thought about and discussed as a bundle of rights and, among the most protected of these rights is the right to alienate or transfer. *See also* John C. O'Quinn, *Protecting Private Intellectual Property From Government Intrusion: Revisiting* Smithkline *and the Case for Just Compensation*, 29 PEPP. L. REV. 435, 494-95 (2002) (discussing the ability to alienate property in the context of the "core" property rights); Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 135 (2000).

> If the government has taken property, then it should pay, whether the owner sells her property or retains it. If the government has not taken property, then it should not have to pay, no matter when title to the property is transferred. The fact that the property changes hands should neither increase nor decrease any party's chances of recovering from the government that has restricted its use.

Id. Thus, the inquiry must properly focus on the property interest, if any, that is affected by an application of the notice rule in order to determine whether or not the notice rule effects a taking. Oswald, *supra* note 130, at 131-32. Confusing the taking question with the separate question of compensation or measure of damages further muddles the regulatory takings discussion. *Id.*

[176] *See infra* Part IV.B.

[177] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 364 (2000). Professor Levinson asserts that the "standard economic analyses of takings [assume] that the purpose of requiring just compensation is to encourage government to make efficient regulatory decisions—that is, only to regulate where the social benefits of the regulation exceed the social costs." *Id.* Similar assumptions pertain to the related but earlier in time issue of the right to pursue just compensation for takings. The term "efficiency," defined in economic terms, means the allocation of scarce resources in a manner that maximizes the wealth, utility, or happiness (depending upon the maximization objective) derived from the resource. *See* DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 4 (1992). "Allocative efficiency means using scarce resources to the greatest possible advantage . . . . Whether a particular use is efficient will depend, by definition, on what exactly one wants to gain or accomplish." *Id.* at 6.

> Focusing on efficiency rather than fairness does not make economics a neutral and unbiased exercise. Directing resources to their most valuable uses and measuring value according to willingness and ability to pay biases allocations towards those with the greatest ability to pay. Among individuals with equally strong desires to own a certain house, the individual with the greater willingness and ability to express that desire by giving up money or other resources is judged the highest-valuing user; allocating the resource to his use is, by definition, allocatively efficient. Because efficiency analysis proceeds from a preexisting set of endowments of wealth, it does not question whether the initial distribution of "abilities to pay" is proper.

Id. at 17. *See also id.* at 1 (stating that by applying economic principles to legal problems one obtains a better understanding of the implications of legal rules). Economists refer to utility as the science of "*how* individuals pursue happiness, satisfaction, and fulfillment," and "assume that people generally prefer more utility to less utility." *Id.* at 3. "Rational individuals therefore attempt to *maximize* their utility and extract the highest possible level of happiness from the limited resources available to them." *Id.*

proposition succinctly:

> The Supreme Court's inability to understand the role of reasonable expectations in generating entitlements paves the way for the rapid elimination of all perceived entitlements by simply claiming that the enactment of a single government regulation reasonably creates an expectation that further regulations will follow. With this understanding of expectations, individual property owners are considered "on notice" about the prospect of new legal restrictions on land use and cannot complain when they occur. Each round of government regulation thus provides justification for the next. In each successive case, it becomes easier to overwhelm a shattered expectation than it would have been to undo a claim of entitlement to private property. The constant refrain that the Takings Clause protects only investment-backed or reasonable expectations has thus been used by the Supreme Court to minimize the level of protection given to private property.[178]

The following three narratives are intended to illustrate the problems inherent in the plurality's decision in *Palazzolo* as it pertains to the notice rule and its impact on the ability of successive interest holders to pursue takings claims.

1. *Narrative Number One (aka Longstanding Homeowners)*

Consider this situation: An elderly, married couple, Longstanding Homeowners, own a significant tract of land in a burgeoning and historically affluent community on which they have constructed their home, a single-family residence. As long as the couple has owned the property, it has been unzoned. Recently, the community started to grow and expand, and the community's leadership has become increasingly aware of a rapidly growing demand for low-and-moderate-income housing. Longstanding Homeowners' property is well-suited for a higher-intensity use. As Longstanding Homeowners continue to age, they anticipate eventually selling their property and relocating to a home that will be easier to maintain. In light of the increased demand for multi-family, low-and-moderate-income housing and in anticipation that developers may be interested in acquiring and developing Longstanding Homeowners' property if Longstanding Homeowners put it on the market, the community places a zoning restriction on the property that restricts its use exclusively to single-family residential purposes and notifies Longstanding Homeowners of the same. Longstanding Homeowners do not view the regulation as hostile to their present or future anticipated use of their property, but they are aware of the

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[178] Epstein, *supra* note 165, at 1371-72.

changing housing needs in the community, and they anticipate that the market of interested buyers, should they decide to sell, would include developers desiring to put the property to a more intense use. They do not challenge the zoning restriction for a variety of reasons.[179] Longstanding Homeowners have a cash-flow problem. They are hesitant to hire expensive hourly lawyers with uncertain cost and uncertain litigation outcomes.[180] They also do not know what potential buyers may use the property for if sold. They, like many in their situation, choose inertia over proactive behavior.

This first narrative is intended to highlight several points. First, Longstanding Homeowners' lack a financial incentive to ripen and pursue a takings challenge as the present uses to which they put their property are permitted as of right under the regulatory restriction. Additionally, they lack the financial resources required to create a development proposal and ripen a takings claim. They do not have a specific plan of development to file and they are not quite ready to sell their property. Second, by promulgating vague land-use standards, the local government has subjected future generations of landowners to diminished development potential and little or no development policy. A rule that limits a successive interest holder's ability to pursue a takings claim provides the government with a windfall. Finally, if future owners may assert a takings claim, Longstanding Homeowners are likely to realize a financial benefit akin to the value of the takings claim when the property is sold.

2. *Narrative Number Two (aka Owner-Developer)*

The second narrative involves an involuntary transfer of property of the same type as that in the *Palazzolo* case.[181] Property Owner possessed a

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[179] Original owners who, for whatever reason, choose not to engage in the administrative process necessary to ripen takings claims avoid the time and monetary costs associated with developing and submitting development plans and pursing the various administrative processes that may be established to address land use questions. One ought not assume that original owners are necessarily pitiful and unsophisticated as compared to their "savvy" purchasers, and that purchasers, on the other hand, are skilled and accustomed to taking advantage of their more vulnerable counterparts.

Proponents of the argument that successive interest holders who have notice of an existing regulation lack reasonable expectations to utilize property in a manner that conflicts with the pre-existing regulation ignore the very real possibility that informed successive interest holders may have particular knowledge that reasonably would lead them to believe that the pre-existing regulation is invalid and vulnerable to a successful regulatory taking challenge. It might be far from unreasonable, although no guarantee of success exists, for a successive interest holder to obtain property, after accounting for the uncertainty, the administrative costs and legal costs, as well as the value of the transferred taking claim, with the expectation that the regulation can either be removed absolutely or perhaps sufficiently limited in scope so as to allow the purchaser to develop the property pursuant to his desired plans.

[180] *Cf.* Marcia Coyle, *Landowners Win Right to Attack Rules*, NAT'L L.J., July 16, 2001, at A1 (quoting a Palazzolo supporter as saying "litigating these cases [post-*Palazzolo*] is going to stop being like getting yourself out of quicksand").

[181] Palazzolo v. Rhode Island, 533 U.S. 606, 614 (2001).

large amount of farmland with no permanent structures. For tax estate planning purposes, once all of his children reached adulthood, he formed a corporation and transferred the entirety of his real property into the corporation.[182] The corporation was engaged in the commercial business of farming chickens for sale to large retail chicken producers. Each of his five children received a twenty-percent interest in the corporation with Property Owner retaining no interest.[183]

Upon Property Owner's death, sibling rivalries overtook the family, and the stockholders were unable to manage the corporation. As a consequence, the corporation failed to meet the quality-control standards of its retail producers and the retail producers canceled their contracts with the corporation. With the loss of its only source of revenue, the corporation was unable to pay the required state corporations taxes and fees. It ceased operating, was dissolved pursuant to state law, and the only remaining asset of the corporation, the land, was divided into fifths and distributed to each of the five stockholders.

At all times, the property was zoned for agricultural use only. The local government enacted this regulation in an effort to slow the rapid loss of agricultural and farmland to more intensive uses by restricting the property

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[182] Family estate planning often uses trusts, corporations, and partnerships to minimize estate tax liability. *See, e.g.*, Travis L. Bowen & Rick D. Bailey, *Limited Partnerships: Use in Tax, Estate and Business Planning*, 32 IDAHO L. REV. 305, 306 (1996) (the family limited partnership as a tool for reducing income, estate, and other taxes).

[183] If "property owners have investment-backed expectations only when they possess formally reserved rights in property," what is the resolution to a donee's taking dilemma? Mandelker, *supra* note 89, at 217. *See, e.g.*, Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999) ("The requirement of investment-backed expectations 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.'") (citation omitted). *But see Palazzolo*, 533 U.S. at 634-35 (O'Connor, J., concurring) (stating that lack of personal financial investment by a postenactment acquirer has never been found to be dispositive of the takings question; rather, it is one factor to weigh in the balance as courts probe into what fairness requires in each individual case). It could potentially be more difficult for donees than for arms-length purchasers to establish a taking, even under otherwise identical circumstances, if courts consider their lack of personal investment in the *Penn Central* calculus. If donees are treated less advantageously than purchasers in the takings context, the logical conclusion is that it is the owner, rather than the land, that is being restricted and therefore deserving, or not, of compensation. But, such an understanding is contrary to established notions of the purposes of zoning laws and of the compensation component of the Fifth Amendment. *See, e.g.*, Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County, 793 A.2d 545, 560-61 (Md. Ct. App. 2002) (an area variance case in which the court stated that "reasonable zoning limitations are always directed to the property, itself, and its uses and structures, not to the completely separate matter of title to property, which is another whole field of law"). *Id.* "In zoning, it is the property that is regulated, not the title." *Id.* at 561. Zoning regulations, either their existence or their absence, restrict or free up property. These regulations attach to the property and travel with it into the hands of whoever acquires title. Consequently, the impact on the holders of title, while very real, is also secondary. *See generally* 1 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 1:2 (2001).

to solely agricultural use.[184] The community leaders indicated to affected property owners that the zoning restrictions were merely temporary measures to allow the community to design development proposals that would allow for the orderly development of the subject property commensurate with the build-out of the necessary capital improvements to accommodate more intense uses of the property.[185] The community, however, never proposed a schedule for capital improvements, nor did it even attempt to propose a development schedule for the property.

Pursuant to the regulation, chicken farming was a permitted use. Additionally, Property Owner and all of the stockholders were confident that the zoning restriction was, as the community had promised, just an interim, temporary measure. Thus, they did not protest the original zoning classification. Upon receiving his property interest, one of the stockholders, Owner-Developer, sought permission to build a modest convenience store on his land to service the residents in the rural community. The convenience store was not permitted of right under the zoning regulation, nor was it permitted as a special exception.[186]

As noted above, this second narrative presents a set of facts that are closely related to those of the *Palazzolo* case.[187] Notice the voluntary and involuntary changes of title and the relationships among owners whose title both pre-date and post-date the effective date of the subject regulation.[188] Moreover, changes in formal land use structures provide local government with the power to possibly reduce or eliminate takings claims and to hamper timely growth and development that might be most beneficial to a community.[189] It makes little sense to recognize that changes in formal

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[184] *See infra* note 185 and accompanying text (discussing moratoria and interim control regulations).

[185] Moratoria and interim controls are land use planning tools implemented by government to control and manage growth.

> A moratorium is a regulation that prohibits new development. Municipalities often adopt moratoria in order to forestall inappropriate development during the time they are considering new growth management controls . . . .
>
> The terms "moratorium" and "interim controls" (or "interim zoning") are often given interchangeable, or at least interrelated, meanings. The substance of an "interim zoning" ordinance may in fact be a freeze on development, in which case it could more properly be called a "moratorium." Generally speaking, cases and commentary that use the word "moratorium" will emphasize the "freeze" aspect of the problem, while those that use the word "interim" are more likely to emphasize a "pause" in development during which rational planning to solve the underlying land use problem can take place, or a service deficiency remedied.

MANDELKER & PAYNE, *supra* note 111, at 642.

[186] *See* STANDARD STATE ZONING ENABLING ACT, *supra* note 51, at 9 (allowing a local board of adjustment to, "in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the [zoning] ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.").

[187] *See supra* Part III.

[188] Palazzolo v. Rhode Island, 533 U.S. 606, 613-14 (2001).

[189] *See, e.g.*, Palazzolo v. State, 746 A.2d 707 (R.I. 2000), *rev'd in part*, 533 U.S. 606 (2001).

ownership have the effect of reducing or eliminating the taking claim.

