IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust,

Appellant,

v.

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.,

Respondent.

Electronically Filed
Sep 08 2021 08:39 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.: 82565

District Court Case No.: 19-CV-0242

EXHIBITS TO ANSWERING BRIEF -- VOLUME 3

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Regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. U.S.C.A. Const.Amend. 5.

92 Cases that cite this headnote

[5] Eminent Domain⇨Zoning, Planning, or Land Use; Building Codes

Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. U.S.C.A. Const.Amend. 5.

215 Cases that cite this headnote

[6] Eminent Domain⇨Constitutional and statutory provisions

Purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. U.S.C.A. Const.Amend. 5.

66 Cases that cite this headnote

[7] Eminent Domain⇨Conditions precedent to action; ripeness

Final decision requirement for ripeness of a regulatory takings claim is not satisfied when a developer submits, and a land use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. U.S.C.A. Const.Amend. 5.

40 Cases that cite this headnote

[8] Eminent Domain⇨Conditions precedent to action; ripeness

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. U.S.C.A. Const.Amend. 5.

95 Cases that cite this headnote

[9] Eminent Domain⇨Conditions precedent to action; ripeness

A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. U.S.C.A. Const.Amend. 5.

28 Cases that cite this headnote

[10] Eminent Domain⇨Conditions precedent to action; ripeness

A takings claim based on a law or regulation which is alleged to go too far in burdening property is not ripe until ordinary processes have been followed to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law; as a general rule, the extent of the restriction on property is not known and a regulatory taking has not yet been established until processes have been followed. U.S.C.A. Const.Amend. 5.

88 Cases that cite this headnote

[11] Eminent Domain⇐Conditions precedent to action; ripeness

Government authorities may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision that would render a takings claim ripe for judicial determination. U.S.C.A. Const.Amend. 5.

38 Cases that cite this headnote

[12] Eminent Domain⇐Conditions precedent to action; ripeness

Takings claim was ripe for judicial determination once state coastal agency interpreted its regulations as precluding any filling or development of marshlands and determined that proposed use did not qualify for special exception, as limitations on development resulting from wetlands regulations were clear and there was no indication that agency would have accepted any application for development that occupied smaller area of marshlands.

77 Cases that cite this headnote

[13] Eminent Domain⇐Conditions precedent to action; ripeness

Landowner's failure to submit application to develop only upland portion of property did not render unripe claim that denial of permission to develop beach club on tract, which was primarily marshland, was taking, where there was no uncertainty as to upland's permitted uses and development value of uplands was uncontested.

16 Cases that cite this headnote

[14] Eminent Domain⇐Value of land
Eminent Domain⇐Value for special use

When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, which will turn in part on restrictions on use imposed by legitimate zoning or other regulatory limitations; mere allegation of entitlement to the value of an intensive use will not avail the landowner if the project would not have been allowed under other existing, legitimate land use limitations. U.S.C.A. Const.Amend. 5.

47 Cases that cite this headnote

[15] Eminent Domain⇐Conditions precedent to action; ripeness

Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies. U.S.C.A. Const.Amend. 5.

51 Cases that cite this headnote

[16] Eminent Domain⇨Persons entitled to question power

Acquisition of title by landowner after effective date of the state-imposed restrictions is not ipso facto fatal to regulatory takings claim on basis that landowner was on notice of those restrictions. U.S.C.A. Const.Amend. 5.

19 Cases that cite this headnote

[17] Zoning and Planning⇨Matters Subject to Regulation

The right to improve property is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.

6 Cases that cite this headnote

[18] Eminent Domain⇨Persons Entitled
Eminent Domain⇨Vendor or purchaser

In a direct condemnation action, or when a State has physically invaded the property without filing suit, 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. U.S.C.A. Const.Amend. 5.

18 Cases that cite this headnote

[19] Eminent Domain⇨What Constitutes a Taking; Police and Other Powers Distinguished

A regulation that otherwise would be an unconstitutional taking absent compensation is not transformed into a background principle of the State's law, which cannot be challenged by those who acquire title after the enactment, by mere virtue of the passage of title. U.S.C.A. Const.Amend. 5.

14 Cases that cite this headnote

[20] Eminent Domain⇨Necessity of making compensation in general

Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. U.S.C.A. Const.Amend. 5.

