Regulatory Takings: Distinguishing Between the Privilege of Use and Duty

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REGULATORY TAKINGS: DISTINGUISHING BETWEEN THE PRIVILEGE OF USE AND DUTY

"Beyond the limits of his confining skin, no man can own any thing. 'Property' refers not to things owned but to the rights granted by society; they must periodically be re-examined . . . ."\(^1\)

I. INTRODUCTION

*Penn Central Transportation Co. v. City of New York*\(^2\) is the first in a line of Supreme Court opinions, spanning roughly the last twenty years, that addresses the law of regulatory takings.\(^3\) These decisions have sent takings jurisprudence through a maze of "ad hoc"\(^4\) and "per se"\(^5\) tests, leaving observers bewildered when attempting to access, understand,

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1. **GARRETT HARDIN, EXPLORING NEW ETHICS FOR SURVIVAL** 127 (1972). Before arriving to this conclusion Hardin noted:

   We often speak of the "rights of private property," but what is "property"? The word has many meanings, among which are the following.

   If I say, "I own this land" I imply that:
   a. I can use the land;
   b. I can abuse the land;
   c. I can sell the land (i.e., I can break the tie of responsibility between my land and me).

   In an uncrowded world there may be no reason to restrict a person's freedom to do all three. But in a spaceship, where land is forever limited, there is a limit to our tolerance of the misuse of the heritage which our generation has received from our ancestors and which we hope to pass on to our descendants. Flagrant abuse is, indeed, almost certain to provoke us to limiting our neighbor's freedom to do what he wishes with "his property." An acute and abiding awareness of the imminence of posterity leads us to conclude that private property is not so much something that a man owns as it is something for which he is a trustee. His enjoyment of certain rights with respect to "his" property is—or should be—conditional upon his acceptance of the implied obligations of trusteeship.

   *Id.* at 126–27. Early in his discussion, Hardin points out "the inescapable truth" that the earth is a spaceship. *Id.* at 16.

and apply the law. Commentators have eloquently described the law of takings as "engulfed in confusion," "suffer[ing] from its own inconsistency," "a problem of considerable difficulty," and "a secret code that only a momentary majority of the Court is able to understand." Into these unsettled waters the Supreme Court sailed, in 2001, to hear *Palazzolo v. Rhode Island*.

The Court's decision in *Palazzolo* proves important for a number of reasons. The Court dismissed the suggestion by certain courts that *Penn Central* no longer serves as the standard by which to decide regulatory takings claims. Instead, *Palazzolo* verifies that *Penn Central* still applies to cases in which there has not been "a deprivation of all economic value." The Court, however, rejected a long-standing assumption made by courts and scholars alike—buyers of property are barred from bringing regulatory takings claims to challenge regulations effective prior to their acquisition. By rejecting this proposition, the

6. Id. at 1078.


11. Id. at 632. Compare, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (rejecting the ad hoc *Penn Central* balancing test in regulatory takings cases and noting that "[Lucas] removed from regulatory takings the vagaries of the balancing process, so dependent on judicial perceptions with little effective guidance in law."); with, e.g., Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 96 (1995) (stating that "[t]he Court has identified two per se tests for takings; all other cases are decided under ad hoc rules"). The two categorical takings situations "are those involving permanent physical invasions" and the deprivation of all economic viability. *Id.*


13. See, e.g., *id.* at 626–30; *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (stating that reasonable investment-backed expectations, one factor in the *Penn Central* test "limits recovery to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation. One who buys with knowledge of a restraint assumes the risk of economic loss." See also infra Part III.B); *Broadwater Farms Joint Venture v. United States*, 45 Fed. Cl. 154, 156 (Fed. Cl. 1999) ("Where a regulatory scheme is in place at the time of purchase . . . the reasonableness of the buyer's expectations must be discounted."); *Brace v. United States*, 48 Fed. Cl. 272 (Fed. Cl. 2000); Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV 1165, 1238 (1967) (arguing that a takings claim would even be weak when a buyer purchased property before the land-use restrictions were adopted if the buyer "knew [the land] might be subjected to restrictions."). Michelman argues that in such a situation—where restrictions already exist or when the purchaser has knowledge of the
Court has opened the door for property owners to bring takings challenges against all land-use regulation, regardless of the date of enactment or the identity of the owner when enacted. Although this holding is logical, as a practical matter it is bound to further muddle a "doctrine-in-most-desperate-need-of-a-principle," while also increasing the frequency of litigation. Adding this decision to the land-use challenges the nation increasingly faces—due to population growth, environmental concerns, and the depletion of natural resources—leaves little doubt that it is imperative to adopt a comprehensible standard for regulatory takings. The purpose of this Comment is to present such a regulatory takings standard.

The proposed standard is based loosely on Wesley Hohfeld’s explanation of legal rights. This Comment adopts Hohfeld’s analysis of legal rights because it describes the substance of each "stick" in the "bundle of rights" associated with property ownership. Upon application of Hohfeld’s analysis, it is apparent that legal concepts that are commonly referred to in the law as property "rights" are actually a conglomeration of, among other things, claims, privileges, and duties. The inquiry courts should make when determining whether compensation is necessary in a regulatory takings case should be the following: "What type of right is interfered with?" In situations in which government regulates a duty or only partially interferes with an owner’s privilege to use his property, government interference without compensation will not violate the Fifth Amendment.

The recommended standard is not designed to drastically alter regulatory takings jurisprudence because the case law generally agrees possibility of restrictions in the future—the purchase price reflects these restrictions. Thus, as far as the buyer is concerned, the government has taken nothing. Thus; cf. infra notes 157–61 and accompanying text (detailing how different Justices on the Supreme Court believe existing regulations should be considered in a takings analysis, including Justice Stevens who argued that "it is the person who owned the property at the time of the taking that is entitled to the recovery." Palazzolo, 533 U.S. at 639 (Stevens, J., concurring in part and dissenting in part)). But see Oswald, supra note 11, at 122 n.158 (disagreeing with Michelman and stating, "that the timing of the property owner’s acquisition of the property at stake is irrelevant to the determination of whether the regulation effects a taking"). See also infra note 150 (providing more authority for this proposition).

14. Rubenfeld, supra note 5, at 1081; see also discussion infra notes 157–60 and accompanying text (pointing out how divided the Court is on the proper application of this holding).
16. See discussion infra Part IV.
17. Perry, supra note 15 at 41–42.
with results that would be reached through applying the proposed legal test. Instead, the proposed standard is designed to serve the following purposes: (1) to bring clarity to a confounded area of the law; and (2) to provide flexibility for the law to address a variety of environmental and natural resource issues, recognizing that "land is forever limited."\(^{18}\)

Although this Comment briefly discusses elements of Hohfeld's observations that are essential to understanding the proposed standard, this Comment does not discuss the philosophy of property. Nor does this Comment present a history of the law of regulatory takings.\(^{19}\) Rather, Part II of this Comment analyzes the regulatory takings tests in the wake of Palazzolo. Part III addresses problems in the current regulatory takings doctrine. Part IV presents an alternative standard for regulatory takings based upon identifying the nature of the property owner's infringed right.

II. Palazzolo and Its Impact on the Law of Regulatory Takings

A. Palazzolo's Facts and Holdings

The facts of Palazzolo are common to disputes arising over environmental regulation. In 1959, Anthony Palazzolo and associates formed Shore Gardens, Inc. (SGI) to purchase three adjoining waterfront parcels containing mostly salt marsh in Westerly, Rhode Island.\(^{20}\) Shortly thereafter, Palazzolo bought out the other SGI shareholders and made plans to develop the property.\(^{21}\) Between 1962 and 1966, SGI submitted three applications to fill the land.\(^{22}\) SGI's applications were denied by various state government departments, which claimed that there were inadequacies in the proposals such as "lack of essential information" and "adverse environmental impacts."\(^{23}\)

During the 1970s, SGI made no attempts to develop the property.\(^{24}\) It was at this time, however, that Rhode Island passed legislation creating the Rhode Island Coastal Resources Management Council (the

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18. See HARDIN, supra note 1, at 126.
19. For those interested in the history of the takings doctrine, see, for example, Rubenfeld, supra note 5, at 1081–94.
21. Id.
22. Id. at 614.
23. Id.
24. Id.
Council), "an agency charged with the duty of protecting the State's coastal properties." Pursuant to this authority, the Council promulgated the Rhode Island Coastal Resources Management Program (CRMP). According to CRMP regulations, almost all of SGI's property was designated as coastal wetlands. Twice during the early 1980s—after SGI's corporate charter was revoked—Palazzolo submitted applications to the Council to fill and develop at least part of his salt marsh. The Council denied both applications. Ultimately, the Council held that Palazzolo could not attain a "special exception" to the CRMP because his proposed use for the land did not "serve a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests."  