3. *Narrative Number Three (aka Acquiring Developer)*

The third and final narrative concerns the development of a substantial shopping center. Acquiring Developer is interested in constructing a shopping center and locates an area consisting of some 180 acres that would be a suitable site. Title to the land is not united as three separate individuals, Owners One, Two, and Three (collectively, "The Three Owners") each own sixty acres. Thus, the challenge for Acquiring Developer is to negotiate the purchase of the entirety of the property held by the three different owners. Acquiring Developer must obtain all 180 acres, as the essential aspects and dimensions of the project cannot be implemented on a smaller scale.

Prior to Acquiring Developer's demonstrating any interest in the property, the property was zoned for commercial use in a way that permitted Acquiring Developer's shopping center as a matter of right. Once the community learned of Acquiring Developer's plans, it decided to change the zoning regulations to make them more restrictive; the community zoned the property in question exclusively for single- and multi-family residential use. Owner One, being prescient and rather affluent, understood the potential commercial value of his property and instituted the process of challenging the zoning classification by submitting a rezoning request. Owners Two and Three, not as prescient or as wealthy, did not challenge the regulation.

Residential and commercial development on a multi-building scale often occurs because developers first identify community needs, then secure financing of their proposed development plans and subsequently acquire properties.[190] Rarely is the property owned by one individual owner. Given that these development plans often become public during the earlier stages of development, communities may develop land use regulation preemptively to hinder existing owners' abilities to sell their property to developers and to recognize the full value of their investments.[191] Similarly, developers are less likely to acquire regulated properties knowing that (1) the government is immune from a takings challenge should they decide to bring one; or (2) should the developers decide to reconvey all or part of the property they acquire but after the community has imposed additional regulations, the value of the property will be further diminished by their inabil-

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[190] *See generally* DEBRA POGRUND STARK ET AL., COMMERCIAL REAL ESTATE TRANSACTIONS: A PROJECT AND SKILLS ORIENTED APPROACH 18-19 (3d ed. 2001) (discussing types of developers); GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 513-15 (3d ed. 1999) (providing an overview of the development process).

[191] *See supra* note 185 and accompanying text (discussing moratoria and interim controls); *see also* Jonathan Walters, *Anti-Box Rebellion*, GOVERNING MAG., July 2000, at 48 (discussing situations where various communities have hindered development through preemptive land use regulation).

ity to convey the takings claim to successive interest holders.[192]

B. *An Analysis of the Issue Under Traditional Property Theories*

This section examines several property theories and justificatory norms often associated with takings. It considers the impact of the notice rule and transfer of title considerations in the context of the various theories and norms. Specifically, this section considers the following property theories and norms: (1) property rights as a mediator between government and its citizens,[193] (2) the "natural law" theory of property,[194] (3) possession as a source of property rights,[195] (4) the fairness and distributive justice theory of property,[196] and (5) the justified-expectation approach to property under a positive law regime.[197] As this discussion illustrates, the transfer of the takings claim from an original owner to a successive interest holder is consistent with general property theory.

First, the notion of property rights as a mediator, tending the relationship between government and its citizens, and "as a safeguard against excessive government interference" is one popular conception of property.[198] Under that conception, the takings claim could itself serve as a bulwark against local governments as they reallocate property rights through the

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[192] *See, e.g., Palazzolo*, 533 U.S. at 608.

[193] *See infra* notes 198-202 and accompanying text.

[194] *See infra* notes 203-08 and accompanying text. Natural law theorists contend that property exists independent of any government creation and that one "has a natural right to those things which he acquires by his labor from the common stock of goods which nature has provided" and also by other means such as occupation. CHARLES DOHANUE, JR. ET AL., CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION 14 (3d ed. 1993); *see also* Patrick H. Martin, *Natural Law: Voegelin and the End of [Legal] Philosophy*, 62 LA. L. REV. 879 (2002).

> Ronald Dworkin gives what he calls a "crude description" of natural law: "Natural law insists that what the law is depends in some way on what the law should be."
>
> In the earlier instances of natural law theory, God tended to be at the forefront of the theory, either acting by His command or through the fact that He was co-extensive with Reason. Human nature derived its character from the fact it was created by God with purpose. Many natural law theorists have felt that logic compels the belief that order does not establish itself, that it must be established.

Id. at 881 (citation omitted). In contrast, positive law theorists contend that property exists largely as a creation of the state, rather than as a derivative of the conception of divine justice or of the nature of man. *See, e.g.*, Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655 (2002) (reviewing JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001)). Dworkin states that legal positivism, in its classic form,

> holds that a community's law consists only of what its lawmaking officials have declared to be the law, so that it is a mistake to suppose that some nonpositive force or agency—objective moral truth or God or the spirit of an age or the diffuse will of the people or the tramp of history through time, for example—can be a source of law unless lawmaking officials have declared it to be.

Id. at 1655.

[195] *See infra* notes 209-12 and accompanying text.

[196] *See infra* notes 213-22 and accompanying text.

[197] *See infra* notes 223-25 and accompanying text; *supra* note 194 (defining positive law).

[198] SINGER, *supra* note 4, at 1085 (quoting Paul, *supra* note 164, at 1402).

land use and regulatory process.[199] Subjecting the takings claim to subjective, case-by-case application of the notice rule and transfer inquiries increases public uncertainty regarding the scope of property rights.[200] Well-defined property standards with deviations in pursuit of equity as the exception, not the rule, enhance the stability of property rights. In contrast, the individual's vulnerability to state over-reaching and infringement of private property rights is increased by the process of limiting an individual's property entitlement by his reasonable investment-backed expectations and then authorizing the government to define those expectations through state or local legislative enactments or administrative rulings.[201]

Given the conflict between public rights and private rights, regulatory takings must be susceptible to reasonable challenges. If government agencies could implement creeping regulations that would be effectively unreviewable given the arguments presented above, the role of takings law as definer and defender of property would be eroded.[202] In order to use property rights as a shield against improper regulations, takings claims must be transferable in property transactions, and successive interest holders should be able to assert the takings claims of the original owner.

Second, one might also look to a natural law conception of property.[203] A natural law perspective on the issue of regulatory takings supports the view that the taking should be a separate property right that survives prop-

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[199] *See, e.g.*, Paul, *supra* note 164, at 1396-97.

> First, throughout its history the Court has been reluctant to invalidate legislative or executive action for failing to provide for compensation. Instead, a longstanding, but perhaps wavering, judicial consensus has supported broad governmental authority to adjust the benefits and burdens of economic life within narrow constraints of fairness and justice. Second, the Court has more recently paired the principle of judicial deference with commitment to ad hoc factual inquiry as the preferred method for resolving takings disputes. Accordingly, the Court has devoted its energy to articulating a series of considerations or factors whose application has led to the denial of the vast majority of takings claims.

Id.

[200] Eagle, *supra* note 122, at 538 ("The State is a source of property rights, an adjudicator of property rights, and the entity responsible for paying just compensation. This inherent conflict of interest would be exacerbated vastly if state regulations are treated as defining the ownership rights of subsequent purchasers."). *But see* Coyle, *supra* note 180. Ms. Coyle quotes John Echaverria of Georgetown University Law Center as stating that the Court's decision in *Palazzolo* will likely result in increased litigation and is also likely to make litigation outcomes more uncertain for government defendants. *Id.* Vicki Been of New York University School of Law added that the increased litigation will occur at considerable cost to state and local governments and that such governments may attempt to avoid litigation costs "by weakening environmental regulations and allowing development that shouldn't proceed." *Id.*

[201] *But cf.* Coyle, *supra* note 180 (discussing increased government vulnerability as a possible consequence from the *Palazzolo* decision).

[202] SINGER, *supra* note 4, at 1085-86.

[203] *See* OXFORD COMPANION, *supra* note 5, at 683. The author notes that some federal judges, relying on the canons of natural law, have adopted a doctrine known as "vested rights" and have used this doctrine as a vehicle for protecting established property rights from being weakened by the legislature.

erty transfers.[204] To allow a successive owner to challenge a pre-existing regulatory structure when it is ripe under the takings clause is consistent with that owner's natural law rights to use the property.[205] Of course, this view is inconsistent with positivism,[206] which would support a government's right to enact rules, statutes, and regulations which define the property owner's rights.[207] Under a natural rights approach, a successive property owner has a natural right to attempt to prove that a pre-existing regulation creates a taking as long as the prior owner had the right to ripen and pursue a takings claim at the time of transfer.[208]

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[204] FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 65, 94 (1985); Martin, *supra* note 194, at 880. Professor Martin notes the work of Randy Barnett and summarizes Barnett's notion of the role of natural law. *Id.*

> Barnett analogizes natural law to an end or "given" achieved through "if-then" propositions in relation to physical laws, such as the law of gravity: because of the force of gravity, "if we want a building that will enable persons to live or work inside it, then we need to provide a foundation, walls, and roof of a certain strength." To illustrate further, he says, "if we want persons to be able to pursue happiness while living in society with each other, then they had best adopt and respect a social structure that reflects these principles."

Id. (citations omitted). Relatedly, society must respect and acknowledge the inherent value of the right to transfer the takings claim as a valuable incident of a current owner's property if one wants to build a stable property regime that encourages citizens to maintain and protect property, and put it to productive use. *Id.*

[205] *See supra* note 194 and accompanying text. *But see* F. Patrick Hubbard, Palazzolo, Lucas, *and* Penn Central*: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465 (2001) (describing the natural rights approach to takings jurisprudence in the context of the *Lucas* decision). Under the *Lucas* approach to natural rights, "an owner has a natural right to at least some developmental use of land unless the government can show that all developmental use is restricted by the state's 'background principles of law,' which are 'objectively' defined by shared cultural expectations, not by 'recent' enactments." *Id.* at 515. He criticizes the natural rights approach in this context as vague and even less useful than *Penn Central*'s reasonable investment-backed expectations. *Id.* This article contends that, in the context of the viability and transferability of the takings claim from a prior owner to a subsequent owner, the natural rights approach is the antithesis of vague as it treats as absolute the prior owner's ability to alienate the right to ripen and pursue a viable takings claim to a subsequent owner. *Id.* Once the subsequent owner elects to do so, such owner would still be susceptible to the *Penn Central*, *Lucas*, and/or *Loretto* analysis depending upon the factual context and the subsequent owner's decision about how to frame the issue. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 626-30 (2001) (discussing Mr. Palazzolo's claim under both a *Lucas* and *Penn Central* analysis).

[206] *See supra* note 194 (defining positivism); Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208 (2002) (review essay). Professor Baron reviews two books by property theorist Joseph Singer and makes certain observations about the interaction between private property rights and government regulation. *Id.* at 217-18. Professor Baron views the state as the guardian of individual property rights and not as a threat to them since property rights result from state regulation. *Id.* at 218. "Deregulation might free owners to use their property as they like, but since it would leave them vulnerable to depredation by neighbors, they might soon have no property left to enjoy. Property seems to require regulation." *Id.* (footnote omitted).

[207] JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 15-17 (2d ed. 1997). The positive law view embraces the concept of property as defined by the government's regulatory structure. *Id.* For example, one who subscribes to the notice rule would argue that a successive interest holder's right of use is defined by the existing regulatory climate at the time of the purchase. *See supra* Part II.B (discussing the notice rule).

[208] *See supra* notes 194, 203-07 and accompanying text.

Third, respecting the takings claim as an independent form of property is also consistent with the doctrine of possession that articulates the first-in-time, first-in-right principle and shields those who possess property from being dispossessed by anyone other than the rightful interest holder.[209] Although the possession doctrine is problematic, as courts have not, at times, respected first possession as a source of superior title, possession is a socially useful standard.[210] To the extent that possession rewards those who clearly communicate their property stake to the world, the doctrine of possession rewards labor and useful labor, in the form of speaking with clarity about and defending one's claim to property as important to society.[211] Thus, the doctrine of certainty of property rights, which is closely related to possession, requires that citizens be given the right to ripen and challenge a takings claim. Certainty in the law will encourage developers such as Owner-Developer and Acquiring Developer to formulate and pursue development plans that will respond to community needs and dedicate property to those purposes that are best and most efficient for particular communities.[212] Similarly, certainty of property rights will allow pre-regulation property owners such as Longstanding Homeowners and The Three Owners to realize anticipated gains from the appreciation of their property investments and to defend against overly intrusive government encroachments.

Fourth, considerations of distributive justice are central to property law.[213] Under a distributive justice theory, a key question arises whether societal regulations should "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[214] Such a distributive consideration underlies much of the takings jurisprudence.[215] Decentralization of property ownership is critical to distributive justice as it promotes the equality and dignity of all of society's

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[209] *See* SINGER, *supra* note 66, at 16.