5 Cases that cite this headnote

[21] Eminent Domain⇨Wetlands and coastal protection

Regulation which precluded use of fill on wetlands and thus development of beach club on wetlands portion of 18-acre tract, but which permitted landowner to build substantial residence on uplands portion of tract, leaving parcel with $200,000 in development value, did not deprive landowner of all economic use of entire parcel so as to support *Lucas* takings claim. U.S.C.A. Const.Amend. 5.

44 Cases that cite this headnote

[22] Certiorari—Scope and Extent in General

Argument that was not pressed in state courts or presented in petition for certiorari, that wetlands portion of tract was distinct parcel from remaining portion of same tract for purposes of asserting *Lucas* takings claim for deprivation of all economic use, would not be considered when raised in brief.

7 Cases that cite this headnote

2451 Syllabus

*606 In order to acquire the waterfront parcel of Rhode Island land that is here at issue, petitioner and associates formed Shore Gardens, Inc. (SGI), in 1959. After SGI purchased the property petitioner bought out his associates and became the sole shareholder. Most of the property was then, and is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill before significant structures could be built. Over the years, SGI's intermittent applications to develop the property were rejected by various government agencies. After 1966, no further applications were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, the State created respondent Rhode Island Coastal Resources Management Council (Council) and charged it with protecting the State's coastal properties. The Council's regulations, known as the Rhode Island Coastal Resources Management Program (CRMP), designated salt marshes like those on SGI's property as protected "coastal wetlands" on which development is greatly limited. Second, in 1978, SGI's corporate charter was revoked, and title to the property passed to petitioner as the corporation's sole shareholder. In 1983, petitioner applied to the Council for permission to construct a wooden bulkhead and fill his entire marshland area. The Council rejected the application, concluding, *inter alia,* that it would conflict with the CRMP. In 1985, petitioner filed a new application with the Council, seeking permission to fill 11 of the property's 18 wetland acres in order to build a private beach club. The Council rejected this application as well, ruling that the proposal did not satisfy the standards for obtaining a "special exception" to fill salt marsh, whereby the proposed activity must serve a compelling public purpose. Subsequently, petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. The suit alleged the Council's action deprived him of "all economically beneficial use" of his property, resulting in a total taking requiring compensation under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, and sought $3,150,000 in damages, a figure derived from an appraiser's estimate as to the value of a 74-lot **2452 residential subdivision on the property. The court ruled against *607 petitioner, and the State Supreme Court affirmed, holding that (1) petitioner's takings claim was not ripe; (2) he had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property; (3) he could not assert a takings claim based on the denial of all economic use of his property in light of undisputed evidence that he had $200,000 in development value remaining on an upland parcel of the property; and (4) because the regulation at issue predated his acquisition of title, he could have had no reasonable investment-backed expectation that he could develop his property, and, therefore, he could not recover under *Penn Central Transp. Co. v. City of York,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631.

Held:

1. This case is ripe for review. Pp. 2457-2462.

(a) A takings claim challenging application of land-use regulations is not ripe unless the agency charged with implementing the regulations has reached a final decision regarding their application to the property at issue. *Williamson*

County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126. A final decision does not occur until the responsible agency determines the extent of permitted development on the land. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285. Petitioner obtained such a final decision when the Council denied his 1983 and 1985 applications. The State Supreme Court erred in ruling that, notwithstanding those denials, doubt remained as to the extent of development the Council would allow on petitioner's parcel due to his failure to explore other uses for the property that would involve filling substantially less wetlands. This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. The CRMP permits the Council to grant a special exception to engage in a prohibited use only where a "compelling public purpose" is served. The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the special exception. The Council determined the use proposed in the second application (the beach club) did not satisfy the "compelling public purpose" standard. There is no indication the Council would have accepted the application had the proposed club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public purpose." Although a landowner may not establish a taking before the land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation, *e.g.*, *MacDonald, supra*, at 342, 106 S.Ct. 2561, once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. Here, the Council's decisions make plain that *608 it interpreted its regulations to bar petitioner from engaging in any filling or development on the wetlands. Further permit applications were not necessary to establish this point. Pp. 2458-2459.