The second denial by the Council led Palazzolo to appeal to the Rhode Island courts. When the Council's decision was affirmed, Palazzolo filed an inverse condemnation claim seeking $3,150,000 in damages. Palazzolo argued that the CRMP "as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments." After an adverse ruling by the Superior Court, Palazzolo's arguments were also rejected by the Rhode Island Supreme Court. The Rhode Island Supreme Court affirmed the trial court's decision because, inter alia, "[Palazzolo] had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI." His claim under Lucas v. South Carolina Coastal Council that his property had been "depriv[ed] of all economically beneficial use was contradicted by [the] evidence," and a partial takings claim under the Penn Central test also had to fail because he could have had no reasonable investment-backed
expectations since the CRMP predated his ownership of the land.\footnote{Palazzolo v. Rhode Island, 531 U.S. 923 (2001).}
Palazzolo appealed to the United States Supreme Court for relief and certiorari was granted.\footnote{Id.}

The Supreme Court affirmed the Rhode Island Supreme Court's decision that, under the Lucas test, Palazzolo's claim must fail because the evidence established that Palazzolo's property retained considerable value.\footnote{Palazzolo, 533 U.S. at 630; Palazzolo did not dispute the State's finding that, even subject to the CRMP, "his parcel retained $200,000 in development value." Id. at 630–31.} The Court, however, reversed the Rhode Island Court's holding that Palazzolo was excluded from challenging regulations enacted prior to his acquiring the property.\footnote{Id. at 626–30; see also discussion infra Part III.B.3.} Finally, the Court remanded the case to be examined under the Penn Central partial takings analysis in light of the Court's conclusion that future property owners are not barred from challenging earlier enacted land regulations.\footnote{See Palazzolo, 533 U.S. at 630–32. Lucas claims are based on the Court's holding in Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992), discussed infra notes 58–68 and accompanying text.}

\section*{B. Regulatory Takings in the Wake of Palazzolo}

Palazzolo is an important decision in at least two respects. First, it reaffirms the propriety of applying the Penn Central test to regulatory takings claims in which the property in question retains more than token value.\footnote{Id. at 632; see also discussion infra Part III.B.3.} Second, Palazzolo rejects the theory that buyers of property are barred from bringing regulatory takings claims to challenge regulations effective prior to acquisition.\footnote{Id. at 632.} The consequence of this holding is that property owners now have two theories to use when challenging any land-use regulation: Penn Central claims and Lucas claims.\footnote{Id. at 632.} To discuss the current regulatory takings doctrine, identification of the elements of each claim is necessary.

\begin{itemize}
\item \footnote{Id. The Rhode Island Supreme Court found that Palazzolo's ownership of the waterfront parcel began after SGI's corporate charter was revoked, not while Palazzolo was sole stockholder of SGI. Palazzolo v. State ex rel Tavares, 746 A.2d 707, 717 (R.I. 2000). According to this reasoning, because the CRMP was enacted while SGI was still a corporation, when Palazzolo was later transferred the title, he took title subject to whatever restrictions the CRMP placed on his property. Id. Thus, at the time the property was transferred to Palazzolo, he could have had no reasonable investment-backed expectations that would be in contradiction of the CRMP. Id.}
\item Palazzolo, 533 U.S. at 630–32. Palazzolo did not dispute the State's finding that, even subject to the CRMP, "his parcel retained $200,000 in development value." Id. at 630–31.
\item Id. at 632; see also discussion infra Part III.B.3.
\item Palazzolo, 533 U.S. at 630.
\item Id. at 632.
\item Id. at 626–30; see also discussion infra Part III.B.3.
\item See Palazzolo, 533 U.S. at 630–32. Lucas claims are based on the Court's holding in Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992), discussed infra notes 58–68 and accompanying text.
\end{itemize}
Referred to as "ad hoc, factual inquiries," Penn Central claims, based on the Supreme Court's holding in Penn Central Transportation Co. v. City of New York, are made by landowners who believe that government regulation has unconstitutionally deprived their property of some of its value. In Penn Central, the Court considered whether a historical preservation law adopted by New York City violated the Takings Clause because it effectively prevented Penn Central from constructing a skyscraper atop Grand Central Station. The Court held that the regulation did not violate the Takings Clause, as applied to the states by the Fourteenth Amendment. While discussing the jurisprudence of the Takings Clause, the Court pointed out its inability "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." To arrive at its decision, the Court compiled a number of significant factors, identified during "ad hoc, factual inquiries" of prior cases, and applied them to the case at the bar.

These factors include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action." The analysis may also consider the breadth, function, and public interest—including health, safety, morals, and general welfare—of the regulation. Ultimately, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose or perhaps if it has an unduly harsh impact upon the owner's use of the property."

47. Id.
49. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation").
51. Id. at 138.
52. Id. at 123-24 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).
53. Id. at 124.
54. Id.
55. See id. at 133.
56. Id. at 127 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Moore v. East Cleveland, 431 U.S. 494, 513-14 (1977) (Stevens, J., concurring)). A problem with this "substantial public purpose standard," also relied on by the Lucas Court, see discussion infra note 63, is that it confuses the law of takings with due process. The Court suggested that there are two situations in which a regulatory taking may occur: 1) a regulation is "not reasonably necessary to . . . effectuat[e] a substantial public purpose," or 2) a regulation "has
The burden on a landowner to establish a regulatory taking under *Penn Central* is a difficult obstacle to overcome. In the words of one federal appellate judge, "[f]ew regulations will flunk this nearly vacuous test. In fact, the Supreme Court has only once found a partial taking to be compensable, and even then only a plurality applied the partial takings analysis."\(^{57}\)

In the alternative, where landowners believe they can establish that a regulation has deprived all, or nearly all, "'economically viable use'"\(^{58}\) of their property, they may bring a *Lucas* claim\(^{59}\) based upon the Supreme Court's holding in *Lucas v. South Carolina Coastal Council*.\(^{60}\) The *Lucas* Court considered whether a South Carolina law, which

\(^{57}\) Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring) (citing E. Enters. v. Apfel, 524 U.S. 498 (1998)). *Eastern Enterprises*, the case to which Judge Williams refers, arose out of an attempt by Congress to solve the problem of funding retired coal miners' health benefits. *E. Enters.*, 524 U.S. at 537. A close read of the case reveals that, despite the plurality's opinion, a majority of the Court actually agrees that the Takings Clause does not even apply, let alone resolve the issue as a taking. See generally *id.* at 539-47 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 553-58 (Breyer, J., dissenting, joined by Justices Stevens, Souter, and Ginsburg). These five Justices disagree with the application of the Takings Clause because they argue that, in order for there to be a takings issue there must be "a specific property right or interest . . . at stake." *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part); *accord id.* at 554 (Breyer, J., dissenting). Instead, *Eastern Enterprises* involves "ordinary liability." *Id.* at 554 (Breyer, J., dissenting); *accord id.* at 543 (Kennedy, J., concurring in the judgment and dissenting in part). Courts are reluctant to find a taking where the property at issue retains more than token value. E.g., Ruth Energy, Inc., v. United States, 270 F.3d 1347 (Fed. Cir. 2001); Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia, 23 F. Supp. 2d 30 (D.D.C. 1998), aff'd, 198 F.3d 874 (D.C. Cir. 1999); Sanitation and Recycling Ind., Inc. v. City of New York, 928 F. Supp. 407 (S.D.N.Y. 1996).


\(^{59}\) Often referred to as a taking "per se." *Lucas*, 505 U.S. at 1052 (Blackmun, J., dissenting).

\(^{60}\) 505 U.S. 1003 (1992).
effectively barred Lucas from building oceanfront homes adjacent to the beach, violated the Takings Clause.\footnote{1} In contrast to the ad hoc factual inquiry adopted by the Penn Central Court,\footnote{2} the Lucas Court employed an economic impact standard; relying on dicta in Agins v. City of Tiburon,\footnote{3} the Court held that the Takings Clause is violated whenever a regulation "'denies an owner economically viable use of his land.'"\footnote{4} Once the total deprivation of economic viability has been found, compensation is necessary unless the regulations are no different than the restrictions already imposed upon the property due to the "background principles of the State's law of property and nuisance."