[210] *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290-91 (1955) (holding a Native American tribe is not entitled to Fifth Amendment compensation for the government taking of their land, as the Court found that their title did not provide a sufficient basis for a takings claim); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (discussing the West's use of law and legal discourse to conquest the American Indians); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 238 (1989) (arguing that public discourses seek to confine and eliminate tribalism).

[211] Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81-82 (1985).

[212] *See id.* at 73 (discussing the social importance of certainty surrounding property matters). "Why, then, is it so important that property owners make and keep their communications clear? Economists have an answer: clear titles facilitate trade and minimize resource-wasting conflict." *Id.* at 81.

[213] SINGER, *supra* note 66, at 19.

[214] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[215] *See* SINGER, *supra* note 66, at 19.

members.[216] No doubt exists that regulation as an exercise of police power constrains citizens but benefits society as a whole.[217] However, when government regulations go so far as to be classified as a taking, society should bear those costs rather than the individual landowner; this is so regardless of whether the regulation is a taking because it deprives a citizen of investment-backed expectations in the case of *Penn Central* takings, or because the regulation deprives property of all economically beneficial use in the context of *Lucas* takings. Thus, distributive justice norms require that society provide a meaningful opportunity to challenge the government's regulatory structure.[218] A failure to do so places too great a burden on the individual rather than on society as a whole when just compensation is at stake.[219] Modern theories of property emphasize fairness and justice and embrace the ancient idea that "*Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him . . . ."[220] The concept that the takings claim is property, owned and possessed by the original owner and therefore alienable by the original owner as an incident of property, comports with deeply held notions of fairness, justice, and, relatedly, predictability that influence property law in the United States.[221] Under this view of the takings claim as property, allowing Longstanding Homeowners, The Three Owners, and Owner-Developer to transfer their takings claims to successive interest holders, either by affirmative act or by involuntary transfer, in the case of Owner-Developer, and to benefit from the value of that transfer, is absolutely fair and just. Any other outcome would further exacerbate the uncertainty and disfavor that owners experience when faced with forging ahead with *Penn Central* takings claims.[222]

Finally, under a positive law regime, property is about expectations,

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[216] "Decentralization promotes justice by recognizing the dignity and equal worth of each individual. It promotes the utilitarian goal of maximizing human satisfaction by creating the conditions necessary for economic efficiency and social welfare. These justice and utilitarian goals often go together." JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 144 (2000).

[217] *See infra* Part IV.C.2.b and accompanying notes (discussing average reciprocity of advantage); *see infra* note 304 (discussing ways in which government confers benefits on private citizens through regulation).

[218] *See supra* notes 196, 213-22 and accompanying text.

[219] *Id.*

[220] MCDONALD, *supra* note 204, at 66.

[221] Michelman, *supra* note 24, at 1171-72.

> A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.

Id. at 1223.

[222] *See supra* note 162 (discussing Professor Frank Michelman's finding of predictably pro-government holdings falling out from the application of takings balancing tests, including *Penn Central*).

citizen-held expectations and government-held expectations created by law.[223] Certainly the idea that property owners do not possess absolute rights in their property is well established; for example, nuisance law constrains owners' use of their property to uses not hostile to the legitimate interests of others in the use of their property.[224] However, justified expectations, created by statute, are a foundation of property jurisprudence. In a regulatory takings claim, property owners derive their expectations from the Constitution and its Fifth Amendment just compensation mandate.[225] Thus, the right of just compensation must be accompanied by a right of access to challenge any regulation that infringes on property rights. Given the problems that long-term property owners may have in challenging regulatory takings, their expectations are furthered by allowing them to transfer the takings claim to successive interest holders.

Based upon the above-discussed theories and norms of property, the current Supreme Court position on the notice rule is untenable. It creates ambiguity; it prevents reasonable challenges to regulatory takings and injures the expectations and rights of property owners. The property interest in the takings claim should arise when the regulation is enacted and should fully survive any transfers to successive owners. Some object to a finding that the takings claim should survive transfers of title because they are concerned that such a construction would allow takings claims to essentially become interminable. Such concerns are unfounded as the takings claim itself is subject to legal issues of ripeness, standing and applicable statutes of limitations.[226]

C. *An Analysis of the Issue Under Economic Theory*

1. *Utilitarianism, Wealth Maximization, and Consequentialism*

This section of the article focuses on the law and economics approach to the need for a purchaser's separate, non-extinguishable right to challenge pre-existing restrictions on land use. The basic premise of a law and economics approach is that the best law is the law that maximizes the benefit to the individual and to society in a measurable way, generally in economic terms. However, even within the law and economics approach to legal issues, at least two main divisions exist: utility and efficiency.[227]

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[223] JEREMY BENTHAM, THE THEORY OF LEGISLATION 111-13 (C.K. Ogden ed., Harcourt, Brace & Co. 1931) (1802).

[224] SINGER, *supra* note 216, at 203-04.

[225] Thompson, *supra* note 8, at 1541.

[226] *E.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 637-43 (2001) (Stevens, J., concurring in part and dissenting in part) (discussing ripeness and the notice issue as a question of standing); Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 226-29 (D.R.I. 2002) (discussing statutes of limitations).

[227] *See infra* Part IV.C.1.

Law and economics is touted as a superior body of jurisprudence partly because economics is viewed by many as a more objective means of uncovering rational choices in a world of scarcity.[228] Utilitarianism concentrates on the consequences, measured in terms of social utility, of various legal rules on individual behavior.[229] The utilitarian's emphasis on consequences necessitates that "[u]tilitarians choose rules based not on their inherent goodness or morality or fairness, but on the consequences they produce."[230] Utility maximization considers the relevant characteristics for purposes of measuring social utility to be those of one's ability to derive "happiness, pleasure, or satisfaction" from a transaction.[231] In comparison, efficiency advocates measure the costs and benefits of social transactions by wealth,[232] what affected parties can and will pay for certain entitlements, based upon their resources.[233]

The analysis under both utility and efficiency models is more difficult to construct when one examines an involuntary exchange, as in the case of

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[228] Scarcity is defined as the state of limited resources in relation to human wants. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (5th ed. 1998). In this case, the scarce resource is understood to be not only the real property or land, but those rights related to the land that the transferor possessed and presumably would be interested in negotiating as part of the transfer transaction to the successive interest holder. *See* Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337 (2002).

> Municipal land use bargaining may imply as many problems as it heralds promise, but it is widely acknowledged as the universal language of land use planning. Planners and scholars agree that public-private negotiation plays a central role in the vast majority of local land use decision-making.
>
> At least in part, this is a result of the peculiar attributes of the resource at issue. Land is, perhaps, the ultimate nonfungible. Land forms and land values are forever in flux—at the mercy of both natural cycles that erode and accrete and economic changes that render a given parcel more or less valuable in relation to external factors. Each parcel of land possesses unique characteristics not only in its physical attributes, but also by virtue of its location, and its proximity to other unique parcels. Unlike almost every other thing of value, it is impossible to relocate spatially. Rules of general application fit poorly to so variegated and unstable a resource.
>
> Moreover, land uses implicate the conflicting strands of property rights far more profoundly than do uses of personalty, since free disposition of one's own land extends perilously into the realm of neighbors' quiet enjoyment of their own. Although private rights in property ownership are a foundational value of our legal system, private rights in land use are considerably more constrained. County and municipal governments designate the outer limits within which landowners may freely exploit their property without unduly burdening the surrounding community. Zoning, by which a community segregates incompatible land uses, is the primary mechanism.

Id. at 338.

[229] SINGER, *supra* note 207, at 19; SINGER, *supra* note 66, at 14.

[230] SINGER, *supra* note 66, at 14.

[231] BARNES & STOUT, *supra* note 177, at 11.

[232] Wealth maximization values resources according to individual's willingness and ability to pay for the resources. *See id.* at 8.

[233] *See* SINGER, *supra* note 207, at 19; SINGER, *supra* note 66, at 19.

government-imposed regulations, as opposed to a voluntary exchange.[234] If one assumes that a forced exchange will occur, meaning government will, as in the case of *Palazzolo*, restrict a property's development potential through regulation, the question becomes, which economic approach to application of the notice rule, utility maximization or efficiency, produces the greater social benefit.[235] An examination of each of the three narratives through this perspective illustrates that when government prohibits a successive interest holder from asserting the taking claim, utility and efficiency are not maximized.[236]

Individuals perceive themselves as benefitted personally in proportion to the rights that they retain in their property.[237] Economic principles de-

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[234] *See* POSNER, *supra* note 228, at 15 (stating that it is much more difficult to know whether involuntary exchanges are efficiency enhancing compared with voluntary exchanges). For purposes of this article, reallocations, whether voluntary or involuntary, that most efficiently redistribute resources so as to increase overall utility are most valued. *See* BARNES & STOUT, *supra* note 177, at 9 n.2 (discussing how voluntary exchange can efficiently redistribute resources so as to increase utility and wealth); *supra* note 177 (defining efficiency and utility); discussion *supra* Part IV.C (discussing the terms further).

[235] *See supra* note 233 and accompanying text (discussing transactions from the perspective of increased utility and wealth); *see supra* note 165 and accompanying text (discussing the maximization of social welfare).

[236] "When the state forces an individual to do something she would rather not do, or prohibits her from doing something she would like to do, by definition the coerced individual suffers a loss of utility as a result of the government's interference." BARNES & STOUT, *supra* note 177, at 414. Although utility maximization is "a laudable goal in theory, in practice utility maximization can be difficult to implement. No direct means of measuring utility exists. . . . Unfortunately, it is impossible to know how *much* utility [one] derives [from a given activity]." *Id.* at 6.

> It is difficult for a decisionmaker (other than the parties to an exchange) to estimate how much utility other persons gain or lose as a result of an exchange. Of course, the decisionmaker can always ask the parties involved. But there may be reason to doubt the accuracy of a party's response when he is not required to "put his money where his mouth is."

Id. at 5. To address this problem, economists apply the theory of revealed preferences which allows economists to estimate the amount of utility a person derives from goods or services by assuming that individuals are rational maximizers and therefore, an individual's behavior is the best method of assessing the value that the individual attaches to particular goods or services. But there is no certain way to determine the comparative amount of utility an individual obtains from one good or service as opposed to another alternative good or service much less as compared to the amount of utility another person would derive from the same good or service. *See id.* at 6.

> [I]t is impossible to gauge even one person's level of utility or satisfaction. Even if it were possible, one cannot compare the value of one person's utils to another person's utils. In addition to the problems of measuring and making interpersonal comparisons of utility, utility maximization also has undesirable distributional implications. Some people may have a greater capacity to enjoy life and derive satisfaction from scarce resources. Following the principle of utility maximization, resources would be allocated to those happy-go-lucky individuals who have a greater capacity for enjoyment while dour and impossible-to-satisfy [individuals] would go without any resources.

Id. at 9-10.

[237] Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 ENVTL. LAW. 1439, 1488-89 (1994). Professor Bosselman notes that most utilitarians agree that human happi-

rive from the basic assumption that individuals are rational maximizers of their own well-being.[238] One can rationally assume that property owners would prefer to retain the right to pursue a takings claim and its potential for government compensation, as opposed to forfeiting to the government their right to challenge a regulation as a taking and perhaps receive compensation.[239]

a. Efficiency[240] and Utilitarianism

The utilitarian standard for measuring the degree to which conduct is desirable because it maximizes societal benefits considers three criteria:[241] (1) "efficiency gains,[242] (2) demoralization costs,[243] and (3) settlement costs."[244] Under this formula, a utilitarian would argue that the government should treat the takings claim as a form of property, independent of the property owner, if the demoralization costs and the settlement costs of failing to do so are greater than the efficiency gains that accrue to the government when it takes the takings claim without paying compensation.[245]

i. *Efficiency Gains and Settlement Costs*

Under all three narratives, utility is not maximized if the property owners who pre-date the land use regulation are forced, by application of the notice rule, to either ripen and pursue the takings claim or lose the right to negotiate the transfer of it upon sale of their property. First, the efficiency

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ness should be emphasized and that "the security that expectations will be realized is a key component of happiness." *Id.* at 1489.

[238] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 1 (1981).

[239] *See* FISCHEL, *supra* note 30, at 185; POSNER, *supra* note 228, at 65-66; Fischel & Shapiro, *supra* note 4, at 287-90.

[240] Efficiency in a utilitarian context means allocating scarce resources "in a fashion that maximizes the happiness or utility people derive from them." BARNES & STOUT, *supra* note 177, at 4.

[241] *See* Fischel & Shapiro, *supra* note 4, at 278.