(b) Contrary to the State Supreme Court's ruling, petitioner's claim is not unripe by virtue of his failure to seek permission for a use of the property that would involve development only of its upland portion. It is true that there was uncontested testimony that an upland site would have an estimated value of $200,000 if developed. And, while the CRMP requires Council approval to develop upland property lying within 200 feet of protected waters, the strict "compelling public purpose" test does not govern proposed land uses on property in this classification. Council officials testified at trial, moreover, that they would have allowed petitioner to build a residence on the upland parcel. Nevertheless, this Court's ripeness jurisprudence **2453 requires petitioner to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use. The State's assertion that the uplands' value is in doubt comes too late for the litigation before this Court. It was stated in the certiorari petition that the uplands were worth an estimated $200,000. The figure not only was uncontested but also was cited as fact in the State's brief in opposition. In this circumstance ripeness cannot be contested by saying that the value of the nonwetland parcels is unknown. See *Lucas, supra*, at 1020, and n. 9, 112 S.Ct. 2886. Nor is there genuine ambiguity in the record as to the extent of permitted development on petitioner's property, either on the wetlands or the uplands. Pp. 2460-2461.

(c) Nor is petitioner's takings claim rendered unripe, as the State Supreme Court held, by his failure to apply for permission to develop the 74-lot subdivision that was the basis for the damages sought in his inverse condemnation suit. It is difficult to see how this concern is relevant to the inquiry at issue here. The Council informed petitioner that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings there. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required under the Court's ripeness decisions. Pp. 2461-2462.

2. Petitioner's acquisition of title after the regulations' effective date did not bar his takings claims. This Court rejects the State Supreme Court's sweeping rule that 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. Were the Court to accept that 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 *609 the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. The State's notice justification does not take into account the effect on owners at the time of enactment, who are prejudiced 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 State's 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 also 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. See, *e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358. The rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the

owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. 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. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, n. 2, 107 S.Ct. 3141, 97 L.Ed.2d 677, is controlling precedent for the Court's conclusion. *Lucas*, 505 U.S., at 1029, 112 S.Ct. 2886, did not overrule *Nollan*, which is based on essential Takings Clause principles. On remand the state court must address the merits of petitioner's *Penn Central* claim, which is not barred by the mere fact that his title was acquired after the effective date of the state-imposed restriction. Pp. 2462-2464.

3. The State Supreme Court did not err in finding that petitioner failed to establish a deprivation of all economic use, **2454 for it is undisputed that his parcel retains significant development value. Petitioner is correct that, assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle." *Lucas, supra*, at 1019, 112 S.Ct. 2886. Petitioner attempts to revive this part of his claim by arguing, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. The Court will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in his certiorari petition. The case comes to the Court on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails. Pp. 2464-2465.

*610 4. Because petitioner's claims under the *Penn Central* analysis were not examined below, the case is remanded. Pp. 2457, 2465.

746 A.2d 707, affirmed in part, reversed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and in which STEVENS, J., joined as to Part II-A. O'CONNOR, J., *post*, p. 2465 and SCALIA, J., *post*, p. 2467 filed concurring opinions. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 2468. GINSBURG, J., filed a dissenting opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 2472. BREYER, J., filed a dissenting opinion, *post*, p. 2477.

Attorneys and Law Firms

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Opinion

*611 Justice KENNEDY delivered the opinion of the Court.

Petitioner Anthony Palazzolo owns a waterfront parcel of land in the town of Westerly, Rhode Island. Almost all of the property is designated as coastal wetlands under Rhode Island law. After petitioner's development proposals were rejected by respondent Rhode Island Coastal Resources Management Council (Council), he sued in state court, asserting the Council's application of its wetlands regulations took the property without compensation in violation of the Takings Clause of the Fifth Amendment, binding upon the State through the Due Process Clause of the Fourteenth Amendment. Petitioner sought review in this Court, contending the Supreme Court of Rhode Island erred in rejecting his takings claim. We granted certiorari. 531 U.S. 923, 121 S.Ct. 296, 148 L.Ed.2d 238 (2000).

I

The town of Westerly is on an edge of the Rhode Island coastline. The town's western border is the Pawcatuck River, which at that point is the boundary between Rhode *612 Island and Connecticut. Situated on land purchased from the Narragansett Indian Tribe, the town was incorporated in 1669 and had a precarious, though colorful, early history. Both Connecticut and Massachusetts contested the boundaries-and indeed the validity-of Rhode Island's royal charter; and Westerly's proximity to Connecticut invited encroachments during these jurisdictional squabbles. See M. Best, The Town that Saved a State-Westerly 60-83 (1943); see also W. McLoughlin, Rhode Island: A Bicentennial History 39-57 (1978). When the borders of the Rhode Island Colony were settled by compact in 1728, the town's development was more orderly, and with some historical distinction. For instance, **2455 Watch Hill Point, the peninsula at the southwestern tip of the town, was of strategic importance in the Revolutionary War and the War of 1812. See Best, *supra*, at 190; F. Denison, Westerly and its Witnesses 118-119 (1878).