Practically speaking, a Lucas claim is likely to be the least common of the two types of claims just discussed because of the high burden on landowners to establish that their property lacks any economic value due to government regulation.\footnote{5} This was an issue of contention even in Lucas due to a suspicious finding of fact by the trial court that the regulation had rendered the oceanfront property "valueless."\footnote{6} This finding led Justice Souter to declare that "the trial court's conclusion is highly questionable."\footnote{7} The Palazzolo Court clarified that the applicable regulatory takings

\begin{footnotes}
\footnotetext[1]{Id.}
\footnotetext[3]{447 U.S. 255, 260 (1980) (stating in dicta that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.") (citations omitted); see also Zeigler, supra note 56, at 1377–79 (pointing out that the dicta Justice Scalia relied upon makes no sense because a regulation making a minor land use restriction that fails to advance a legitimate state interest would not be found to violate the Takings Clause and he took the sentence totally out of context).}
\footnotetext[4]{Lucas, 505 U.S. at 1016 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (emphasis omitted).}
\footnotetext[5]{Id. at 1029.}
\footnotetext[6]{Zeigler, supra note 56, at 1380.}
\footnotetext[7]{Lucas, 505 U.S. at 1007.}
\footnotetext[8]{Id. at 1076 (Souter, J., statement). In his independent statement, Justice Souter argued that, although determining "what constitutes total deprivation [of property] deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation," the Court mistakenly addressed these issues in Lucas. Id. at 1078. In response to the unreviewable factual finding that the property in Lucas had been deprived of all economic viability, Justice Souter stated that "it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity." Id. Due to the likelihood that the factual conclusions reached at trial were in error, the Lucas case presented a poor opportunity to face these issues on the merits. Id. Instead, claims Justice Souter, the Court should have dismissed the writ of certiorari and waited for the opportunity to "confront these matters directly." Id.}
\end{footnotes}
test—either Penn Central or Lucas—depends on the degree to which regulation deprives owners of the "economically beneficial use" of their property.\(^6\) In the wake of Palazzolo, there is no question that Lucas applies only to those cases in which regulation leaves the property "'economically idle.'"\(^7\) All other regulatory takings claims—those in which the property retains more than token value—should be analyzed under the Penn Central standard.\(^8\) By clarifying that the degree of economic devaluation determines which rule applies, Palazzolo should aid future regulatory takings analysis.

Aside from delineating the two types of regulatory takings claims, Palazzolo fails to address the issues that so thoroughly permeate the Takings Clause with confusion. Before an alternative standard can be discussed, it is appropriate to consider some of these problematic issues separately. First, there is a discussion of how the Court has struggled to balance two considerations often at odds: (1) the economic impact that regulation has on property; and (2) the harm to the public that regulation is designed to abate.\(^9\) Second, there is an examination of how the ambiguous notion of investment-backed expectations has muddied the takings doctrine and how Palazzolo is likely to further confound this concept.\(^10\) The final issue considered is how the doctrine of nuisance has also complicated application of the Takings Clause.\(^11\)

III. PROBLEMS IN THE TAKINGS DOCTRINE

A. The Conflict Within: A Tale of Two Doctrines

One recurring issue facing courts confronted with the current takings analysis is the inconsistent and contradictory applications of two distinct doctrines labeled by one commentator as "the harm principle and the economic-impact test."\(^12\) The harm principle is based upon a belief that when the government is abating harmful or noxious use, hereinafter "nuisance,"\(^13\) any regulation is constitutional because such government

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70. Id. at 631 (quoting Lucas, 505 U.S. at 1019).
71. Id. at 617.
72. See infra Part III.A.
73. See infra Part III.B.
74. See infra Part III.C.
75. Rubenfeld, supra note 5, at 1088.
76. These terms are not always understood to be interchangeable. See, e.g., Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026–29 (1992) (stating that a regulation totally depriving property of economic value while abating a noxious-use will require compensation unless the
action is a valid exercise of the police power. The economic-impact test presents a theory in which the "diminution of value would be a decisive factor in determining the existence of a 'taking." The conflict between the harm principle and the economic-impact test is apparent whenever a regulation abating a nuisance completely devalues property of all economically viable use. On one hand, if a court applies the harm principle, the property owner is probably out of luck. On the other hand, if the Court applies the economic-impact test, most likely the government will be forced to compensate the property owner.

The conflict between the economic-impact test and the harm principle has remained unresolved for eighty years. The earliest manifestation of the conflict can be found in Pennsylvania Coal Co. v. Mahon. The Mahon Court determined whether a statute forbidding the mining of "coal in such a way as to cause the subsidence of... any structure used as a human habitation" constituted a taking of the coal beneath Mahon's residence. Writing for the majority, Justice Holmes stated that although regulation was generally permissible, "if regulation goes too far it will be recognized as a taking." This statement marks the birth of the economic-impact test; as far as Justice Holmes was concerned, the threshold inquiry in a takings analysis is the degree to which a regulation devalues property.

In his dissent, Justice Brandeis expressed support for the harm principle. Justice Brandeis argued that there is no absolute right to use land. Once a use is recognized as a nuisance, even if it was previously acceptable, "the Legislature has power to prohibit such uses without restricted use is already prohibited by the background principles of property law or nuisance).

77. Rubenfeld, supra note 5, at 1085 (citing Mugler v. Kansas, 123 U.S. 623 (1887)). In Mugler, the Court used the harm principle to reject a takings challenge to a law prohibiting the manufacture or sale of alcohol. See Mugler, 123 U.S. 623 (1887).

78. Rubenfeld, supra note 5, at 1087 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

79. See discussion supra note 76 and accompanying text (broadly defining nuisance for the sake of this discussion).


82. Id. at 412–13.

83. Id. at 415.

84. Id. at 415.

85. See id. at 413.

86. See id. at 417 (Brandeis, J., dissenting).

87. Id. (Brandeis, J., dissenting).
paying compensation."\(^8\) In contrast to Justice Holmes, whose takings analysis focus is the economic impact on the property, Justice Brandeis's threshold inquiry is the character of the government action; if the state is abating a nuisance, then it is validly exercising its police power and compensation is unnecessary.\(^9\)

Like the Mahon Court, the Court stands today divided over which doctrine—the harm principle or the economic-impact test—is the proper doctrine to apply to regulatory takings cases. The Lucas case is the most recent decision clearly addressing the conflict between the economic-impact test and the harm principle.\(^90\) Writing for the majority, Justice Scalia used the economic-impact test to create a per se rule that a regulation depriving property of all economically viable use constitutes a taking.\(^91\) It is evident, however, that Justice Scalia was internally conflicted regarding the proper application of the two principles; he qualified his per se rule, based on the economic-impact test, with the nuisance exception\(^92\)—a manifestation of the harm principle. Essentially, in regards to the proper relationship between the economic-impact test and the harm principle, the majority believed that in "total" takings cases the economic-impact test requires compensation unless a narrow version of the harm principle applies, in which event compensation is unnecessary.\(^93\)

As Justice Kennedy's concurring opinion and the two dissenting opinions reveal, Justice Scalia is not the only Justice questioning a per se rule based on the economic-impact test.\(^94\) Justice Kennedy not only implied that the harm principle, as manifested in the nuisance exception, may extinguish the need for a state to compensate when its regulations deprive property of all economically beneficial use, but further stated that he "do[es] not believe [that nuisance] can be the sole source of state authority to impose severe restrictions."\(^95\) Similarly, both Justices Blackmun and Stevens argued that the harm principle is paramount.\(^96\)

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88. Id. (Brandeis, J., dissenting).
89. See id. (Brandeis, J., dissenting).
91. Id. at 1015.
92. Id. at 1029. Justice Scalia stated that another exception should be made for the "background principles of the State's law of property." Id.
93. See id.
94. See generally id. at 1032-76 (Kennedy, J., concurring; Blackmun, J., dissenting; Stevens, J., dissenting).
95. Id. at 1035 (Kennedy, J., concurring).
96. Id. at 1051 (Blackmun, J., dissenting); id. at 1068 (Stevens, J., dissenting).
Quoting the majority opinion in *Keystone Bituminous Coal Association v. DeBenedictis*, Blackmun stated that, because there is no right to use property as a nuisance, state regulation of "'nuisance-like activity'" therefore takes nothing. 98

Since *Lucas*, the Court has yet to reconsider the conflict between the economic-impact test and the harm principle. Because the record established that the land retained significant value, the *Palazzolo* Court had no opportunity to address the issue. 99 Eventually, if the Court wishes to achieve consistency, this conflict must be resolved.

**B. Interfering with Investment-Backed Expectations and Lifting the Bar on Subsequent Owners**

Investment-backed expectations are part of the takings doctrine because the Court has recognized that prohibiting a prospective use may destroy the value of property as effectively as prohibiting a current use or direct appropriation. 100 One common example of how devastating prohibitions on prospective use can be is when, under section 404 of the Clean Water Act, the Army Corps of Engineers denies a landowner's application for a permit to fill wetlands. 101 In many of these cases, the landowners are left with land retaining a mere token of its former value. 102 If, however, takings were limited to cases in which the state

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98. *Lucas*, 505 U.S. at 1051 (Blackmun, J., dissenting) (quoting *DeBenedictis*, 480 U.S. at 491 n.20); accord *Lucas*, 505 U.S. at 1068 (Stevens, J., dissenting).
102. E.g., *Bowles*, 31 Fed. Cl. at 44, 48–49 (finding that the denial of a section 404 permit left a $70,000 lot essentially worthless). A drastic reduction in the value of property alone, however, often will not constitute a taking. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (finding no taking where a zoning law decreased the value of property by seventy-five percent); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding no taking where an ordinance reduced the value of an $800,000 plot of land to $60,000)). *But see supra* Part III.A. (discussing how under the economic-impact test, courts have found that the total devaluation of property alone is sufficient to constitute a taking. E.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003
either prohibits a current use or appropriates property, owners denied section 404 permits would have no cause of action. Although it is generally agreed that there are some instances in which the property owner will ultimately be without remedy, it is also recognized that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Thus, both logic and justice support giving owners, whose property has arguably been destroyed by state prohibition of a prospective use, the opportunity to establish a taking. In practice, however, the judicial doctrine created to address the validity of government prohibition of prospective use—investment-backed expectations—is immersed in confusion and ambiguity.