[242] *Id.* Efficiency gains capture the amount by which government produced benefits exceed government inflicted losses. *Id.* Benefits are measured by the total amount prospective gainers would pay in order to insure that the government measure is adopted and losses are measured by the total amount prospective losers would insist on being paid before agreeing to the government measure. *Id.*

[243] *See id.* at 279. Demoralization costs are essentially the negative impacts from a utilitarian perspective that occur when a government adopts a measure without compensating the property owner. *Id.* They are

> the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the preset capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.

Id. (footnote omitted).

[244] *Id.* Also known as transaction costs, "[settlement costs] are 'the dollar value of time, effort, and resources which would be required in order to reach compensation settlements adequate to avoid demoralization costs.'" *Id.*

[245] *See id.*

gains are arguably de minimus and are offset by the high demoralization and settlement costs to the property owners. Establishing efficiency gains criteria is subjective but experimental evidence clearly indicates that, in general, people demand more for the voluntary surrender of an entitlement they already possess than they are willing to pay for the identical entitlement that was not originally assigned to them.[246] Thus, the likelihood is great that Longstanding Homeowners (narrative number one), Owner-Developer (narrative number two), and The Three Owners (narrative number three) would place a higher value on the ability to alienate the takings claim to successive interest holders than the government would place on its ability to divest them of the ability to negotiate the alienation of such claim.

Moreover, the settlement costs associated with restricting the transferability of the takings claim may exceed the settlement costs of allowing Longstanding Homeowners and The Three Owners to transfer the takings claim to their purchasers or of allowing Owner-Developer, as a subsequent owner, to acquire the takings claim upon dissolution of the family-owned corporation. These settlement costs might include the cost of prematurely ripening the takings claims[247] and the cost of litigating the transferability of the takings claim itself before a full development plan is in place. Society will be better off as the population of taxpayers called upon by government to pay for the taking of the entitlement realizes that allowing property owners to alienate takings challenges could result in lower settlement costs than

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[246] *Id.* at 278; *see* Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q. J. ECON. 507, 507 (1984) (finding that evidence from a series of experiments involving real transactions "indicate[s] that the value of entitlements may be substantially greater when measured in terms of compensation required than it is when measured in terms of willingness to pay"). Experimental evidence of the discrepancy is also presented in James D. Marshall et al., *Agents' Evaluations and the Disparity in Measures of Economic Loss*, 7 J. ECON. BEHAV. & ORG. 115, 125 (1986), in which the authors explain that:

> In the context of the evaluation of economic losses reference points are presumably taken to be present wealth or income levels and current entitlements, or perhaps in some instances the expectations of such rights. The taking of an entitlement is then a loss from this reference position and is consequently valued at a relative premium to reflect the fact of its being a subtraction from that position. The money offered in exchange seems to be viewed as an addition to current, or reference, monetary wealth, and is therefore evaluated with a relative discount to reflect its being in the domain of gains. When asked to pay to prevent a loss, the money is then viewed as a taking from the money account. This is apparently regarded as a more important loss and, as such, is given up more reluctantly. The consequences of these perceptions are that foregone gains are perceived to be less onerous than losses from current or reference point positions, and people will demand more money to give up a good than they will pay to keep it.

Id.

[247] Inefficiencies can result from requiring owners to ripen and assert takings claims earlier in time than the market requires. Eagle, *supra* note 52, at 370. Premature regulatory challenges and premature property development are wasteful. Alan E. Friedman, *The Economics of the Common Pool: Property Rights in Exhaustible Resources*, 18 UCLA L. REV. 855 (1971).

the settlement costs associated with restricting the transferability of the takings claim.[248] Thus, society benefits by allowing takings claims to fully transfer to successive interest holders.

For example, the government's taking of the takings claim could prompt Longstanding Homeowners or The Three Owners to ripen and pursue regulatory takings claims at the expense of the government and the general public, whereas they would not do so had the government not disturbed their right to fully transfer the right to pursue a takings claim.[249] Longstanding Homeowners, for example, knowledgeable of the impact of the notice rule on their property value, and wishing at some point to transfer their affected property, will want to protect the value of the property as much as possible. As the notice rule adversely affects their ability to transfer the takings claim along with the property, Longstanding Homeowners may rush to ripen their takings claims prior to transfer by attempting to develop the property. If, however, they were secure in their ability to transfer the takings claim they would have less incentive to pursue premature or economically inefficient development plans.[250] This rush to development may be at Longstanding Homeowners' instigation or may be compelled by a prospective developer of moderate and low income housing who, also knowledgeable of the impact of the notice rule, conditions the purchase of the property on Longstanding Homeowners' pursuit of the takings claim.[251]

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[248] The government has various mechanisms for raising revenue from its citizens in order to exercise its power of eminent domain and compensate property owners for takings. How the government decides to raise money to finance its projects, whether out of general taxes, borrowing, special funds, etc., is of consequence to the utility and wealth maximization analysis because it lends insight to the question of who must directly bear the compensation burden. *See* Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 289-90 (1990).

[249] *Cf.* Eagle, *supra* note 52, at 370 (discussing growth patterns and timeliness issues and incentives to develop in this context).

[250] *Id.*

> [The] requirement that the prior owner "assert whatever compensatory takings claim it might have" assumes a sharply defined claim extant under then-current law [and is an assumption that ignores reality]. . . . Assume, for instance, that there is no obvious best use for a parcel of land and that its "fair market value" derives from the fact that it is close enough to a city so that five or ten years later some more intense use will materialize. Is the owner now to devote considerable resources to challenging an ordinance that might preclude one of those possible uses? Perhaps not, but on the other hand the surrounding lands probably will be developed with uses consistent with the ordinance, so that a court would be much more likely to uphold it when challenged ten years hence than if challenged today. Also, the owner might die within ten years, or be forced to sell before the time is ripe for development. The buyer, for whom the restriction would be "preexisting," would be foreclosed from litigating when contemplating a sale to an actual developer of the land. In short, premature challenges to regulations are just as wasteful as premature development of land.

Id.

[251] Some may argue that the notice rule issue could be resolved by allowing property owners the right to assign the takings claim along with the transfer of their property to a successive interest holder.

Similar arguments pertain to Acquiring Developer who is much more likely, given the current status of the law after *Palazzolo,* to require The Three Owners to challenge the zoning classification by undertaking the cost of ripening a takings challenge as a condition to its purchase of the parcels. Absent the notice rule, Acquiring Developer might still condition its purchase of all three parcels on The Three Owners succeeding in their takings challenges. Alternatively, Acquiring Developer might purchase all three parcels after discounting the purchase price to reflect the possibility that Acquiring Developer might not be able to get the use restriction lifted with the idea of ripening and pursuing the takings claim at the optimal time. The Three Owners will receive a lower sales price in this instance than they would receive if they were successful in getting the use restriction lifted before selling the property but will not have to worry with ripening the takings claim. However, the sales price will reflect the discounted value of a takings claim and thus will be higher than the sales price with the regulation in place and no opportunity to challenge the regulation. If the notice rule applies, the property either does not sell or is sold under a significant discount to reflect that the regulation cannot be challenged.

If Longstanding Homeowners or The Three Owners, spurred on by knowledge of the devastating impact of the notice rule, prematurely develop their property, ripen a takings claim, and succeed in their takings claims, the government will either: (1) remove the restriction, resulting in an increase in the properties' fair market value,[252] or (2) not remove the restriction and pay compensation to the owners which will represent the difference between the fair market value of the properties in their unregulated state and the fair market value of the properties with the regulatory imposition.[253] Neither situation maximizes the government's utility. In both cases, the government will be forced to incur settlement costs earlier than it would have if the takings claims had transferred with the other property interests to the purchasers. In the first case, the regulation is repealed earlier than it might have been if the owner had the opportunity to convey the takings claim to a subsequent owner who could ripen the takings claim (perhaps avoiding litigation all together as part of the administrative process) at a later date when the development was actually com-

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This is a phantom argument that appears to solve the problem. However, if state common law were to allow the taking claim to be assigned, the court would still need to apply the notice rule of *Palazzolo*. In other words, the successive interest holder would face an identical problem when ripening and challenging the regulatory taking. Thus, the only way to solve the problem is to allow full transferability of the takings claim.

[252] The government may, additionally, have to compensate Longstanding Homeowners and The Three Owners for a temporary taking. *See infra* Part IV.C.1.b.i (discussing temporary takings).

[253] *E.g.*, Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973) ("And 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.").

pelled by market demands. In the second case, the government must disgorge the settlement costs in the form of compensation for the taking earlier in time than it otherwise would have, thus losing the benefit of the time value of money.[254] Additionally, land in its natural, undeveloped state as open space has an ascertainable value.[255] The consequence of enforcing the notice rule is that the value of land in its undeveloped state is prematurely lost.[256] The failure to allow the successive interest holder to assert a full takings claim also disadvantages the developer interested in Longstanding Homeowners' property ("Housing Developer") as well as Acquiring Developer. They must either finance the premature takings claim[257] or be

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[254] *See, e.g.*, Stephen J. Wolma, Note, *Ambushed in a Safe Harbor: Taxation of Intrafamilial Installment Sales Contracts*, 33 VAL. U. L. REV. 309, 316-18 (1998) (describing central concepts of the time value of money and how to calculate the value of money over time).

[255] *Cf. supra* note 247 and *infra* note 256 and accompanying text (establishing that undeveloped as well as developed land retains value).

[256] *See generally* Robert Innes, *Takings, Compensation, and Equal Treatment for Owners of Developed and Undeveloped Property*, 40 J. LAW & ECON. 403 (1997). Professor Innes applies a model in his article that assumes that the most efficient development is development that occurs, gradually, over time, with some portion of available land developed presently and additional land developed at some future time. *Id.* at 407-08. Applying this model, he asserts the following:

> In this setting, different owners of homogeneous property make different development choices; some develop their property early on and others . . . wait to develop. Moreover, government takings do not—and should not—treat developed and undeveloped property symmetrically. Other things equal, the least valuable undeveloped land should be taken first, which implies that, if takings are not compensated, landowners have an incentive to develop their land early in order to reduce their risk of government appropriation.
>
> This overdevelopment incentive can be countered by paying appropriate takings compensation. . . . Incentives to develop early are generated by differences between ex post profits that are available to owners of developed and undeveloped land, respectively. Hence, by appropriately protecting the *relative* value of undeveloped and developed land, rather than allowing this relative value to fall with takings of undeveloped land, efficient ex ante development incentives can be provided.

Id. at 406 (emphasis in original). In summary, Mr. Innes asserts that excess development occurs because landowners perceive that they can reduce the risk of a government taking by developing earlier rather than later. *Id.* at 412. Mr. Innes does not argue that just compensation is essential for the achievement of efficient development incentives; rather, he advocates for "equal treatment" of owners of developed and undeveloped property in the form of compensation at a common rate, whether land is developed or undeveloped. *Id.* at 406, 414. Mr. Innes's construct of the appropriate compensation to be paid to landowners for takings is beyond the scope of this article which focuses exclusively on the value of the takings claim to the affected parties and does not address the viability of claims or what types of regulatory events should result in compensation to private landowners. Nevertheless, Mr. Innes's insights regarding the incentive to overdevelop land are directly relevant to the question of the appropriate treatment of the notice rule as part of the takings analysis.

[257] If at all possible, the seller will set the purchase price to reflect the cost of pursuing the takings claim. If, for instance, the purchaser requires the owner to ripen and/or pursue a takings claim as a condition of the sales contract, the seller will likely attempt to negotiate so as to require the purchaser to finance this activity. If the owner ripens the claim on its own and/or pursues the takings claim perhaps prior to even locating a purchaser, the owner will, to the extent the market allows, attempt to recover at least a portion of the cost of ripening the claim by such mechanisms as locating a purchaser who will benefit from the development analysis and reports that the owner necessarily had to generate as part of the development process. This result may create delays in the alienation of property. Also,

forever barred from bringing it (or at the very least, the date of acquisition in relation to the date of the regulatory enactment will weigh against the finding of a taking should the purchaser pursue such a claim).[258]

ii. *Demoralization Costs*

Unlike settlement costs which exist and remain regardless of whether takings compensation is paid, demoralization costs vanish if the property owner knows that the government will pay compensation.[259] "Demoralization costs are not simply costs; they are costs that are imposed by the lack of compensation itself."[260] For utilitarians, the certainty that established expectations will be realized is a key component to happiness and directly impacts the extent of the property owner's demoralization cost.[261]

The Supreme Court in *Palazzolo* clearly rejected the Supreme Court of Rhode Island's notion that notice of a regulation can be a basis for completely denying a successive interest holder's right to assert a takings challenge.[262] Justice O'Connor's language, as contained in her concurring opinion, significantly undermines the certainty and predictability that the plurality and Justice Scalia promote through their recognition, if only implicitly, of the takings claim as a separate property interest and of the successive interest holder's right to pursue such claim. Uncertainty surrounding the alienability of a takings claim significantly favors government in its ability to take property through regulatory impositions without paying compensation.[263] Simultaneously, the uncertainty that inheres in Justice O'Connor's shunning of a per se rule rejecting the notion that notice of prior regulation might divest a successive interest holder of the ability to challenge a regulation as a taking exacerbates demoralization costs by destabilizing property owners' sense of entitlement and security in the expectations they hold in their land.[264]

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development plans and data accumulated too far in advance of the market demand for such products become outdated and result in additional costs as the data has to be updated or results in the premature loss of open space.