In later times Westerly's coastal location had a new significance: It became a popular vacation and seaside destination. One of the town's historians gave this happy account:

"After the Civil War the rapid growth of manufacture and expansion of trade had created a spending class on pleasure bent, and Westerly had superior attractions to offer, surf bathing on ocean beaches, quieter bathing in salt and fresh water ponds, fishing, annual sail and later motor boat races. The broad beaches of clean white sand dip gently toward the sea; there are no odorous marshes at low tide, no railroad belches smoke, and the climate is unrivalled on the coast, that of Newport only excepted. In the phenomenal heat wave of 1881 ocean resorts from northern New England to southern New Jersey sweltered as the thermometer climbed to 95 and 104 degrees, while Watch Hill enjoyed a comfortable 80. When Providence to the north runs a temperature of 90, the mercury in this favored spot remains at 77." Best, *supra,* at 192.

*613 Westerly today has about 20,000 year-round residents, and thousands of summer visitors come to enjoy its beaches and coastal advantages.

One of the more popular attractions is Misquamicut State Beach, a lengthy expanse of coastline facing Block Island Sound and beyond to the Atlantic Ocean. The primary point of access to the beach is Atlantic Avenue, a well-traveled 3-mile stretch of road running along the coastline within the town's limits. At its western end, Atlantic Avenue is something of a commercial strip, with restaurants, hotels, arcades, and other typical seashore businesses. The pattern of development becomes more residential as the road winds eastward onto a narrow spine of land bordered to the south by the beach and the ocean, and to the north by Winnapaug Pond, an intertidal inlet often used by residents for boating, fishing, and shellfishing.

In 1959 petitioner, a lifelong Westerly resident, decided to invest in three undeveloped, adjoining parcels along this eastern stretch of Atlantic Avenue. To the north, the property faces, and borders upon, Winnapaug Pond; the south of the property faces Atlantic Avenue and the beachfront homes abutting it on the other side, and beyond that the dunes and the beach. To purchase and hold the property, petitioner and associates formed Shore Gardens, Inc. (SGI). After SGI purchased the property petitioner bought out his associates and became the sole shareholder. In the first decade of SGI's ownership of the property the corporation submitted a plat to the town subdividing the property into 80 lots; and it engaged in various transactions that left it with 74 lots, which together encompassed about 20 acres. During the same period SGI also made initial attempts to develop the property and submitted intermittent applications to state agencies to fill substantial portions of the parcel. Most of the property was then, as it is now, salt marsh subject to tidal flooding. The wet ground and permeable soil would require considerable fill-as much as six feet in some *614 places-before significant structures could be built. SGI's proposal, submitted in 1962 to the Rhode Island Division of Harbors and Rivers (DHR), sought to dredge from Winnapaug Pond and fill the entire property. The application was denied for lack of essential information. A second, similar proposal followed a year later. A third application, submitted in 1966 while the second application was pending, proposed more limited filling of the land for use as a private beach club. These latter two applications were referred to the Rhode Island Department of **2456 Natural Resources, which indicated initial assent. The agency later withdrew approval, however, citing adverse environmental impacts. SGI did not contest the ruling.

No further attempts to develop the property were made for over a decade. Two intervening events, however, become important to the issues presented. First, in 1971, Rhode Island enacted legislation creating the Council, an agency charged with the duty of protecting the State's coastal properties. 1971 R.I. Pub. Laws, ch. 279, § 1 *et seq.* Regulations promulgated by the Council designated salt marshes like those on SGI's property as protected "coastal wetlands," Rhode Island Coastal Resources Management Program (CRMP) § 210.3 (as amended, June 28, 1983) (lodged with the Clerk of this Court), on which development is limited to a great extent. Second, in 1978, SGI's corporate charter was revoked for failure to pay corporate income taxes; and title to the property passed, by operation of state law, to petitioner as the corporation's sole shareholder.