Exactly what is confusing about investment-backed expectations? At the risk of giving the topic too cursory a review, it is necessary to identify some of the problems associated with investment-backed expectations. To begin, it is worth discussing the inconsistent manner in which the doctrine of investment-backed expectations is applied.

Next, an examination of the meaning of "investment-backed" will be undertaken.

Finally, there is a brief discussion of the likely impact the Court's holding in Palazzolo will have on the investment-backed expectations doctrine.

1. Investment-Backed Expectations as Applied

There is general confusion regarding how courts should apply the

103. See, e.g., Brace v. United States, 48 Fed. Cl. 271 (Fed. Cl. 2000) (challenging an order to dismantle a drainage system and restore a wetland).

104. E.g., Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (holding that granting a building permit on condition that the owner dedicate an easement to the public, allowing lateral beach access, is a taking). Included in this category are permanent government intrusions into private property. E.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). A permanent intrusion into private property is merely a different form of direct property appropriation for public use. See id.

105. E.g., Lucas, 505 U.S. at 1029 (holding that compensation will be denied when the government is abating a nuisance); Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain, 112 (1985) ("Supreme Court cases have repeatedly referred to control of nuisances as a proper end of the state, and there is no doubt today, as in times past, that this proposition is sound in principle.").


107. See infra Part III.B.1.

108. See infra Part III.B.2.

109. See infra Part III.B.3.
doctrine of investment-backed expectations. While some courts strictly adhere to the theory that the doctrine of investment-backed expectations is one consideration in a multi-factor test, other courts have regularly decided takings claims on this factor alone. In addition, a third category of courts use the doctrine of investment-backed expectations as one prong of a two-prong test to determine whether or not a regulation has denied a landowner of all economically viable use.


111. See, e.g., Good v. United States, 189 F.3d 1355, 1360 (Fed. Cir. 1999) ("For any regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him."); Coan v. Bernier, 176 B.R. 976, 990 (Bankr. D. Conn. 1995) (labeling investment-backed expectations, "the sine qua non of a taking"); Adamson v. City of Provo, 819 F. Supp. 934, 953 (D. Utah 1993) (rejecting a takings claim because the plaintiffs failed to allege interference with investment-backed expectations); Brace v. United States, 51 Fed. Cl. 649, 651 (Fed. Cl. 2002) (referring to investment-backed expectations, the court said, "The Supreme Court has implicitly recognized that the third Penn Central criterion, by itself, may be determinative over a takings claim." (citing Good v. United States, 39 Fed. Cl. 81, 95 (1997), aff'd, 189 F.3d 1355 (Fed. Cir. 1999)). Palazzolo was reviewed by the Supreme Court after the Rhode Island Supreme Court applied this dispositive version of the investment-backed expectations doctrine. Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 717 (R.I. 2000). However, in her concurrence, Justice O'Connor warned against such an application of the investment-backed expectations doctrine:

The court erred in elevating what it believed to be "[petitioner's] lack of reasonable investment-backed expectations" to "dispositive" status. Investment-backed expectations, though important, are not talismanic under Penn Central. Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far."

Palazzolo, 533 U.S. at 634 (O'Connor, J., concurring) (alteration in original) (citations omitted); see also Radford & Breemer, supra note 100, at 480 (stating how recent "trends have elevated expectations analysis from its initial place as one element in Penn Central's multi-factor balancing test and converted it into something resembling a procedural bar"); infra notes 115-16 and accompanying text.

112. Reahard v. Lee County, 968 F.2d 1131, 1136 (11th Cir. 1992). The other prong of this test is "the economic impact of the regulation on the claimant." Id.; accord Resolution Trust Corp. v. Town of Highland Beach, 18 F.3d 1536, 1549 (11th Cir. 1994), vacated en banc, 42 F.3d 626 (11th Cir. 1994); New Port Largo, Inc. v. Monroe County, 873 F. Supp. 633, 642
Which of the three investment-backed expectations analyses does the Supreme Court endorse?

As it turns out, any of these applications of investment-backed expectations may be correct depending upon which Justice's opinion prevails. In *Bowen v. Gilliard*, Justice Stevens endorsed the rule that investment-backed expectations are one consideration in a multi-factor test. Conversely, Justice Blackmun's opinion in *Ruckelshaus v. Monsanto Co.* is cited as the source of the proposition that takings cases may be decided solely by considering investment-backed expectations. Meanwhile, Justice Kennedy's concurrence in *Lucas* supports the two-prong test by indicating that investment-backed expectations must be considered when determining whether or not a regulation has stripped property of its value. With so little guidance from the Supreme Court, it is no surprise that the doctrine of investment-backed expectations has been given such inconsistent treatment by the lower courts.

It has been no help that investment-backed expectations also have, what one commentator has labeled, "murky" origins in case law. Before *Penn Central*, "regulatory takings claims focused primarily on factors such as the presence of a physical invasion, the diminution in value of the property, and a determination of whether the regulation was intended to prevent a harm or provide a benefit." Interestingly, the *Resolution Trust* Court cited the Supreme Court's opinion in *Bowen v. Gilliard*, 483 U.S. 587 (1986), for the proposition that investment-backed expectations are one factor in a two-pronged economic viability test. *Resolution Trust*, 18 F.3d at 1549. The *Bowen* Court, however, does not employ such a rule. See generally *Bowen*, 483 U.S. 587. Instead, *Bowen* follows the multi-factor *Penn Central* test. *Id.* at 606-08; see also infra note 122 and accompanying text.

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114. *Id.* at 606-08.
116. *Id.* at 1005 (stating, in reference to investment-backed expectations, that the Court "find[s] that the force of this factor is so overwhelming... that it disposes of the taking question."). For an example of how courts have used this statement to elevate the weight given to investment-backed expectations, see Good, 39 Fed. Cl. at 95. See also discussion supra note 111 (listing cases that have been decided solely on the investment-backed expectation factor).

117. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.").
118. See supra notes 110-12.
119. Oswald, supra note 11, at 99.
120. *Id.* at 99-100.
backed expectations did not become part of the takings analysis until *Penn Central*, when Justice Brennan wrote, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."121 There has been wide recognition that Brennan's opinion in *Penn Central* stands for the proposition that the ad hoc takings analysis includes three crucial factors: (1) the economic impact of the regulation on the claimant, (2) the interference with distinct (later defined as "reasonable") investment-backed expectations, and (3) the character of the governmental action.122 There are two problems with this interpretation of *Penn Central* worth closer scrutiny: (1) it has no support in case law, and (2) it ignores Justice Brennan's exact words. Therefore, it is likely that the prevailing interpretation of *Penn Central* overlooks the idea Justice Brennan attempted to convey when he referred to investment-backed expectations.

A close evaluation of Justice Brennan's language reveals that, contrary to popular interpretation, he did not write "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."123 This interpretation omits the word "particularly."124 According to both *Webster's* and *The Oxford
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Under such a reading it becomes clear that Justice Brennan was not proposing two separate and distinct factors. Rather, by this reading, he proposed one broad factor—the economic impact of the regulation on the claimant—under which there exist multiple considerations. Chief among these economic considerations is interference with distinct investment-backed expectations. In other words, Justice Brennan was saying that economic impact is an important factor in a regulatory takings analysis, but when courts evaluate economic impact they should consider the investment-backed expectations of the claimant.

Such an interpretation of investment-backed expectations is consistent with the doctrine's design: to evaluate the validity of economic impact, courts should consider the investment-backed expectations of the claimant.

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It is clear that these factors as first described in Penn Central Transportation were not divided into three parts, but two. The test consisted of the "economic impact" and "character" factors, of which the "economic impact" factor had a further, more specific part: . . . "investment-backed expectations" . . . . The use of "particularly" indicates that the "reasonable expectation" factor of the test is a subsection of the overall economic impact analysis, and not a stand-alone factor. Thus, the Supreme Court explained that a proper analysis of the economic impact in a regulatory takings case would include consideration of the diminution of the known, present value of property as well as the expectations of value based on the development or intended use of the property. Subsequent Supreme Court cases, however, have divided the "economic impact" language from the "reasonable expectations" language, creating a new factor. See, e.g., Connolly, 475 U.S. at 225, 106 S.Ct. 1018; Ruckelshaus, 467 U.S. at 1005, 104 S.Ct. 2862; PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); Kaiser Aetna, 444 U.S. at 175, 100 S.Ct. 383. The United States Court of Appeals for the Federal Circuit has adopted this three-factor test, see, e.g., 767 Third Ave., 48 F.3d at 1580, despite the test's likely alteration of the analysis required in determining regulatory takings. This court will therefore apply the same test. See Rockefeller, 32 Fed.Cl. at 591.
government prohibition on the prospective use of property. This interpretation—that investment-backed expectations are merely part of the larger analysis of economic impact—is also consistent with Justice Brennan's application of the doctrine. In his discussion of investment-backed expectations, Justice Brennan claims that the leading authority for this doctrine is *Pennsylvania Coal Co. v. Mahon.* As at least one scholar has noted, "nowhere in that case does the phrase 'investment-backed expectations' appear."