[258] *See, e.g.*, *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

[259] *See* Fischel & Shapiro, *supra* note 4, at 281; Michelman, *supra* note 24, at 1210. Michelman cites property theorist David Hume for the proposition "that men's habits of mind have been shaped in accordance with [the notion that, absent stabilized private possession, society would disintegrate] . . . so that events which are inconsistent with, or which threaten, stabilized private possession are the cause of a kind of instinctive unease which demands rectification." *Id.*

[260] Fischel & Shapiro, *supra* note 4, at 281.

[261] *See supra* note 243 (discussing demoralization costs).

[262] Palazzolo v. Rhode Island, 533 U.S. 606, 626-27 (2001). "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 628.

[263] *See supra* note 164 and accompanying text.

[264] Bosselman, *supra* note 237, at 1439. Professor Bosselman characterizes Justice Scalia's land ethic as one of opportunity as contrasted with a preservationist view of property. *Id.* at 1485. According to Professor Bosselman, adherents to the land ethic of opportunity believe that "efficiency is en-

The *Palazzolo* court took the first step in reducing demoralization costs associated with takings jurisprudence by recognizing that a successive interest holder on notice of a regulation may, under certain circumstances, assert a takings claim when it is ripe.[265] An important second step is to make the entitlement absolute thereby vesting property owners and successive interest holders with the security and predictability that comes from an established rule that the legal entitlement to sue for a taking of property, at all times, is transferable with the title to the land.[266] Such a rule makes the land itself more valuable and insures the fairness for which Justice O'Connor advocates.[267] Certainty of property rights and entitlements is necessary to defeat demoralization costs.[268] Purchasers seeking to acquire property from Longstanding Homeowners (narrative number one) and The

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hanced by maximizing the landowner's opportunity to use his private property to fulfill the landowner's own human needs." *Id.* at 1489. He further characterizes Justice Scalia as follows:

> Although Scalia avows land's uniqueness, he also advocates its free marketability, which means that if land is to produce maximum happiness, it must be "commodified" so that it can be converted into other forms of wealth if its owner so chooses. This means it should be made easily available for purchase, assembly, and use through legal rules that draw bright lines around both the boundaries of land and the rights of the owner.

Id. at 1496-97. Importantly, Professor Bosselman acknowledges that Justice Scalia is not opposed to all government regulation of land; he does support government regulations that are founded upon sound economic principles. *Id.* at 1502; *see also* Poirier, *supra* note 104, at 159 ("Human beings will tend to price more highly something they believe they own and could sell than something they believe they do not own and could buy. . . . Similarly, people put a higher value on something they believe they have a right to.").

[265] *Palazzolo*, 533 U.S. at 628.

[266] FISCHEL, *supra* note 30, at 185. Professor Fischel discusses why the ability to challenge a land use restriction as a taking should be alienable by the owner to the successive interest holder. He makes the point by use of the following illustration:

> When A sold the property to B, he sold along with the nominal title to the land a legal entitlement to sue the community for a taking of his property. This made the land that much more valuable, and thus A gained from being able to sell it. If A had the right to sue for a taking, but B does not, the right to legal redress is made inalienable. This shifts the burden back to A; he must keep title to the property to retain the right to benefit from the taking clause.
>
> This would be a burden insofar as A might have had a strong time preference, a need for liquidity, or an inability to act as a developer. (Since much undeveloped property is sold upon the death of the owner, all of these would usually apply to the heirs.) Allowing only original owners to sue for a taking . . . is itself a restraint on alienation of property and a taking.

Id..

[267] *See Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). Justice O'Connor rejects a per se notice rule in favor of property owners. Instead, she advocates that courts, on a case by case basis, should decide whether a successive interest holder's notice of prior regulations should prevent him from challenging a regulation as a taking, according to what fairness dictates. *Id.* at 632-36. This type of ad hoc inquiry creates an environment in which property owners lack an objective and reliable standard for assessing and valuing their property and the entitlements that accompany and flow with the title to property.

[268] *But cf.* Poirier, *supra* note 104, at 158 ("[W]here transaction costs are high potentially efficient bargaining will not occur. Relying on a third party to enforce vague standards can break this impasse and result in greater overall efficiency.") (citation omitted).

Three Owners (narrative number three) will discount their maximum purchase price to account for uncertainty of the transferability of the takings claim and, if given the choice, will gravitate towards properties with fewer restrictions and subject to more certain legal rules.[269] The natural consequence for Longstanding Homeowners and The Three Owners is increased demoralization costs. Likewise, the involuntary transfer of property from the corporate owner to its various shareholders disadvantages Owner-Developer who, in the wake of the transfer, may be faced with the absolute loss of the right to pursue a takings challenge. The corporation was dissolved pursuant to the applicable state law for failure to pay taxes; thus, it does not exist as a legal entity and cannot ripen or pursue a takings challenge[270] and Owner-Developer also may lack the ability to challenge the regulation under a subjective application of the notice rule.[271] Thus, the takings challenge, as a property interest, is destroyed in the process of transferring title. The demoralization cost to Owner-Developer in his capacity as a corporate shareholder before the dissolution is obvious.

b. Efficiency[272] and Wealth Maximization

Efficiency theorists apply several tests as measures of efficiency, including the Pareto[273] and Kaldor-Hicks[274] efficiency standards.[275] The the-

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[269] *See* JUERGENSMEYER & ROBERTS, *supra* note 7, at 83 ("[T]he value of . . . land usually increases when the number and intensity of allowable uses increase.").

[270] *See, e.g.*, 3 JAMES D. COX ET AL., CORPORATIONS § 26.10 (2002) ("At common law, in the absence of a statutory provision to the contrary, a dissolved corporation can neither sue nor be sued, and all actions or proceedings commenced by or against it prior to its dissolution abate.") (citation omitted).

[271] *See Palazzolo*, 533 U.S. at 632-36 (O'Connor, J., concurring) (discussing the subjective weighing of a property owner's notice of pre-existing regulations in the context of a *Penn Central* takings challenge).

[272] An alternative to measuring efficiency by utility maximization is to measure efficiency by pursuing a policy of wealth maximization ("the dollar value of scarce resources as measured by individuals' willingness and ability to pay for them"). BARNES & STOUT, *supra* note 177, at 6.

[273] The Pareto system evaluates not only reallocations but also allocations themselves. The term Pareto optimal refers to allocations of resources where there is no possible reallocation that can improve one individual's situation without making someone worse off. *Id.* at 12. As this article is concerned with the taking of the takings claim, that is the transfer of the right to pursue a takings claim or to assign it to a transferee as part of the bundle of rights that the pre-regulation owner holds in the property, from the individual to the government, the focus is on the Pareto system's efficacy in judging the efficiency of transfers of the takings challenge in the regulatory takings area. A reallocation of resources is Pareto inferior if it renders at least one individual worse off regardless of the number of individuals who may be better off with the reallocation. *Id.* at 11. A transaction that is truly Pareto superior leaves no individual worse off, including those individuals external to the government-coerced transaction. Blake D. Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*, 69 TUL. L. REV. 715, 768 (1995). The added difficulty of insuring the improvement, or minimally, maintenance of the status quo of third parties, in conjunction with the Pareto system's failure to question the fairness of the initial allocations "diminish[es] the efficacy of [P]areto criteria as a reliable indicator of efficiency." *Id.* at 769.

[274] Under the Kaldor-Hicks test:

ory of Pareto superior reallocations states that a reallocation of resources is desirable if the reallocation improves at least one person's situation without worsening the situation of anyone else.[276] The Pareto system of assessing the societal benefits conferred by a particular allocation or reallocation of resources is useful; however, its practical value is limited by the strictness

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> all of the costs and benefits of a legal rule or institution are first valued according to the affected persons' willingness to pay, and then all of those benefits and costs are separately aggregated. If the beneficiaries of the rule could in theory fully compensate the losers for their losses and still come out ahead; that is, if the total benefits exceed the total costs, the rule or institution is deemed to be efficiency-enhancing (a "Kaldor-Hicks improvement"), even though those theoretical compensation payments are not made.

Gregory Scott Crespi, *The Mid-Life Crises of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV 231, 236 (1991) (citations omitted); *see also* BARNES & STOUT, *supra* note 177, at 16. The distinction between the Pareto and Kaldor-Hicks approaches is that although both require that compensation be "full," the Pareto approach requires that compensation for a taking actually be paid in order to insure that the benefit of the taking to the government outweighs the loss to the individual. *Id.* Under Kaldor-Hicks, compensation need not actually be paid and, in fact, it may be undesirable to fully compensate the regulatory takings loser. *Id.* ("[C]ompensating everyone who suffers as a result of state action is complicated and expensive, and interferes with the government's everyday operation."). *But see* Michelman, *supra* note 24, at 1181 (responding to the argument that compensation payments must be limited lest society find itself unable to afford beneficial plans, improvements and regulations):

> The foregoing analysis will, it is to be hoped, indicate the need for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain "unsocialized," exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.

Id. All that is required is that the winner be willing and able to compensate the loser.

[275] Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512 (1980). Both of these doctrines are subject to criticism: the Pareto standard for potentially discouraging socially beneficial projects by the government because of large settlement costs, and Kaldor-Hicks, also known as the wealth maximization standard, for its inability to insure utility maximization and its failure to question the fairness of initial distributions of wealth. Nevertheless, even after accounting for their shortcomings, the Pareto and Kaldor-Hicks standards articulate useful criteria against which to discuss the desirability of effecting an outright transfer of the takings claim to the government via application of the notice rule.

> If a distribution is Kaldor-Hicks efficient then some individual has been made sufficiently better off so that he could—hypothetically at least—fully compensate those who have been made worse off. It does not follow that from their new relative positions the winners and losers are incapable of further mutual improvement through trade. Thus a Kaldor-Hicks efficient allocation need neither be Pareto superior nor Pareto optimal though it may be either or both.

Id. at 513-14; *see also* POSNER, *supra* note 228, at 17 ("The Kaldor-Hicks or wealth maximization approach runs into a special problem of the dependence of the efficient allocation of resources on the existing distribution of income and wealth in cases where the subject matter of the transaction is a large part of one of the parties' wealth."). Fischel and Shapiro define demoralization costs as, in essence, the negative impacts from a utilitarian perspective if the government does not offer compensation. Fischel & Shapiro, *supra* note 4, at 279; *see also* POSNER, *supra* note 238, at 91; *supra* Part IV.C.1 (defining utility and utility maximization).

[276] *See* Morant, *supra* note 273, at 767; *see* BARNES & STOUT, *supra* note 177, at 11.

with which the Pareto criteria evaluates reallocations.[277] According to the Pareto model, a reallocation will be Pareto inferior even if an extraordinarily large number of people benefit from the reallocation and only one person is harmed.[278] The impracticalities inherent in using the Pareto criteria as a determinant of efficient and socially beneficial reallocations make the Kaldor-Hicks or wealth maximization method of measuring efficiency more realistic for real world situations in which externalities and preexisting distributions operate and affect the efficiency analysis.[279] A reallocation is Kaldor-Hicks efficient if those who gain from the reallocation value their gain in an amount that is greater than the losers from the reallocation value their losses.[280] Although economists prefer to think of efficiency in terms of Pareto superiority, policymakers typically apply the Kaldor-Hicks criteria of efficiency when it is difficult to compensate all losers.[281] For purposes of this portion of this article, the term "efficiency" is used in the Kaldor-Hicks sense.

i. *Owners Pursue Takings Challenges*

Applying the notice rule does not maximize efficiency, as measured by wealth,[282] for all of the private parties to the transaction. The settlement cost rationales articulated earlier also apply in the efficiency context.[283]

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[277] *See* BARNES & STOUT, *supra* note 177, at 12.

[278] *Id.*

[279] FISCHEL, *supra* note 30, at 117.

> If the defect in zoning is seen to be an incomplete assignment of entitlements, the property rights approach leads one to ask how entitlements ought to be assigned. If the defect is high transaction costs, the approach leads one to ask how to reduce such costs. If the defect is one of fairness, it leads one to ask how entitlements should be distributed or protected so as to promote fairness.

Id.; *see also infra* note 288 (discussing externalized costs).