In 1983, petitioner, now the owner, renewed the efforts to develop the property. An application to the Council, resembling the 1962 submission, requested permission to construct a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marshland area. The Council rejected the application, noting it was "vague and inadequate for a project of this size and nature." App. 16. The agency also found that "the proposed activities will have significant impacts *615 upon the waters and wetlands of Winnapaug Pond," and concluded that "the proposed alteration ... will conflict with the Coastal Resources Management Plan

presently in effect." *Id.*, at 17. Petitioner did not appeal the agency's determination.

Petitioner went back to the drawing board, this time hiring counsel and preparing a more specific and limited proposal for use of the property. The new application, submitted to the Council in 1985, echoed the 1966 request to build a private beach club. The details do not tend to inspire the reader with an idyllic coastal image, for the proposal was to fill 11 acres of the property with gravel to accommodate "50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbecue pits of concrete, and other trash receptacles." *Id.*, at 25.

The application fared no better with the Council than previous ones. Under the agency's regulations, a landowner wishing to fill salt marsh on Winnapaug Pond needed a "special exception" from the Council. CRMP § 130. In a short opinion the Council said the beach club proposal conflicted with the regulatory standard for a special exception. See App. 27. To secure a special exception the proposed activity must serve "a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." CRMP § 130A(1). This time petitioner appealed the decision to the Rhode Island courts, challenging the Council's conclusion as contrary to principles of state administrative law. The Council's decision was affirmed. See App. 31-42.

Petitioner filed an inverse condemnation action in Rhode Island Superior Court, asserting that the State's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. See *id.*, at 45. The suit alleged the Council's action deprived him of "economically, beneficial use" of his property, *ibid.*, resulting in a total taking *616 requiring compensation under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). He sought damages in the amount of $3,150,000, a figure derived from an appraiser's estimate as to the value of a 74-lot residential subdivision. The State countered with a host of defenses. After a bench trial, a justice of the Superior Court ruled against petitioner, **2457 accepting some of the State's theories. App. to Pet. for Cert. B-1 to B-13.

The Rhode Island Supreme Court affirmed. 746 A.2d 707 (2000). Like the Superior Court, the State Supreme Court recited multiple grounds for rejecting petitioner's suit. The court held, first, that petitioner's takings claim was not ripe, *id.*, at 712-715; second, that petitioner had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property from SGI, *id.*, at 716; and third, that the claim of deprivation of all economically beneficial use was contradicted by undisputed evidence that he had $200,000 in development value remaining on an upland parcel of the property, *id.*, at 715. In addition to holding petitioner could not assert a takings claim based on the denial of all economic use, the court concluded he could not recover under the more general test of *Penn Central Transp. Co. v. City New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). On this claim, too, the date of acquisition of the parcel was found determinative, and the court held he could have had "no reasonable investment-backed expectations that were affected by this regulation" because it predated his ownership, 746 A.2d, at 717; see also *Penn Central*, *supra*, at 124, 98 S.Ct. 2646.

We disagree with the Supreme Court of Rhode Island as to the first two of these conclusions; and, we hold, the court was correct to conclude that the owner is not deprived of all economic use of his property because the value of upland portions is substantial. We remand for further consideration of the claim under the principles set forth in *Penn Central*.

*617 II

[1] [2] [3] The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.*, at 415, 43 S.Ct. 158.

[4] [5] [6] Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, see *infra*, at 2463-2464, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886; see also *id.*, at 1035, 112 S.Ct. 2886 (KENNEDY, J., concurring); *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central*, *supra*, at 124, 98 S.Ct. 2646. These inquiries are informed by the purpose of the *618 Takings Clause, which is to prevent the government **2458 from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960).

Petitioner seeks compensation under these principles. At the outset, however, we face the two threshold considerations invoked by the state court to bar the claim: ripeness, and acquisition which postdates the regulation.

A

In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Court explained the requirement that a takings claim must be ripe. The Court held that a takings claim challenging the application of land-use regulations is not ripe 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." *Id.*, at 186, 105 S.Ct. 3108. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, see *Lucas*, *supra*, at 1015, 112 S.Ct. 2886, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see *Penn Central*, *supra*, at 124, 98 S.Ct. 2646. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Drawing on these principles, the Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim.

The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether petitioner obtained a final decision from the Council determining the permitted use for the land. As we have noted, SGI's early applications to fill had been granted at one point, *619 though that assent was later revoked. Petitioner then submitted two proposals: the 1983 proposal to fill the entire parcel, and the 1985 proposal to fill 11 of the property's 18 wetland acres for construction of the beach club. The court reasoned that, notwithstanding the Council's denials of the applications, doubt remained as to the extent of development the Council would allow on petitioner's parcel. We cannot agree.