While at a glance this may be interpreted as a mistake or an attempt to be deliberately misleading on Justice Brennan's part, such a negative interpretation is unwarranted when investment-backed expectations are considered as just one element of a broad economic impact analysis. Discussing the Court's holding in *Mahon,* Justice Brennan wrote, "[T]he statute made it commercially impracticable to mine the coal and thus had nearly the same effect as the complete destruction of rights the claimant had reserved from the owners of the surface land... Phrasing this another way, Justice Brennan claimed that the statute interfered with the expectations of the coal company—expectations flowing from rights the coal company had safeguarded from the owners of the surface. One result of the statutory interference with the coal company's expectations was that the statute made it "commercially impracticable to mine the coal." Because coal that cannot be mined is worthless, the interference with mining expectations completely devalued the coal company's property. Hence, under *Mahon,* the economic impact-prong of Justice Brennan's two-prong analysis was satisfied.

Interpreting investment-backed expectations as one element in a broad economic impact consideration solves both of the previously mentioned problems: (1) it has support in case law prior to *Penn Central* and (2) it is consistent with Justice Brennan's language. In addition, whereas the courts currently disagree on how to apply

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127. See Michelman, *supra* note 13, at 1233; Radford & Breemer, *supra* note 100, at 454; discussion *supra* Part III.B.
129. 260 U.S. 393 (1922).
130. Oswald, *supra* note 11, at 100.
132. *Id.*
133. The other prong "is the character of the governmental action." *Id.* at 124.
134. See discussion *supra* text accompanying notes 122–23.
investment-backed expectations, adopting this interpretation would aid in clarifying the doctrine. Only during an economic impact analysis should investment-backed expectations be considered.

2. The Meaning of "Investment-Backed"

A second controversy associated with investment-backed expectations, though admittedly of much smaller concern than how to apply the doctrine, is the meaning of "investment-backed." The Palazzolo Court recognized that there are some situations in which the owners will have acquired regulated property by some means other than purchase. Obviously, in these situations it would be difficult for an owner to argue that the regulated property interest is "investment-backed." Do these owners, whose property interest is the result of a gift, devise, or inheritance, have valid claims against the state for interfering with prospective uses?

Like the different signals the Court has sent regarding how to apply the doctrine of investment-backed expectations, the Court has also provided inconsistent guidance on the meaning of "investment-backed." Justice O'Connor downplayed the need for investment-backing in her Palazzolo concurrence by stating 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." However, in Hodel v. Irving Justice O'Connor implied that investment-backing is required for Fifth Amendment protection of prospective uses. The issue in Hodel was whether the "escheat" provision of the Indian Land Consolidation Act of 1983—created as a solution to the fractionalization of Indian lands—effects a taking without just compensation. In commenting on the fact that appellees'
decedents "overwhelmingly acquired [their property] by gift, descent, or
device," Justice O'Connor noted that "[t]he extent to which any of
appellees' decedents had 'investment-backed expectations' in passing on
the property is dubious."

Scholars and courts alike have interpreted
this statement as removing unpurchased property from the
constitutional protection of the Takings Clause.

As one author noted, such a proposition "leads to a ludicrous
outcome . . . . Constitutional protection of property does not, and should
not, depend upon either the unilateral actions of the property owner or
the manner in which the property was acquired." While "investment-
backed" may be an accurate description of the expectations claimants
regularly possess in takings challenges, there should be no requirement
that the claimants purchased these expectations. The only requirement
should be that a claimant's expectations regarding the property be
objectively reasonable.

A good illustration of why the only requirement should be that the
expectations be objectively reasonable is found in Loveladies Harbor,
Inc. v. United States. This case also serves as an example of how a
court applied investment-backed expectations along the parameters
discussed by Justice O'Connor in Hodel. According to the opinion,
investment-backed expectations analysis provides "a way of limiting
takings recoveries to owners who could demonstrate that they bought
their property in reliance on a state of affairs that did not include the

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142. Id. at 715. Ultimately, the Court found the "escheat" provision unconstitutional
under a different Penn Central factor—"the character of the Government regulation here is
extraordinary." Id. at 716.

143. See, e.g., Whitehorse v. Babbit, 918 F. Supp. 274, 280 (W.D. Wis. 1996); Oswald,
supra note 11, at 116.

144. Oswald, supra note 11, at 117.

145. Although there was some initial controversy over whether the investment-backed
expectations doctrine was designed as a subjective or an objective standard, ever since the
term "distinct," used in describing the expectations, was replaced by the term "reasonable" in
Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979), there has been a gradual shift towards
a general recognition that investment-backed expectations is an objective standard. Radford
& Breemer, supra note 100, at 460; see also Elias v. Town of Brookhaven, 783 F. Supp. 758,
761 (E.D.N.Y. 1992) ("To establish a 'taking' it is, of course, not enough to show a subjective
expectation of making a profit or even of recovering all of one's investment. The test must be
an objective one."); Oswald, supra note 11, at 107 ("The Court has replaced its original
reference to 'distinct' investment-backed expectations in Penn Central with the term
'reasonable' investment-backed expectations [in subsequent cases], suggesting that the
owner's expectations should be gauged by some objective standard.").

146. 28 F.3d 1171 (Fed. Cir. 1994).

147. See supra notes 139–42 and accompanying text.
challenged regulatory regime." Following this theory to a logical conclusion, if two owners—one who purchased her land and the other who received his land through inheritance—possess identical swamps in identical neighborhoods and the State subsequently prohibits the development of swamps, only the owner who purchased her property is entitled to recovery. Obviously, this should not be the result; both owners should be entitled to the same recovery or lack thereof because both of their property interests have been equally affected.

Instead of evaluating how the owners acquired their property, a proper expectations analysis should ask, "would reasonable owners in these owners' position have a reasonable expectation to use the property in a way now regulated?" Applying the investment-backed expectations doctrine in this fashion results in a consistent recovery for the owners wishing to develop their swamps. Under such a "reasonable expectations" interpretation, the doctrine of "investment-backed expectations" is a misnomer. Investment has no role in a reasonable expectations analysis.


A third problem with the investment-backed expectations doctrine is that Palazzolo further muddles the doctrine because it establishes the right of property owners to challenge regulations enacted prior to their ownership. Before Palazzolo, it was widely accepted that when a land purchase was made, the owner took title subject to whatever land-use restrictions existed. Accordingly, any regulations would be reflected

148. Loveladies, 28 F.3d at 1177. Judge Plager, writing for the court, appears to apply a subjective investment-backed expectations standard. He stated: "With regard to... investment-backed expectations it is not disputed that Loveladies purchased the land involved with the reasonable expectation and intention of developing it—over time for sale to purchasers of the improved lots ...." Id. at 1179.


150. See, e.g., Loveladies, 28 F.3d at 1177 (stating that "the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss."); Michelman, supra note 13, at 1238; see also Naegele Outdoor Adver., Inc. v. City of Durham, 803 F. Supp. 1068, 1079 (M.D.N.C. 1992) (quoting Claridge v. N.H. Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984)). The Claridge court stated:

"A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights ... the state cannot be the guarantor by inverse condemnation proceedings, of the investment risk which people choose to take in the face of statutory or
in the purchase price.\textsuperscript{151} Thus, it was believed, new owners were prohibited from bringing takings challenges because they had notice of the limitations and, consequently, suffered no loss.\textsuperscript{152}

*Palazzolo* rejects this argument because of the unfairness inherent in denying property owners the "right to challenge unreasonable limitations on the use and value of [their] land."\textsuperscript{153} If the Court had followed the reasoning presented by the State of Rhode Island,\textsuperscript{154} it would have effectively amounted to "an expiration date on the Takings Clause."\textsuperscript{155} Although the Court properly recognized that a regulation that deprives an owner of a property right should be able to be challenged as unconstitutional, regardless of when the regulation was enacted, the Court is expressly divided on the role this holding should play in a takings analysis.\textsuperscript{156}

Justices O'Connor and Breyer argued that it is proper to consider existing regulations on a property at the time of acquisition to determine the buyer's reasonable investment-backed expectations.\textsuperscript{157} Justice Scalia, however, claimed "that a restriction exist[ing] 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."\textsuperscript{158} In addition, Justice Stevens argued that while subsequent owners may challenge unreasonable land-use regulations, they are not entitled to compensation because a taking is a "discrete event."\textsuperscript{159} Instead, "it is the person who owned the property at the time of the taking that is entitled

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\textsuperscript{151} Michelman, *supra* note 13, at 1238.