[280] Morant, *supra* note 273, at 770; *see also* ROBERT C. ELLICKSON & A. DAN TARLOCK, LAND-USE CONTROLS: CASES AND MATERIALS 64 (1981).

[281] ELLICKSON & TARLOCK, *supra* note 280, at 64.

[282] *See supra* Part IV.C.1 (defining wealth); *see also* BARNES & STOUT, *supra* note 177, at 10.

> Wealth maximization avoids some of the measurement problems associated with utility maximization. Although one may not trust what people always say about how highly they value a particular good or service, one can usually trust their behavior when they express their willingness (and ability) to pay through the actual purchase or sale of resources. Moreover, while the [experienced utility] of two people are not comparable, one person's dollar is as valuable as another's. Money thus provides a common measuring rod for comparing the relative values that different persons attach to particular resources.
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> Because wealth is much easier to quantify than utility, economists customarily use individuals' relative willingness and ability to pay money to judge the propriety of a particular reallocation of resources. But defining the value of a resource according to peoples' willingness and ability to pay for it also has distributional implications. Wealth maximization inevitably requires that a greater share of resources go to wealthier people.

Id.

[283] *See supra* Part IV.

Under one scenario, application of the notice rule might motivate knowledgeable owners such as Longstanding Homeowners, Owner-Developer, and The Three Owners to prematurely ripen and pursue regulatory takings challenges. Such premature activity will occur at the government's expense, regardless of whether Longstanding Homeowners, Owner-Developer, and The Three Owners ultimately succeed or fail.

First, assume that Longstanding Homeowners, Owner-Developer, and The Three Owners succeed in their takings challenges. The government will have to decide whether to (1) lift the regulatory restriction and pay compensation for the temporary taking if one is found[284] or (2) leave the regulation in place and pay compensation for a permanent taking.[285] Aside from the adverse outcome and the related settlement costs,[286] the government would have to address the compensation and regulatory repeal decisions earlier than if Longstanding Homeowners, Owner-Developer, and The Three Owners and their respective successive interest holders were confident of the alienability of the takings claim. Longstanding Homeowners, Owner-Developer, and The Three Owners have a reduced incentive to challenge the regulation and incur the related monetary and time costs as the existing use restriction is not inconsistent with their current desired and anticipated property uses. If they were secure that the takings claim was alienable, they might negotiate a purchase price that reflects the discounted value of the property in its regulated state plus the value of the takings claim.[287]

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[284] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (Stevens, J., dissenting).

> When [a regulation is deemed a taking] the government has a choice: it may abandon the regulation or it may continue to regulate and compensate those whose property it takes. . . . Paying compensation for the property is, of course, a constitutional prerogative of the sovereign. Alternatively, if the sovereign chooses not to retain the regulation, repeal will, in virtually all cases, mitigate the overall effect of the regulation so substantially that the slight diminution in value that the regulation caused while in effect cannot be classified as a taking of property. We may assume, however, that this may not always be the case. There may be some situations in which even the temporary existence of a regulation has such severe consequences that invalidation or repeal will not mitigate the damage enough to remove the "taking" label. This hypothetical situation is what the Court calls a "temporary taking." . . .
>
> A temporary interference with an owner's use of his property may constitute a taking for which the Constitution requires that compensation be paid.

Id. at 328-29.

[285] *Id.*

[286] *See supra* Part IV (defining and discussing settlement costs from a utilitarian perspective).

[287] *See* Eagle, *supra* note 52, at 391-92 (stating that although the court of appeals in the subject cases could, under New York state law, deprive the owners subject to a preexisting regulation of the right to challenge an as applied takings claim, "the taking of a takings claim is, under United States Supreme Court precedent, itself a taking") (citations omitted); Fischel & Shapiro, *supra* note 4, at 287-91 (considering the notice and capitalization arguments against compensation for takings and concluding that refusing to confer the right to pursue a takings claim on owners who acquire title after the date of a regulatory enactment makes a valuable property entitlement inalienable). "Insofar as alienability is regarded as an essential aspect of normal property rights, a rule that purchasers are not compensated is

Second, the takings challenges of Longstanding Homeowners, Owner-Developer, and The Three Owners could fail. If their takings challenges fail, efficiency is not maximized for the government because it is forced, prematurely, to defend the regulation. Assuming that the respective successive interest holders would have, later in time, ripened and pursued a takings claim if given the chance, the government is forced to undertake the cost of such a challenge earlier than it would have absent the loss of the takings claim.

Likewise, the loss of the takings claim is not efficient for Longstanding Homeowners, Owner-Developer, and The Three Owners who incur the cost of ripening and pursing the takings claim but, because their takings challenges fail, their property remains valued in its regulated state. Absent the forced loss of the takings claim, Longstanding Homeowners, Owner-Developer, and The Three Owners might have transferred their properties to successive interest holders and avoided the cost associated with the unsuccessful challenge. The successive interest holders, perhaps positioned to await a change in the market, such as a natural outgrowth of a community generating a need for development of the property inconsistent with the current restriction, might be better positioned, compared to Longstanding Homeowners, Owner-Developer, and The Three Owners, to successfully challenge the regulation. Even if unsuccessful, the successive interest holder, understanding that the right to pursue the takings claim is no guarantee of success, would have negotiated a purchase price, in the case of Longstanding Homeowners and The Three Owners, at which the successive interest holder would be satisfied to possess the property in its regulated state. Weaker takings claims would be transferred without much value given their reduced possibility of succeeding.

ii. *Owners Do Not Pursue Takings Challenges*

Under a second scenario, Longstanding Homeowners, The Three Owners and Owner-Developer do not ripen and pursue regulatory takings claims and transfer their properties to successive interest holders encumbered by the regulation. The successive interest holders' ability to successfully pursue a takings claim is either eliminated by strict adherence to the

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itself a taking of the seller's property." *Id.* For purposes of this article, the term "capitalization" is defined as "[a] mathematical process for estimating the value of a property using a proper rate of return on the investment and the annual net operating income expected to be produced by the property." Buyer's Resource Real Estate Glossary, *at* http://www.4554.com/Glossary/CAPITALIZATION.html (last visited Sept. 17, 2003) (on file with the Connecticut Law Review). Net operating income (the income projected for an income-producing property after deducting losses for collection, operating expenses and vacancy) divided by the capitalization rate (the rate of return that a property will produce on the property owner's investment) is the formula for determining the capitalization amount. *See also* FISCHEL, *supra* note 30, at 184-86 (considering the capitalization argument and advocating for the alienability of the right to pursue takings claims for owners who acquire title after the date of regulatory enactment).

notice rule or, at the very least, adversely impacted. The government obtains wealth maximization by externalizing the costs[288] associated with its regulation of the affected property. Once the property transfers, Longstanding Homeowners, The Three Owners, and Owner-Developer are no longer able to ripen a takings claim;[289] thus, they lose the opportunity to challenge the government's regulatory imposition as a taking and to obtain compensation if successful. The government benefits from the certainty that it will not have to compensate them and from diminished costs associated with defending a takings challenge.[290] Further, the transfer of title with notice of the earlier-enacted regulation will either absolutely bar the successive interest holders' takings challenge or serve as a factor that adversely impacts the successive interest holders' likelihood of succeeding in a takings challenge.[291] Again, the government benefits from the greatly, if not absolutely, enhanced certainty that the successive interest holders lack the right to pursue a takings claim or, even if they are successful in establishing such a right, the government benefits from the negative impact notice of the regulation will have on their reasonable investment-backed expectations.[292]

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[288] Externalized costs are costs that are imposed, in this case, by the government on others as a result of the government's activities that the government is not required to account for in its decision-making. *See* BARNES & STOUT, *supra* note 177, at 23.

> Economic analysis explains why rational individuals might prefer a coercive government authority over the freedom of the "state of nature." Rational maximizers in the state of nature impose external costs on and withhold external benefits from each other in a wasteful, inefficient fashion that prevents society from reaching the much higher level of well-being possible when a government controls externalities. By mutually agreeing to submit to a coercive state, individuals force themselves to behave more responsibly and efficiently, improving the well being of all.

Id. at 418. Although this statement is true in certain contexts, as discussed above, the coerced externalization of the regulatory cost by the taking of the takings claim through the notice rule has the greatest potential for maximizing the government's wealth at the expense of the individual property owner.

[289] Once property is transferred, the prior owner has no authority, without the consent of the successive interest holder, to pursue any development plans and in any event no longer has a property interest in the subject property.

[290] Once a judicial precedent establishes that, under these facts, owners lack the right to bring takings challenges, such challenges are subject to dismissal in the pleading stage through a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, or on a Rule 56 summary judgment motion or such other motion on the merits, early in the litigation process. FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56.

[291] *See* Palazzolo v. State, 746 A.2d 707, 717 (R.I. 2000) (barring takings claims where regulations existed when the landowner acquired the property), *rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001) (stating that acquisition of title by landowner after effective date of the state-imposed restrictions is not ipso facto fatal to a regulatory takings claim on the basis that landowner was on notice of those restrictions).

[292] *See* Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 282 (1992). Professor Farber notes that seizure of property without a compensation requirement results in pure gain from the government's perspective. *Id.* He makes this observation in the context of a hypothetical foreign investor facing the possibility of a forced government transfer of wealth from the foreign investor, an outsider, to the government's local voters. *Id.* The argument is not quite as stark in

Longstanding Homeowners, The Three Owners, and Owner-Developer suffer from a wealth maximization perspective as they are "under-compensated"[293] in the purchase of the land. The regulation reduces the fair market value of the property and the government's further restriction on the life of the takings claim prohibits them from negotiating the transfer of the potential claim along with title to the property. The loss of the takings claim is not wealth maximizing for Longstanding Homeowners or The Three Owners because, but for the loss of part or all of their takings claim, they could have negotiated not only the transfer of the property but of the takings claim also at a price somewhere between the value of the property prior to the regulation and the value of the regulated property without the ability to ripen and pursue a takings claim.

It is difficult to imagine a scenario in which a successive interest holder would not prefer the transfer of the property to include takings challenges. The successive interest holders' evaluation of the likelihood of succeeding in a takings challenge would impact his valuation of the takings challenge. Even if the successive interest holders did not perceive a present possibility of succeeding, they would still place some value, even if only nominal, on the right to transfer the takings challenge to an even more subsequent in time interest holder who might assess the likelihood of succeeding in a takings challenge differently and who might place a greater value on the transfer of right to attack the government's regulation.[294] Regardless of the successive interest holders' valuation of the claim, they would always be better situated in terms of wealth maximization by having the right to challenge the government.

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the context of seizures of property by government from a local property owner without a compensation requirement because the local property owner is a member of the government's constituency along with the other local voters whereas the foreign investor is more discernibly an outsider. *Id.* Nevertheless, government does experience some benefit from the appropriation of private property without the obligation to compensate the losing property owner. *See Palazzolo*, 533 U.S. at 626-27 (discussing the adoption of the Rhode Island view of the impact of notice as conferring a windfall on government).

[293] Longstanding Homeowners, The Three Owners, and Owner-Developer are under-compensated. Absent the government's interference, established notions of property would allow them, expressly, if not already implied in law, to assign their rights to pursue a takings claim, and any other claims the owner might be entitled to pursue related to the property and non-personal in nature, to the purchaser. Removal of the takings claims from the owner's bundle of property rights, diminishes the market value of the bundle to the world of potential takers.

[294] Statutes of limitations would affect the successive interest holder's assessment of the value of the right to negotiate the transfer of the takings claim to a yet subsequent successive interest holder as a running of the applicable statute of limitations would make an assignment of the claim moot and of no value. *See, e.g.*, Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 226-29 (D.R.I. 2002) (describing the process for determining if a takings claim is time-barred); Palazzolo v. Rhode Island, 1988 R.I. Super. LEXIS 127, at **3-9 (Oct. 31, 1988) (discussing statutes of limitations as applied to direct constitutional claims predicated on the Fifth Amendment Just Compensation Clause).

2. *Windfalls and the Average Reciprocity of Advantage*

a. The Windfall Argument

Some argue that allowing subsequent purchasers to challenge the enforcement of regulations pre-dating their acquisition of title and of which they had notice would confer undeserved windfalls on successive interest holders and reward land speculation to the detriment of the public fisc.[295] After all, as the argument goes, these successive interest holders bought their property at a reduced purchase price which arguably reflected the value of the property to them in its regulated state.[296] Considering windfall

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[295] *Palazzolo*, 533 U.S. at 626-27 (discussing the Rhode Island Supreme Court's decision to bar subsequent purchasers from challenging an earlier-enacted restriction as a taking). Professor Gregory M. Stein states the following regarding the impact on a buyer's investment-backed expectations of the buyer's actual or constructive knowledge of a government-imposed land use restriction at the time of the buyer's acquisition of title:

> A buyer cannot claim that his reasonable investment-backed expectations have been impaired if his expectations were not reasonable and were not backed by his investment. The buyer's actual or constrictive knowledge of the new land use restriction before he acquired title means that he cannot argue that the land is as valuable after the enactment as it was before. Even if he subjectively held this expectation, it was not reasonable. Thus, when he buys the property, he must insist upon a price discount that reflects the drop in value that the regulation has caused. After he demands this reduced price, any expectation on his part that the land can be developed later without restriction will not be backed by his actual investment, which already has factored in the drop in value that the restriction causes. Not only does this buyer lack a reasonable investment-backed expectation that the land may be used without restriction, he also cannot prove any financial loss.