[7] The court based its holding in part upon petitioner's failure to explore "any other use for the property that would involve filling substantially less wetlands." 746 A.2d, at 714. It relied upon this Court's observations that the final decision requirement is not satisfied when a developer submits, and a land-use authority denies, a grandiose development proposal, leaving open the possibility that lesser uses of the property might be permitted. See *MacDonald*, *supra*, at 353, n. 9, 106 S.Ct. 2561. The suggestion is that while the Council rejected petitioner's effort to fill all of the wetlands, and then rejected his proposal to fill 11 of the wetland acres, perhaps an application to fill (for instance) 5 acres would have been approved. Thus, the reasoning goes, we cannot know for sure the extent of permitted development on petitioner's wetlands.

This is belied by the unequivocal nature of the wetland regulations at issue and by the Council's application of the regulations to the subject property. Winnapaug Pond is classified under the CRMP as a Type 2 body of water. See CRMP § 200.2. A landowner, as a general rule, is prohibited from filling or building residential structures on wetlands adjacent to Type 2 waters, see *id.*, Table 1, p. 22, and § 210.3(C)(4), but may seek a special exception from the Council to engage in a prohibited use, see *id.*, § 130. The Council is permitted to allow the exception, **2459 however, only where a "compelling public purpose" is served. *Id.*, § 130A(2). The proposal to fill the entire property was not accepted under Council regulations and did not qualify for the special exception. The Council determined the use proposed *620 in the second application (the beach club) did not satisfy

the "compelling public purpose" standard. There is no indication the Council would have accepted the application had petitioner's proposed beach club occupied a smaller surface area. To the contrary, it ruled that the proposed activity was not a "compelling public purpose." App. 27; cf. *id.*, at 17 (1983 application to fill wetlands proposed an "activity" conflicting with the CRMP).

[8] *Williamson County's* final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997). While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. The case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted. See *MacDonald, supra*, at 342, 106 S.Ct. 2561 (denial of 159-home residential subdivision); *Williamson County, supra*, at 182, 105 S.Ct. 3108 (476-unit subdivision); cf. *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (case not ripe because no plan to develop was submitted).

[9] [10] [11] These cases stand for the important principle that a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development *621 plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established. See *Suitum, supra*, at 736, and n. 10, 117 S.Ct. 1659 (noting difficulty of demonstrating that "mere enactment" of regulations restricting land use effects a taking). Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision. *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

[12] With respect to the wetlands on petitioner's property, the Council's decisions make plain that the agency interpreted its regulations to bar petitioner from engaging in any filling or development activity on the wetlands, a fact reinforced by the Attorney General's forthright responses to our questioning during oral argument in this case. See Tr. of Oral Arg. 26, 31. The rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use. There can be no fill for its own sake; no fill for a beach club, either rustic or upscale; no fill for a subdivision; no fill for any likely or foreseeable use. And with no fill there can be no structures and no development on the wetlands. Further permit applications were not necessary to establish this point.

**2460 As noted above, however, not all of petitioner's parcel constitutes protected wetlands. The trial court accepted uncontested testimony that an upland site located at the eastern end of the property would have an estimated value of $200,000 if developed. App. to Pet. for Cert. B-5. While Council approval is required to develop upland property which lies within 200 feet of protected waters, see CRMP § 100.1(A), the strict "compelling public purpose" test does not govern proposed land uses on property in this classification, *622 see *id.*, § 110, Table 1A, § 120. Council officials testified at trial, moreover, that they would have allowed petitioner to build a residence on the upland parcel. App. to Pet. for Cert. B-5. The State Supreme Court found petitioner's claim unripe for the further reason that he "has not sought permission for any ... use of the property that would involve ... development only of the upland portion of the parcel." 746 A.2d, at 714.

[13] In assessing the significance of petitioner's failure to submit applications to develop the upland area it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on landowners because "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S., at 348, 106 S.Ct. 2561. Ripeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.