\textsuperscript{152} *Palazzolo*, 533 U.S. at 626.

\textsuperscript{153} Id. at 627.

\textsuperscript{154} See *supra* note 13.

\textsuperscript{155} *Palazzolo*, 533 U.S. at 627.

\textsuperscript{156} See generally id.

\textsuperscript{157} Id. at 632–36 (O'Connor, J., concurring); id. at 654–55 (Breyer, J., dissenting).

\textsuperscript{158} Id. at 637 (Scalia, J., concurring) (citation omitted).

\textsuperscript{159} Id. at 638 (Stevens, J., concurring in part and dissenting in part).
to the recovery."  If the concurring and dissenting opinions in *Palazzolo* are any indication of what is to come, the doctrine of investment-backed expectations is bound to become even further fractured.

C. Nuisance: Living Up to Its Name

A nuisance has been defined as "an unreasonable interference with the use or enjoyment of land." Although this definition may appear straightforward, the role of nuisance in the takings doctrine, at least with respect to regulations that deny an owner all economically viable use of his land, is considerably more complicated. In a *Lucas* analysis, unreasonable interference alone will not qualify as a nuisance; for a nuisance to fit within the nuisance exception to a regulatory taking, the state "must identify background principles of nuisance... that prohibit the uses [the landowner] intends in the circumstances in which the property is presently found." To clarify his point, Justice Scalia also stated that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition.... So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."  

Despite noting that "changed circumstances or new knowledge may make what was once previously permissible no longer so," Justice Scalia rejected with little consideration the possibility that any new knowledge would render coastal development a nuisance noting that "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land." Justice Stevens aptly pointed out that this holding "effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."

This narrow application of the nuisance doctrine has two significant shortcomings. First, it denies the ability of the nuisance doctrine to

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160. *Id.* at 639.
161. *See supra* notes 158–61 and accompanying text.
164. *Id.*
165. *Id.* (citing *RESTATEMENT (SECOND) OF TORTS* § 827 cmt. g (1979)).
166. *Id.*
167. *Id.* at 1068–69 (Stevens, J., dissenting).
change with time. As Justice Stevens correctly argued, legislatures have throughout history played an important role in determining what constitutes a nuisance. 168 Nuisance, itself, has always been a dynamic doctrine and has been characterized as the product of "our ongoing self-education." 169 Even though Scalia expressly recognized the dynamic character of the nuisance doctrine, 170 his emphasis on common-law principles when applying the doctrine 171 resulted in ignoring any nuisance that was not a recognized nuisance at some point in the past. 172

Second, determining the status of the nuisance doctrine in the past may be problematic. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." 173 Nonetheless, Justice Scalia apparently believes that when a state regulation deprives a property owner of all economically viable use, the logical and just way to determine if the Takings Clause requires compensation is to send lawyers, law clerks, and judges alike, on a wild-goose-chase through nineteenth-century reporters. Surely the Takings Clause does not require such absurd results.

IV. PROPERTY OWNERSHIP AS CLAIMS, PRIVILEGES, POWERS, AND DUTIES

Although there is general agreement that the law of regulatory

168. Id.; see also, e.g., Mugler v. Kansas, 123 U.S. 623 (1887). Mugler is one of many cases in which a takings challenge was rejected based on a legislative determination that the restricted use was a nuisance. Id. In Mugler, the court agreed that a regulation prohibiting the manufacture and sale of alcohol, effectively depriving Muglar of any economically viable use of his property, was a valid exercise of the State's police power because it abated a nuisance. Id.

169. Lucas, 505 U.S. at 1069 (Stevens, J., dissenting); see also YHLTON, supra note 162, at 98 (comparing Wescott v. Middleton, 11 A. 490 (N.J. 1887) (holding that funeral parlors in residential neighborhoods are not nuisances) with Powell v. Taylor, 263 S.W.2d 906 (Ark. 1954) (holding that funeral parlors in residential neighborhoods are nuisances)).

170. Lucas, 505 U.S. at 1031; see also supra text accompanying note 165.

171. Lucas, 505 U.S. at 1031.

172. See discussion infra Part IV.B (explaining how the problems of applying an uncertain nuisance standard from the past is remedied by evaluating property "rights" with Hohfeld's legal concepts); Lucas, 505 U.S. at 1055 (Blackmun, J., dissenting) (questioning why Scalia believes "judges in the 18th and 19th centuries can distinguish a harm from a benefit, [but] judges [and legislators] in the 20th century [cannot];" and observing, "[i]t is nothing magical in the reasoning of judges long dead.").

takings deserves serious reconsideration, there is no consensus on the appropriate remedy.\textsuperscript{174} No doubt, much of the discontent with the current takings doctrine stems from the problems with the doctrine set forth in Part III.\textsuperscript{175} Thus, any theory resolving the shortcomings of the takings doctrine must address the following three problems: (1) the inconsistency between the economic-impact test and the harm principle;\textsuperscript{176} (2) the confusion and inconsistency encountered by those applying the doctrine of investment-backed expectations;\textsuperscript{177} and (3) the obstacles bound to confront courts attempting to apply Lucas’s arcane version of the nuisance doctrine.\textsuperscript{178} In addition, given the land-use problems humanity is bound to face in the twenty-first century—as our world becomes increasingly populated while our natural resources are rapidly depleted—for any takings doctrine to realize longevity, it necessarily requires flexibility. A theory based loosely on Wesley Hohfeld’s\textsuperscript{179} explanations of legal rights can provide this flexibility while at the same time simplifying the application of the problematic principles previously mentioned. A brief review of Hohfeld’s relevant concepts provides a foundation for this discussion.

\textsuperscript{174} See, e.g., Rubenfeld, \textit{supra} note 5, at 1081 (“I have not encountered a single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how.”) (quoting \textsc{Bruce A. Ackerman, Private Property and the Constitution} 8 (1977)).

\textsuperscript{175} See \textit{supra} Part III.

\textsuperscript{176} See \textit{supra} Part III.A.

\textsuperscript{177} See \textit{supra} Part III.B.

\textsuperscript{178} See \textit{supra} Part III.C.

\textsuperscript{179} Wesley Hohfeld was a Professor of Law at Stanford University and later accepted an offer to teach at Yale. \textsc{Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning} vii (Walter Wheeler Cook ed., 1964). In 1913, Hohfeld wrote an article entitled \textit{Fundamental Conceptions as Applied in Judicial Reasoning}, published by the Yale Law Journal. \textit{Id.} In this article, Hohfeld used ordinary words to identify and distinguish "eight concepts . . . found in the minds and writings of every judge and of every man capable of thought." \textit{Id.} at viii. He did this to bring clarity to the language, "forcing a judge or other user to have a clear and definite meaning (thought, concept) and to choose the one word that would convey that exact meaning to another person." \textit{Id.} Furthermore, “he grouped the eight terms into pairs of ‘correlatives’ and ‘opposites.’” \textit{Id.} at viii-ix. Hohfeld’s analysis was not designed “as a method of determining social and legal policy.” \textit{Id.} at xi. Rather, Hohfeld created his concepts to be used as tools to help clarify issues. \textit{Id.; see also id.} at 26 (stating in his own words that "the main purpose of [his article] is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, everyday problems of the law."). Although Hohfeld died in 1918, at the mere age of 38, his writings were an important influence on the American Law Institute’s Restatement of the Law of Property. \textit{Id.} at xi-xiv.
A. Hohfeld's Explanation of Legal Rights

Hohfeld recognized that interests commonly described as "rights" are really a cluster of legal concepts. Hohfeld identified eight "fundamental" concepts he believed expressed "vitally important legal relations of men with each other." As an aid to understanding these concepts, Hohfeld presented a scheme exhibiting how these eight fundamental concepts are related as "opposites" and "correlatives:

<table>
<thead>
<tr>
<th>Correlatives</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>right (claim)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>duty</td>
<td>no-right</td>
<td>liability</td>
<td>disability</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Opposites</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>right (claim)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>no-right</td>
<td>duty</td>
<td>disability</td>
<td>liability</td>
</tr>
</tbody>
</table>

Thereafter, Hohfeld distinguished the eight concepts from one another. A "right" is defined as "a legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act." This definition of "right" is limited to those concepts for which there is a correlative duty. For example, if A has a right against B that B shall stay off of A's land, B has a correlative duty to stay off A's land. To avoid confusion with the ordinary use of "right," Hohfeld said "claim" could be used as an adequate synonym. This Comment will use "claim" as a synonym for Hohfeld's "right," and continue to use "right" in the ordinary sense of the term.