Stein, *supra* note 175, at 114-17. *But see* Fischel & Shapiro, *supra* note 4, at 287-88. Professors William A. Fischel and Perry Shapiro caution against making property entitlements inalienable by divesting purchasers with notice of existing regulations of their ability to challenge the regulations as takings. They observe the following:

> Looking at takings at the wrong moment in time is the source of another problem that causes persistent confusion in the takings literature. This is the argument that expectations of a taking are capitalized in the value of property so that purchasers of the property pay less for it and thus should not be compensated. Our argument is that capitalization does not satisfy anxiety about takings because it again views the problem at the wrong moment in time.
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> If [Purchaser], expecting that a taking of [Seller's] land will not be compensated once [Seller] sells it, nonetheless purchases it for $100 instead of the $300 it would command absent the prospective taking, it is true that [Purchaser] does not lose in an expected-value sense if the land is subsequently taken without compensation. But [Seller] surely lost from the prospective taking. If he had been guaranteed compensation for takings that, like other property entitlements, ran with the land, [Purchaser] would have had to pay [Seller] $300.
>
> To say that [Purchaser] should not be compensated because he "moved to the taking" or "purchased with notice" or "assumed the risk" or "had [irrational] expectations" is to make one of [Seller's] property entitlements inalienable, if [Seller] would have received compensation by holding on to it.

Id.

[296] *See Palazzolo*, 533 U.S. at 626-27, 635 (O'Connor, J., concurring) (stating that subsequent owners purchase with notice of the regulatory limitation, possibly receiving windfalls); *see, e.g.*, Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997).

> The rule that preexisting regulations inhere in a property owner's title will affect the value of property, but this should furnish ample incentive to the prior owner—the

issues in this context increases the administrative complexity that arises when decision makers allow their takings and just compensation determinations to be influenced by an aversion to conferring undeserved windfalls on successive interest holders.[297] Although successive interest holders, in the context of the *Palazzolo* case, who successfully pursue takings claims, would benefit from government expenditures in the form of takings compensation, it is also true that, as a group, private property owners and their land frequently benefit from government expenditures and programs.[298] For example, when government reclaims land from lakes or rivers, offers homesteaders the limited right to seize public lands, or relaxes an existing zoning regulation, government confers benefits on private property owners.[299] Property owners would tend to view government actions as ineffi-

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> party whose title has been redefine by the promulgation of a new regulation—to assert whatever compensatory takings claim it might have. If a prior owner, whether immediate or not, fails to assert a takings claim, it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title. Of course, the parties can condition sale on receipt of the necessary use allowances or prosecution of a takings claim. Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc. . . . The bright-line rule articulated in *Kim* and *Gazza*, which allows for a subsequent successive interest holder to challenge the validity of previously enacted laws (as opposed to pursuing a compensatory takings claim), will enhance certainty and, to that extent, facilitate transferability of title.

Id. *But see id.* at 873 (Wesley, J., dissenting).

> If a prior owner cannot transfer a potential taking claim to a subsequent purchaser, then the property's value is destroyed by the transfer without the government having to pay compensation for it. As suggested by the court in *Lopes*, and as noted in my concurring opinion in *Gazza*, the majority's reasoning effectively forces New York property owners to keep abreast of regulatory enactments and, if an enactment appears to deprive a parcel of its economic value, to seek compensation for the taking. Any property owner who overlooks or misinterprets a regulatory enactment, or who lacks the resources to commence a taking action, cannot transfer the property to someone else without destroying the property's value. Instead, he or she will find that the property has, without compensation, been dedicated to whatever governmental purpose formed the basis for the regulatory enactment.

Id.

[297] POSNER, *supra* note 228, at 65-66 (discussing the complexity of requisitioning property from subsequent interest holders).

[298] *See infra* notes 299-300 and accompanying text (discussing the benefits of a taking for private property owners); Melvyn R. Durchslag, Village of Euclid v. Ambler Realty Co., *Seventy-Five Years Later: This is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 651 (2001) ("Richard Epstein has written (and this is and must be for the sake of space a gross oversimplification) that any regulation, land use or otherwise, that extracts from the regulated party more than it returns to the general pubic in the form of benefits is a taking.").

[299] POSNER, *supra* note 228, at 65-66 (explaining that most, if not all privately owned property benefits from government expenditures). "The benefits may long ago have been impounded in the price of land, however, so that payment of full compensation will confer no windfall on anyone." *Id.* at 65-66; Bell & Parchomovsky, *supra* note 22, at 563-64 (explaining that owners of land abutting government derivative givings benefit financially from that giving). The authors explain:

cient and unpredictable if, by application of the notice rule, the judiciary essentially attempted to prohibit successive interest holders from obtaining these types of windfalls.[300] Further, the windfall argument is circular. If a takings claim does not survive a property transfer, then the successive interest holder pays nothing for it in the purchase price.[301] But if the successive interest holder receives the full takings claim transferred by the original owner, the discounted sales price will reflect the value of the takings claim.[302] Thus, under the approach advocated in this article, the original

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> Like takings, givings fall into three categories. In a physical giving, the government bestows a property interest upon a private actor. A regulatory giving occurs when a government enhancement of property value by means of regulation goes "too far." A derivative giving transpires when, as a result of a government giving or taking, surrounding property increases in value even though no direct giving has occurred.
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> . . . .
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> All three types of givings are ubiquitous in reality. Examples of physical givings include the granting of cattle grazing rights, mineral rights, and logging rights on public land to private interests, and the transfer of public land to private entities such as professional sports franchises. Real world instances of regulatory givings pervade zoning law. In principle, any case of upzoning may constitute a giving. The same is true of grants of variances, exceptional uses, and even transferable development rights. Finally, derivative givings may be found anywhere there are physical and regulatory givings. For example, when the government builds a new park, the value of surrounding residential property increases dramatically, bestowing a derivative giving on the property owners. Likewise, any zoning change that increases (or decreases) the value of the subject property might also enhance the value of neighboring property not subject to the change.

Id.

[300] *See supra* Part IV.C (discussing efficiency). Judge Posner notes that in some instances of benefits to private property emanating from government expenditures, the benefits have long been "impounded in the price of the land" so that payment of full compensation, in fact, does not confer a windfall on the property owners who suffer the taking. POSNER, *supra* note 228, at 65-66. The predictability argument assumes an ability on the part of property owners

> to view the particular decision in question as a specific manifestation of a general practice which will be applied consistently to situations involving other people. If he is unable to extend his thinking [in this way], there is no possibility that immediately disadvantageous treatment will be acceptable to him because it is fair.

Michelman, *supra* note 24, at 1221-22.

[301] *See* Fischel & Shapiro, *supra* note 4, at 287-88 (showing that, absent a prospective taking, the purchaser does not have to pay the full amount the property would command if the seller had been guaranteed compensation for the taking); *cf.* JUERGENSMEYER & ROBERTS, *supra* note 7, at 83 (stating that as land value increases commensurate with the increase of permissible uses, it also increases if the ownership of the land carries with it the right to challenge land use restrictions as takings).

[302] The windfall argument is a ruse, a camouflage for the forced reallocation of a benefit from the original owner to the government. Although it is true that a purchaser, knowledgeable of the regulatory environment affecting the property in the hypothetical, will discount the purchase price to reflect the regulation's impact, that is not the end of the economic modification. If the original owner's private right of the takings claim was transferable to the purchaser, the purchaser would consider the value of the expectancy, the claim transferred, which would reflect a weighing of the administrative costs of ripening a takings claim, the likelihood of successfully challenging the regulation and proving a compensable taking, and the investment in litigation. One can imagine that the original owner would obtain the maximum purchase price in an environment that was regulation free, the lowest purchase price where the purchaser knows of the regulation's existence and is unable to purchase the right to pursue the original owner's regulatory taking claim, and a purchase price somewhere in between the best and

owner will receive part of the value of the takings claim.[303]

b. The Average Reciprocity of Advantage[304]

Commentators may assert an alternative and contrary view regarding the utility and efficiency of the government restricting the ability of successive interest holders to pursue takings claims, which view may be expressed in terms of securing an average reciprocity of advantage among property owners.[305] The term "average reciprocity of advantage" is "un-

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worst possible outcomes for the original owner if the parties are able to negotiate not only the purchase price for the property in its restricted state but also the value of the transferred regulatory taking claim in the purchaser's hands. *See* Eagle, *supra* note 52, at 371-72. Eagle discusses the notions of windfalls and land speculation if regulatory takings claims survive the sale of land and are assignable by original owners to buyers by separate instrument.

> [T]he buyer would gain only upon procuring a determination that the application of the land use restriction to the parcel was invalid and if the original owner had failed to challenge the application. Thus, the buyer's victory would be based on diligence, legal acumen, and a sizeable investment in litigation. These factors would hardly make the buyer's victory undeserved, as the connotation of "windfall" would have it.
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> Second, a "rule tolerating" buyer suits would generate only fleeting gains. . . .[E]veryone would understand that buyers enjoyed the same legal rights as original owners. The price of land thereafter would reflect only its highest and best use, taking into account the possibility that very restrictive zoning would be struck down by the courts. Astute buyers might have an advantage over original owners in understanding the potential advantage in challenging land use restrictions, but that should have no more legal relevance than their advantage in understanding the potential of converting farm land to housing subdivisions or in obtaining creative financing. The court's complaint about "speculation" also suggests that it objects more to land being treated as a commodity than it is concerned about maintaining a just balance between the police power and property rights. The economic effect of "speculation" is, after all, a smoother and more rapid re-pricing of assets to reflect their underlying value than otherwise would occur.

Id.; *see also* Fischel & Shapiro, *supra* note 4, at 287-88 (explaining that a rule against compensating purchasers is itself a taking of the seller's property).

[303] Some argue that an original owner ought to directly receive the value of the takings claim. This is a relatively complicated issue in the regulatory taking context. The successive owner is often the party that has ripened and expended funds to challenge the regulation. That party will also negotiate with the government and may reach an accommodation in many instances. In such cases, money may not change hands. So, how do you pay the original owner? Also, original owners could stay in the picture by conditioning the sale on the successful takings challenge. Then the price paid would reflect the property with a successful claim. Therefore, the most practical way of solving this is to allow the market to work to value the claim in the purchase price paid to the original owner.

[304] *See generally* Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1489-1524 (1997) (explaining the average reciprocity of advantage rule).

> The "average reciprocity of advantage" rule was the second of the two tools developed by the early Supreme Court to draw the critical distinction between valid and invalid police power acts. Although most government regulations that confer a benefit are compensable takings, the average reciprocity of advantage rule identifies a critical subset of government actions that, although they convey a private or mixed public/private benefit, are nonetheless valid police power actions.

Id. at 1489 (citations omitted).

[305] *See supra* note 304 (discussing the average reciprocity of advantage rule).

derstood to mean that the owner has not been singled out for adverse treatment, but instead is simply being required to abide by a reasonably general requirement of widespread applicability . . . ."[306] According to this competing view, if given the choice between (1) retaining the takings claim (and having all, most, or perhaps just a simple majority of the similarly situated property owners in proximity to their property likewise retain their claims); and (2) transferring the takings claim to the government, property owners may, in service of their own best interest and utility, elect to abandon their takings claims; however, they will only do so under certain circumstances.[307] First, the present owner must be confident that the claims of similarly situated and affected property owners will also be abandoned, whether voluntarily or involuntarily.[308] Second, the property owner will choose voluntarily to reallocate his takings claim to the government only if he believes that a loss of his takings claim is a prerequisite and necessary condition to the loss of the takings claim of neighboring property owners. If the property owner believes that he can secure the residual benefits of a use restriction of neighboring property owners' properties and a loss of their takings claim to challenge the restriction, without sacrificing his own rights to challenge a similar use restriction, the property owner will attempt to free ride,[309] meaning he will attempt to benefit from the restrictions attaching to the property of others without experiencing the costs associated with similar restrictions of his own property. Finally, most rational property owners will voluntarily relinquish their takings claims if they believe that any diminution in their property values resulting from the regulatory restriction will be offset by an increase in their property values resulting from the certainty of permissible uses on surrounding properties, which increase is equal to or greater than the diminution in their property values. Under this view, the increased value accrues from the "average reciprocity of advantage" that the property owner's property will receive from similar

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[306] DANA & MERRILL, *supra* note 59, at 153.