The State asserts the value of the uplands is in doubt. It relies in part on a comment in the opinion of the Rhode Island

Supreme Court that "it would be possible to build at least one single-family home on the upland portion of the parcel." 746 A.2d, at 714. It argues that the qualification "at least" indicates that additional development beyond the single dwelling was possible. The attempt to interject ambiguity as to the value or use of the uplands, however, comes too late in the day for purposes of litigation before this Court. It was stated in the petition for certiorari that the uplands on petitioner's property had an estimated worth of $200,000. See Pet. for Cert. 21. The figure not only was uncontested but also was cited as fact in the State's brief in opposition. See Brief in Opposition 4, 19. In this circumstance ripeness cannot be contested by saying that the value of the nonwetland parcels is unknown. See *Lucas*, 505 U.S., at 1020, and n. 9, 112 S.Ct. 2886.

*623 The State's prior willingness to accept the $200,000 figure, furthermore, is well founded. The only reference to upland property in the trial court's opinion is to a single parcel worth an estimated $200,000. See App. to Pet. for Cert B-5. There was, it must be acknowledged, testimony at trial suggesting the existence of an additional upland parcel elsewhere on the property. See Tr. 190-191, 199-120 (testimony of Dr. Grover Fugate, Council Executive Director); see also *id.*, at 610 (testimony of Steven Clarke). The testimony indicated, however, that the potential, second upland parcel was on an "island" which required construction of a road across wetlands, *id.*, at 610, 623-624 (testimony of Mr. Clarke)-and, as discussed above, the filling of wetlands for such a purpose would not justify a special exception under Council regulations. See *supra*, at 2458-2459; see also Brief for Respondents 10 ("Residential construction is not the basis of such a 'special exception' "). Perhaps for this reason, the State did not maintain in the trial court that additional uplands could have been developed. To the contrary, its post-trial memorandum identified only the single parcel that petitioner concedes retains a development value of $200,000. See State's Post-Trial Memorandum in No. 88-0297 (Super.Ct. R. I.), pp. 25, 81. The trial court accepted the figure. So there is no genuine ambiguity in the record as to the extent of permitted development **2461 on petitioner's property, either on the wetlands or the uplands.

Nonetheless, there is some suggestion that the use permitted on the uplands is not known, because the State accepted the $200,000 value for the upland parcel on the premise that only a *Lucas* claim was raised in the pleadings in the state trial court. See Brief for Respondents 29-30. Since a *Penn Central* argument was not pressed at trial, it is argued, the State had no reason to assert with vigor that more than a single-family residence might be placed on the uplands. We disagree; the State was aware of the applicability of *Penn Central*. The issue whether the Council's decisions *624 amounted to a taking under *Penn Central* was discussed in the trial court, App. to Pet. for Cert. B-7, the State Supreme Court, 746 A.2d, at 717, and the State's own post-trial submissions, see State's Post-Trial Supplemental Memorandum 7-10. The state-court opinions cannot be read as indicating that a *Penn Central* claim was not properly presented from the outset of this litigation.

A final ripeness issue remains. In concluding that *Williamson County*'s final decision requirement was not satisfied, the State Supreme Court placed emphasis on petitioner's failure to "appl[y] for permission to develop [the] seventy-four-lot subdivision" that was the basis for the damages sought in his inverse condemnation suit. 746 A.2d, at 714. The court did not explain why it thought this fact significant, but respondents and *amici* defend the ruling. The Council's practice, they assert, is to consider a proposal only if the applicant has satisfied all other regulatory preconditions for the use envisioned in the application. The subdivision proposal that was the basis for petitioner's takings claim, they add, could not have proceeded before the Council without, at minimum, zoning approval from the town of Westerly and a permit from the Rhode Island Department of Environmental Management allowing the installation of individual sewage disposal systems on the property. Petitioner is accused of employing a hide the ball strategy of submitting applications for more modest uses to the Council, only to assert later a takings action predicated on the purported inability to build a much larger project. Brief for the National Wildlife Federation et al. as *Amici Curiae* 9.

[14] It is difficult to see how this concern is relevant to the inquiry at issue here. Petitioner was informed by the Council that he could not fill the wetlands; it follows of necessity that he could not fill and then build 74 single-family dwellings upon it. Petitioner's submission of this proposal would not have clarified the extent of development permitted by the wetlands regulations, which is the inquiry required *625 under our ripeness decisions. The State's concern may be that landowners could demand damages for a taking based on a project that could not have been constructed under other, valid zoning restrictions quite apart from the regulation being challenged. This, of course, is a valid concern in inverse condemnation cases alleging injury from wrongful refusal to permit development. The instant case does not require us to pass upon the authority of a State to insist in such cases that landowners follow normal planning procedures or to enact rules to control damages awards based on hypothetical uses that should have been reviewed in the normal course, and we do not intend to cast doubt upon such rules here. The mere allegation of entitlement to the value of an intensive use will

not avail the landowner if the project would not have been allowed under other existing, legitimate land-use limitations. When a taking has occurred, under accepted condemnation principles the owner's damages will be based upon the property's fair market value, see, *e.g.*, *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); 4 J. Sackman, Nichols on Eminent Domain § 12.01 (rev.3d ed.2000)-an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning **2462 or other regulatory limitations, see *id.*, § 12C.03[1].