In addition to claims and duties, Hohfeld also distinguished "privileges" and their correlative, "no-rights." A "privilege" is defined as "a legal freedom on the part of one person as against another

180. Id. at 36; PERRY, supra note 15, at 41-42.
181. HOHFELD, supra note 179, at viii.
182. Id. at 36. (chart as it appears in the original).
183. See generally id. at 36-64.
184. RESTATEMENT OF PROPERTY § 1 (1936).
185. HOHFELD, supra note 179, at 38.
186. Id.
187. Id.
188. Id. at 38-39.
to do a given act or a legal freedom not to do a given act."\textsuperscript{189} Returning to the previous example, if $A$ has a claim against $B$ that $B$ stay off of $A$'s land, $A$ has the privilege of entering the land.\textsuperscript{190} Privilege is the exact opposite of duty.\textsuperscript{191} Thus, another way of saying that $A$ has a privilege of entering the land is to say that $A$ does not have a duty to stay off of the land.\textsuperscript{192} $B$ has a correlative no-right, meaning that $B$ has no claim that $A$ not enter.\textsuperscript{193} However, $B$'s no-right does not mean that $B$ owes a duty to $A$; in fact, $B$ may interfere with the exercise of $A$'s privilege.\textsuperscript{194}

A "power" is defined as "an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act."\textsuperscript{195} For example, $A$ has the power to transfer his land to $B$.\textsuperscript{196} If $B$ has the power to transfer $A$'s land to a third party, $A$ has a correlative liability concerning his interest in the land.\textsuperscript{197} An "immunity" is defined as "a freedom on the part of one person against having a given legal relation altered by a given act or omission to act on the part of another person."\textsuperscript{198} In the example, $A$, the landowner, has immunity against $B$ that $B$ not transfer $A$'s land.\textsuperscript{199} In other words, $B$ has a correlative disability to change $A$'s legal interest in $A$'s land.\textsuperscript{200}

When analyzing a property interest with these concepts in mind, it is apparent that ownership amounts to a bundle of rights.\textsuperscript{201} To articulate the bundle of rights, it is worth considering one of Hohfeld's examples:

$A$ is fee-simple owner of Blackacre..... First, $A$ has... claims, that others, respectively, shall \textit{not} enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. Second, $A$ has an indefinite number of legal privileges of entering on the land,

\begin{itemize}
  \item \textsuperscript{189} \textit{Restatement of Property} § 2 (1936).
  \item \textsuperscript{190} Hohfeld, \textit{supra} note 179, at 39.
  \item \textsuperscript{191} \textit{Id.} at 38.
  \item \textsuperscript{192} \textit{Id.} at 39.
  \item \textsuperscript{193} \textit{Id.} Of the eight legal concepts Hohfeld identified and distinguished, this is the only term he coined, noting that there was "no single term available to express [this] concept[]."
  \item \textit{Id.}
  \item \textsuperscript{194} Perry, \textit{supra} note 15, at 42.
  \item \textsuperscript{195} \textit{Restatement of Property} § 3 (1936).
  \item \textsuperscript{196} Hohfeld, \textit{supra} note 179, at 51.
  \item \textsuperscript{197} \textit{Id.} at 36.
  \item \textsuperscript{198} \textit{Restatement of Property} § 4 (1936).
  \item \textsuperscript{199} Hohfeld, \textit{supra} note 179, at 60.
  \item \textsuperscript{200} \textit{Id.}
  \item \textsuperscript{201} \textit{Id.} at 96.
\end{itemize}
using the land, harming the land, etc., that is, within limits fixed by law on grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of other persons. Third, A has the legal power to alienate his legal interest to another . . . . Correlative to all such legal powers are the legal liabilities in other persons . . . . Fourth, A has an indefinite number of legal immunities . . . . A has the immunity that no ordinary person can alienate A's legal interest . . . ; the immunity that no ordinary person can extinguish A's own privileges of using the land; the immunity that no ordinary person can extinguish A's right that another person X shall not enter on the land or, in other words, create in X a privilege of entering on the land. Correlative to all these immunities are the respective legal disabilities of other persons in general.

With Hohfeld's legal concepts in mind, what sense can be made of the takings doctrine?

B. Applying Hohfeld's Fundamental Concepts to Takings

When applying Hohfeld's concepts to a takings analysis, the threshold question is: What type of right is interfered with? If a "claim" is interfered with, a taking has occurred because the correlative right of an owner's claim is the duty non-owners have with respect to that claim. If the state violates this duty, the property owner is entitled to compensation regardless of the economic impact that interference has on the property at issue.

A number of property rights fall into the "claim" category including the right to exclude and the right to be free from physical harm. The law supports these claims by recognizing owners' rights to exclude non-owners and by permitting inverse condemnation actions. In addition

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202. Id. at 96–97.
203. See id. and accompanying text.
204. See id. and accompanying text.
205. HYLTON, supra note 162, at 69 ("[C]haracteriz[ing] the 'right to exclude' as 'universally held to be a fundamental property right'" (quoting Justice Holmes in Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)) and describing the right to exclude "as 'implicit in the basic conception of private property'" (quoting EPSTEIN, supra note 105, at 63)); see also Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (stating that when "the government encroaches upon or occupies private land for its own proposed use" a taking has occurred); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982) (holding that even a slight "permanent physical occupation" of private land by the sovereign qualifies for
to these two claims, the right to possess qualifies as a claim as well.\textsuperscript{207} While claims are commonly infringed upon in cases of physical occupation or actual takings,\textsuperscript{208} these rights are not typically at issue in a regulatory takings case.

If the government interferes with a power, it also exceeds a valid exercise of authority. In property law, there exists at least one power: the power to dispose.\textsuperscript{209} The Supreme Court affirmed the legitimacy of this power in \textit{Hodel v. Irving}\textsuperscript{210} by striking down a statute that abrogated the right to dispose of property by will or intestate succession.\textsuperscript{211} In applying Hohfeld's legal concepts, the same conclusion is reached because the correlative right of the owner's power is the liability non-owners have concerning the property.\textsuperscript{212} The government is at the mercy of the owner to have the legal relation between the owner and the property changed.\textsuperscript{213} Thus, if the state interferes with a property owner's power without paying compensation, the state has done so in violation of the Takings Clause. Like claims, however, powers are also not normally at issue in regulatory takings cases.

If it is found that the government has interfered with neither a claim nor a power, it must be determined whether either a privilege or a duty is subject to interference. This determination is the essence of most regulatory takings inquiries. This is because the overwhelming majority of regulatory takings cases involve government interference with a current or proposed use.\textsuperscript{214} Although other privileges exist, such as an owner's privilege to enter her land,\textsuperscript{215} the privilege to use the land is most often subjected to government regulation.

\textsuperscript{206.} \textit{E.g.,} Palm Beach County v. Tessler, 538 So. 2d 846 (Fla. 1989).
\textsuperscript{207.} \textit{E.g.,} Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding a taking where the city granted a development permit on condition that the property owner dedicate ten percent of her land to the city for use as a pedestrian or bicycle pathway).
\textsuperscript{208.} \textit{E.g.,} Loretto, 458 U.S. at 419.
\textsuperscript{209.} See supra note 202 and accompanying text.
\textsuperscript{210.} 481 U.S. 704 (1987).
\textsuperscript{211.} \textit{Id.}
\textsuperscript{212.} See discussion supra Part IV.A.
\textsuperscript{213.} RESTATEMENT OF PROPERTY § 3 cmt. a (1936).
\textsuperscript{214.} For example, cases addressing the denial of section 404 permits under the Clean Water Act. See \textit{United States v. Riverside Bayview Homes, Inc.}, 474 U.S. 121 (1985); \textit{Palm Beach Isles Assocs. v. United States}, 231 F.3d 1354 (Fed. Cir. 2000); \textit{Loveladies Harbor, Inc. v. United States}, 28 F.3d 1171 (Fed. Cir. 1994); \textit{Fla. Rock Indus., Inc. v. United States}, 18 F.3d 1560 (Fed. Cir. 1994); \textit{Bowles v. United States}, 31 Fed. Cl. 37 (Fed. Cl. 1994).
\textsuperscript{215.} See supra note 202 and accompanying text.
The determination of whether it is a privilege or a duty that is regulated is necessary even though privileges do not have a correlative duty or a guarantee to be free from interference. This determination is required because the government does not have unbridled reign to regulate privileges. There is a limitation on the government in the form of a disability; property owners have immunity from having their privileges extinguished. The government's correlative disability prohibits it from extinguishing an owner's privilege. Therefore, if a regulation extinguishes an owner's privilege, the Takings Clause has again been violated.

The privilege to use—manifested in various ways—is qualified by "limits fixed by law on grounds of social and economic policy." These limits are the claims third persons have against the property owners to do or to forbear. One example is nuisance; third persons have claims against a property owner to forbear from being a nuisance. The correlative right of the property owner is the duty not to be a nuisance.

Distinguishing between where a privilege ends and where a duty begins, however, can prove to be a difficult task. Under Hohfeld's scheme of legal concepts, privilege is the opposite of duty. To define "duty," Hohfeld quotes Lake Shore & M.S.R. Co. v. Kurtz: A duty or a legal obligation is that which one ought or ought not to do. This definition bears a close resemblance to the duty standard currently used in tort—whenever a reasonable person of ordinary prudence "reasonably foresee[s] that his conduct will involve an unreasonable risk of harm to other[s] . . . he is then under a duty to them to exercise the care of a reasonable person as to what he does or does not do." So it follows that to distinguish between privileges and duties, courts need only apply the same duty standard established in tort law.