[307] *See id.* at 154 (discussing Richard Epstein's "universal benefit" theory of average reciprocity of advantage and the alternative, more relaxed, interpretation of the doctrine). Professor Epstein's universal benefit theory requires that *all* owners fare better, to some degree, with the regulation in place than without it. *Id.* ("[E]very owner must receive 'implicit-in-kind compensation' from the law, in the sense that their property has a higher value after the regulation than it did before.") (citing EPSTEIN, *supra* note 4, at 195-215). The more relaxed interpretation does "not insist on universal benefit, but simply require[s] that the regulation be general and that most (or perhaps just a majority) property owners benefit." *Id.*; *see also* Baron, *supra* note 206, at 217-18 (discussing reciprocal benefits that accrue to similarly situated property owners under a system of property regulation).

[308] *See* DANA & MERRILL, *supra* note 59, at 152-56 (explaining the benefit of the more relaxed interpretation of the average reciprocity of advantage rule).

[309] M. Neil Browne & Nancy K. Kubasek, *A Communitarian Green Space Between Market and Political Rhetoric About Environmental Law*, 37 AM. BUS. L.J. 127, 143 n.69 (1999) (defining a free rider as "a person who participates in something for free because others have already paid for it") (quoting DANA COLANDER, MICROECONOMICS 118 (3d ed. 1998)).

restrictions imposed on the neighboring properties.[310]

In this narrow set of circumstances, successive interest holders are potentially willing to pay more for land subject to use restrictions than for unrestricted land because they perceive that comparable restrictions on adjoining properties will ensure against the negative externalities associated with incompatible uses.[311] Thus, the value of the seller's property

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[310] Justice Holmes articulated the "average reciprocity of advantage" doctrine in Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922), and in Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Bell & Parchomovsky, *supra* note 22, at 597. An average reciprocity of advantage exists when a government action "creates diffuse public benefits to all, including the owner whose property is taken. The underlying logic is that both the wealth-enhancing (giving) and wealth-diminishing (taking) elements of government action must be taken into account in determining compensation." *Id.* *See also* Oswald, *supra* note 304, at 1489.

> [T]he average reciprocity of advantage rule identifies a critical subset of government actions that, although they convey a private or mixed public/private benefit, are nonetheless valid police power actions.
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> The rule has undergone substantial change since its genesis in the early part of the twentieth century. Simply put, in its original form, the rule stated that a land use regulation that resulted in benefits to regulated landowners roughly equal to the burdens imposed on them did not violate the United States Constitution. In its modern, corrupted form, however, the average reciprocity of advantage rule states that if a land use regulation results in benefits to society as a whole roughly equal to the burdens imposed upon the regulated landowners, no taking has occurred. As a result of this perversion, the average reciprocity of advantage rule has lost its former potency as a tool for distinguishing valid police power actions from invalid regulatory takings and instead has become a method for simply rubberstamping legislative acts.

Id.

> The term "average reciprocity of advantage" is subject to a wide range of definitions. Historically, it has been most closely identified as a justification for, and legitimation of, comprehensive zoning regulation. When examined within this context, the heart of the concept lay in the presumption that mutual restrictions on property use can enhance the total welfare of the affected landowners. Governmental regulation of land use is thereby justified by the reciprocal benefits that accrue to the burdened individuals. Such ordinances do not give rise to a takings challenge either because it is thought that benefits outweigh burdens and the regulations are, therefore, within the penumbra of substantive due process, or, alternatively, that the benefits that accrue from the regulations provide the necessary compensation to satisfy fifth amendment guarantees.

Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 301-02 (1990) (citations omitted); *see also* Oswald, *supra* note 304, at 1509-10 ("Although each property owner may find use of his or her land restricted by . . . regulation, each is benefited by having similar burdens imposed upon his or her neighbors.").

[311] A successive interest holder is willing to pay more for land with use restrictions if the successive interest holder is certain that the restriction is not only constitutionally permitted but is not a compensable taking (governments, in lieu of paying compensation may decide to lift the restriction so as to avoid compensation all together or, minimally, only have to pay compensation for a temporary takings). *See, e.g.*, Oswald, *supra* note 304, at 1509 (explaining that land use regulations may benefit property owners).

> [Some] regulations are designed to increase property values by affording protection to similarly situated property owners by providing reciprocal benefits through land use regulation. Indeed, contemporary scholars had explicitly discussed the reciprocal benefits that flow to similarly situated property owners through a zoning ordi-

increases as a result of the restriction, and the successive interest holder is happiest to purchase restricted land that is adjoined by land containing similar restrictions,[312] as is evidenced by his willingness to pay more for such land, thus maximizing the successive interest holder's utility.[313] The government's utility is maximized by application of the average reciprocity of advantage doctrine because it does not have to internalize the costs (whether administrative, legal, or in the form of compensation for the property interest taken by the regulation) associated with the regulation and it establishes, by valid exercise of the police power, a policy that will protect the public health, safety and general welfare.[314]

The average reciprocity of advantage theory is an effective measure of utility maximization only in special circumstances, though, when the subject properties are similar in their characteristics and nature and therefore likely to be subject to the same regulation.[315] Additionally, commercial users, such as heavy industry, are typically less sensitive to incompatible uses than are residential users of property and to the extent the market of successive interest holders for the seller's property is not sensitive to uses occurring on neighboring properties, the average reciprocity of advantage theory is a less accurate gauge of utility.[316] Furthermore, the residual social costs that emanate from the over-regulation of property may outweigh any

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nance, noting that such regulations may well protect and increase the value of all property regulated under them.

Id.

[312] The successive interest holder would ultimately be happiest to purchase land that is unrestricted but that is surrounded by land that is restricted in such a manner so as not to be inconsistent with the successive interest holder's use and enjoyment of his/her land. Such a phenomenon is known as spot zoning which is defined as "the process of singling out a small parcel of land for a use classification different and inconsistent with the surrounding area, for the benefit of the owner of such property and to the detriment of the rights of other property owners." MANDELKER & PAYNE, *supra* note 111, at 474. Spot zoning is susceptible to constitutional attack on equal protection and substantive due process grounds. *See id.* at 154-57, 474 (defining substantive due process limitations under the federal constitution).

[313] *See* BARNES & STOUT, *supra* note 177, at 6 (stating that "individuals' willingness to pay money for particular goods can serve as a rough indicator of the value they attach to those goods").

[314] *See* JUERGENSMEYER & ROBERTS, *supra* note 7, at 418 (stating that courts must determine when an "otherwise . . . valid exercise of police power" is excessive or unwarranted, and therefore "should be converted into an exercise of the power of eminent domain" in order to prevent the government from forcing some people to bear financial burdens that should be "borne by the public as a whole"). "Since the Constitution does not prohibit the taking of property, crossing the line from the police power to the eminent domain power does not invalidate the regulation. It means that compensation is due." *Id.*

[315] *Compare supra* Parts IV.A-IV.C.1 *with* Part IV.C.2.(b) (discussing social repercussions of the overregulation of land).

[316] *See* JUERGENSMEYER & ROBERTS, *supra* note 7, at 83-84 (discussing cumulative and exclusive zoning and highlighting that residential zones are typically the least intense, most protected use zones, as contrasted with industrial and commercial zones that permit more intensive uses).

benefits derived from the average reciprocity of advantage.[317] Further, average reciprocity of advantage can come into play in both the substantive takings analysis stage and in the valuation stage but not to deny successive interest owners the right to assert a takings claim.[318]

V. CONCLUSION: THE ALMOST FORGOTTEN TAKING[319]

Windfalls accrue to the government when the notice rule is applied to the detriment of original and successive property owners. The government hinders a property owner's right of disposition of the entirety of its property interest by restricting, either absolutely or partially, a successive interest holder's ability to assert a takings claim. The right of disposition is tantamount to the right of exclusive possession and should be afforded similar protections.[320] My narratives illustrate three common methods by which property owners transfer title in the United States. As states expand the use of land use and zoning powers, these narratives evidence that each exercise by the government of its regulatory powers could gradually divest property owners of valuable property interests and long held entitlements, all without compensation. Successive interest holders need to have the right to stand in the shoes of their predecessors in title and assert the same takings claims that their predecessors could assert. Such right logically flows from an understanding and acceptance of the takings claim as a separate and transferable property interest and is a valuable check on the power of government. The only way to protect pre-regulation owners' ability to realize legitimate property entitlements and incite developers and others to propose and complete community enhancing projects is to recognize the takings claim as a separate interest which passes from owners to successive interest holders.

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[317] *See* Bell & Parchomovsky, *supra* note 22, at 553-54 (stating that "[t]he efficiency rationale for the Takings Clause is to ensure that the state exercises its eminent domain power only when the aggregate benefit exceeds the aggregate cost. Compensation for takings, on this view, forces the state to take into account the cost of its actions. . . . [T]he state's failure to internalize the cost of takings creates fiscal illusion and inefficiency. . . .") (citations omitted); Farber, *supra* note 292, at 126 (acknowledging that, although challenging in some respects, the plausibility of the argument that in a world lacking a government compensation requirement (whether by application of the average reciprocity of advantage doctrine or otherwise), private property owners will under-develop their properties out of fear that government will overexpand by consuming "the fruits of their venture").

[318] *See* Oswald, *supra* note 304, at 1489 (discussing the average reciprocity of advantage doctrine as relevant to the question of whether a regulation constitutes a taking); *see generally* Bell & Parchomovsky, *supra* note 22 (discussing the doctrine in the context of determining the amount of compensation to be paid for a taking).

[319] *Cf.* J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 52 (2002) (concluding with "The Undiscovered Taking").

[320] *See* EPSTEIN, *supra* note 4, at 74 ("The right of disposition is a property right, in the same degree and manner as the right to exclusive possession.").

It is understandable that state and local governments would embrace the concept of a notice rule to eliminate regulatory takings claims.[321] Although *Penn Central* takings are rarely found by courts, state and local governments benefit significantly from being able to use transfers of property to deny, outright, subsequent interest owners' right to challenge their regulations.[322] This positivist view of property heavily benefits government regulation. But it does so at a significant cost to individual property owners. This phenomenon is accentuated by the manner in which property is developed in this country. It is further accentuated by the difficulty and lack of resources and incentives that original property owners have in challenging regulatory takings.

The Supreme Court in *Palazzolo* moved one step closer to a natural law view of property. It is an important step to hold that governments cannot absolutely deny successive owners a right to challenge a regulatory taking because they had notice of a pre-existing regulation. However, the failure of the Supreme Court to articulate a clear rule on how lower courts should constitutionally consider the notice rule has the potential to significantly undermine the right to challenge regulatory takings.

As this article has shown, a clear property right of a taking which transfers from original owner to successive interest holders is consistent with theories of property and economics. Courts should recognize that governments have other legal constructs such as standing, ripeness, and statutes of limitation to limit potential takings claims. Further, although the event of the property transfer should not limit or eliminate the takings claim, the determination of compensation will undoubtedly consider the amount paid by the successive interest holder for the property.[323]

"A clear announcement that judicial changes in property law are subject to the takings constraints would serve as a valuable reminder to courts that the judiciary, like all branches of government, should be concerned

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[321] Barton Thompson believes majoritarian pressure is often the catalyst for the taking of property. Thompson, *supra* note 8, at 1483. "Recognizing the advantage that the state has in acquiring property for free, politically powerful individuals and entities will almost certainly lobby the state to use the takings power to redistribute property in their private favor." *Id.* at 1484.

[322] *Id.*

[323] To consider investment-backed expectations at the classification stage rather than at the valuation stage exposes the danger that the judiciary, and the population whose interest it serves, will begin to imagine that there are certain interests and expectations that are, for whatever reason, less laudable than others and should therefore be excluded from the compensation scheme. *See* Michelman, *supra* note 24, at 1193-94 (discussing the deleterious impact of balancing social gains against private losses). Takings questions involve asset reallocation. The judiciary, by weighing investment-backed expectations in the takings analysis, reallocates the burdens and benefits of land ownership and regulation between current owners who become future, willing sellers and the landless, willing purchasers. The primary beneficiary of this reallocation is the regulating entity (and residually the population it serves) while the seller and post-regulatory enactment purchaser are both in a worse position than if the reallocation were left to the market forces.

with the impact of its decisions reordering property rights."[324] Given the rare instance in which regulatory takings are found, the approach advocated in this article gives the proper balance between government regulation and individual property rights.

[324] Thompson, *supra* note 8, at 1496.