216. HOHFELD, supra note 179, at 41; see also discussion supra Part IV.A.
217. HOHFELD, supra note 179, at 41.
218. Id. at 97; see also supra note 202 and accompanying text.
219. See discussion supra Part IV.A.
220. HOHFELD, supra note 179, at 96.
221. See discussion supra Part IV.A.
222. See discussion supra Part III.C.
223. See discussion supra Part IV.A.
224. Id.
225. 37 N.E. 303 (Ind. 1894).
226. HOHFELD, supra note 179, at 38 (quoting Lake Shore & M.S.R. Co. v. Kurtz, 37 N.E. 303, 304 (1894)).
The adoption of the tort law duty standard to determine duties in regulatory takings cases has multiple benefits. First, judges, lawyers, and legislators are well-versed in this familiar standard. As a result, much of the confusion associated with the current takings doctrine would be alleviated. Second, this standard would effectively eliminate the conflict between the economic-impact test and the harm principle. Some critics are certain to argue that, although the tort standard of duty does resolve the conflict, the standard resolves the inconsistency decidedly in favor of the harm principle. Granted, this duty standard incorporates much of the harm principle, but it must not be forgotten that even the relatively stringent application of the economic-impact test in *Lucas* incorporates elements of the harm principle by way of the nuisance exception. In addition, Justice Scalia recognized another regulatory taking exception—background principles of state property law—that further evidences flaws in a pure economic-impact analysis. With these two *Lucas* exceptions in mind, it can hardly be argued that the economic-impact test did not already yield to the harm principle. Adopting the duty standard would simply affirm that the state may "prevent... [an] owner from making a use which interferes with paramount rights of the public." A third benefit, closely related to the second, is that the duty standard would eliminate any need to apply the arcane doctrine of nuisance. Rather than requiring the courts to dust off old texts in an attempt to decipher what constituted an unreasonable use of property in a time long past, finders of fact operating under the tort standard of duty would be allowed, even encouraged, to consider humanity's "ongoing self-education" in arriving at their conclusions. This flexibility is imperative because there is near universal recognition that "changed circumstances or new knowledge may make what was previously permissible no longer so" or vice-versa.

Returning to the takings determination, if it is found that an owner's

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228. See discussion supra Part III.A.
229. Id.
230. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992). In *Lucas* the Court stated that to qualify as a "background principle" of property law, the State "must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or [make a] conclusory assertion that they violate a common-law maxim." Id.
232. See discussion supra Part III.C.
234. Id. at 1031 (Scalia, J., writing for the majority).
duty is regulated, no taking has occurred because the regulation is merely a legal exercise of the correlative public claim against the owner.\footnote{235}{See discussion supra Part IV.A.} Conversely, if the property owner is found to have no duty regarding the regulated activity, it is a privilege that must be the subject of regulation because privilege is the opposite of duty.\footnote{236}{Id.} Alteration and diminution of privileges are generally permissible because the holders of the correlative "no-rights" are not prohibited from interfering with property privileges.\footnote{237}{HOHFELD, supra note 179, at 41; see also discussion supra Part IV.A.} When a property-use regulation extinguishes an owner's privilege to use, however, the state has exceeded its authority because property owners have immunity from having their privilege to use extinguished.\footnote{238}{HOHFELD, supra note 179, at 97; see also supra note 202 and accompanying text.} The government's correlative disability prohibits it from extinguishing an owner's privilege to use without compensation.\footnote{239}{See discussion supra Part IV.A.}

To determine whether or not an owner's privilege to use has been extinguished, there must be a common definition of "extinguish." Obviously, a standard requiring all use to be eliminated is unduly harsh on the property owner. Even the most stringent regulation will always leave some use to the owner, albeit likely that the reserved use is impractical.\footnote{240}{For example, there was probably no regulation preventing the Pennsylvania Coal Co. from using the regulated pillar of coal as a place to mount a peg for a coat rack. See Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).} A better standard is one that, like the standard for duty, focuses on reasonableness;\footnote{241}{See discussion supra note 227 and accompanying text.} that is, would a reasonable owner have a reasonable use for the property? If it is found that a reasonable owner would have no reasonable use for the property, the privilege to use has been extinguished thus indicating a taking has occurred.

The proposed regulatory takings standard both simplifies the law and provides for flexibility. Flexibility goes hand-in-hand with the duty standard. As knowledge increases, so does the recognition that certain property uses may create an unreasonable risk of harm to other's person or property. Likewise, knowledge may also result in the abolition of certain ownership duties currently recognized. The standard simplifies regulatory takings by accommodating practitioners and courts with familiar tools. Both "duty" and the concept of "the reasonable person" are well known to the law.

In addition, the standard simplifies the law by requiring the parties
to focus their regulatory takings arguments. The government will have two ways to defend land-use regulations. First, the government can attempt to prove that the regulated use is actually a duty the property owner has towards others. To prove this, the government must show that a reasonable person would recognize that the regulated use would involve an unreasonable risk of harm to other persons or property. For example, in *Lucas*, using this defense, the government could have attempted to prove that a reasonable person would recognize that development of the beachfront parcels would unreasonably risk harm to the state's beaches by increasing the rate of beach erosion.²⁴²

The second defense available to the government is to prove that the property retains a reasonable use despite regulation of the owner's privilege to use. Again returning to *Lucas*, the government could attempt to prove that a reasonable owner would reasonably rent the lots to mobile venders.²⁴³

Of course, such an argument would be open to attack by the property owner, who is bound to argue that a reasonable owner would have no reasonable use for the property subject to the regulation. In the example presented, the property owner would argue that it is unreasonable to expect a reasonable owner to rent the lots for a reasonable sum under the circumstances.²⁴⁴ Likewise, the property owner will also attempt to rebut any claim by the government that it is simply regulating a duty.

V. CONCLUSION

The Takings Clause has been in dire need of judicial clarification for the last eighty years.²⁴⁵ While the *Palazzolo* case clarified the difference between a *Lucas* claim and a *Penn Central* claim, the Court postponed addressing other problems in takings law.²⁴⁶ The doctrines primarily relied upon to determine a taking—the economic-impact test and the harm principle—are contradictory and elude consistent application.²⁴⁷ The notion of investment-backed expectations is confusing,

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²⁴³ See generally id.
²⁴⁴ See generally id.
²⁴⁵ Regulatory takings has been a muddled area of the law at least since *Mahon*, 260 U.S. at 393.
²⁴⁶ See discussion supra Part II.
²⁴⁷ See discussion supra Part III.A.
misunderstood, and often irrelevant. In addition, because the perceived bar on owners challenging regulations enacted prior to their acquisition was recently lifted by Palazzolo, the confusion currently found in the doctrine of investment-backed expectations is likely to increase dramatically. Likewise, the doctrine of nuisance is living up to its name.

Inevitably, the law of takings must be put in order. The proposed standard presented in this Comment is relatively simple. As opposed to determining which standard applies by evaluating the degree of economic harm seemingly caused by the regulation, the threshold question in the proposed analysis is as follows: "What type of right is interfered with?" If in answering this question it is discovered that a claim, power, or immunity is being subjected to interference, the Takings Clause requires compensation. If the infringed right is a duty, the state has validly exercised its police power. In either case, the takings inquiry is finished.

Only if the regulation is found to have drastically restricted a privilege—which will almost invariably be the owner's privilege to use the land—is further analysis necessary. The purpose of the follow-up inquiry is to determine whether the restriction on the property has extinguished the owner's privilege of using the property. If, as a result of the regulation, the owner is left with no reasonable use of the property, compensation is required.

Noticeably absent from the proposed standard are the doctrines of nuisance and investment-backed expectations. As previously discussed, the nuisance doctrine is incorporated into the proposed duty standard. Investment-backed expectations, however, have been entirely omitted from this Comment's proposed standard. The only remote resemblance to investment-backed expectations found in this standard is the requirement that, if the government regulates a privilege, the owner must be reserved at least one reasonable use or else compensation is due. The one reasonable use requirement is far less confusing and

248. See discussion supra Part III.B.
249. See discussion supra Part III.B.3.
250. See discussion supra Part III.C.
251. See discussion supra Part IV.B.
252. Id.
253. Id.
254. Id.
255. Id.
256. Id.
speculative than investment-backed expectations.257

In sum, the proposed standard is more objective, more flexible, and less confusing than the current takings doctrine. These benefits should enable justice and logic to prevail. Given the land-use challenges facing humankind this century, it is important that the Court adopt clear standards upon which policy makers can rely.

ZACH WHITNEY*

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257. See discussion supra Part III.B.

* The author thanks Madeline, Dunc, Barb, and Dio for their encouragement.