[15] The state court, however, did not rely upon state-law ripeness or exhaustion principles in holding that petitioner's takings claim was barred by virtue of his failure to apply for a 74-lot subdivision; it relied on *Williamson County*. As we have explained, *Williamson County* and our other ripeness decisions do not impose further obligations on petitioner, for the limitations the wetland regulations imposed were clear from the Council's denial of his applications, and there is no indication that any use involving any substantial structures or improvements would have been allowed. Where the state agency charged with enforcing a challenged land-use regulation entertains an application from an owner and its denial of the application makes clear the extent of development *626 permitted, and neither the agency nor a reviewing state court has cited noncompliance with reasonable state-law exhaustion or pre-permit processes, see *Felder v. Casey*, 487 U.S. 131, 150-151, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), federal ripeness rules do not require the submission of further and futile applications with other agencies.

B

[16] We turn to the second asserted basis for declining to address petitioner's takings claim on the merits. When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use, 746 A.2d, at 716, and to the *Penn Central* claim, 746 A.2d, at 717. While the first holding was couched in terms of background principles of state property law, see *Lucas*, 505 U.S., at 1015, 112 S.Ct. 2886, and the second in terms of petitioner's reasonable investment-backed expectations, see *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. See, *e.g.*, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). 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.

[17] *627 The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. See *Pennsylvania Coal Co.*, 260 U.S., at 413, 43 S.Ct. 158 ("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"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend **2463 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 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. See *628 *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation"); cf. Ellickson, Property in Land, 102 Yale L.J. 1315, 1368-1369 (1993) (right to transfer interest in land is a defining characteristic of the fee simple estate). The proposed rule is, furthermore, capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic. 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.

[18] Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation. 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. See *Danforth v. United States*, 308 U.S. 271, 284, 60 S.Ct. 231, 84 L.Ed. 240 (1939); 2 Sackman, Eminent Domain, at § 5.01[5][d][i] ("It is well settled that when there is a taking of property by eminent domain in compliance with the law, it is the owner of the property *at the time of the taking* who is entitled to compensation"). 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.

*629 There is controlling precedent for our conclusion. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), presented the question whether it was consistent with the Takings Clause for a state regulatory agency to require oceanfront landowners to provide lateral beach access to the public as the condition for a development permit. The principal dissenting opinion observed it was a policy of the California Coastal Commission to require the condition, and that the Nollans, who purchased their home after the policy went into effect, were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.*, at 860, 107 S.Ct. 3141 (Brennan, J., dissenting). A majority of the Court rejected the proposition. "So long as the Commission could not have deprived the prior owners of the **2464 easement without compensating them," the Court reasoned, "the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*, at 834, n. 2, 107 S.Ct. 3141.

It is argued that *Nollan*'s holding was limited by the later decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In *Lucas* the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which "inhere in the title itself." *Id.*, at 1029, 112 S.Ct. 2886. This is so, the Court reasoned, because the landowner is constrained by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Ibid.* It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.

[19] We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise *630 would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition, see *id.*, at 1029-1030, 112 S.Ct. 2886. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. See *id.*, at 1030, 112 S.Ct. 2886 ("The 'total taking' inquiry we require today will ordinarily entail ... analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"). A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles.

For reasons we discuss next, the state court will not find it

necessary to explore these matters on remand in connection with the claim that all economic use was deprived; it must address, however, the merits of petitioner's claim under *Penn Central*. That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

III

As the case is ripe, and as the date of transfer of title does not bar petitioner's takings claim, we have before us the alternative ground relied upon by the Rhode Island Supreme Court in ruling upon the merits of the takings claims. It held that all economically beneficial use was not deprived because the uplands portion of the property can still be improved. On this point, we agree with the court's decision. Petitioner accepts the Council's contention and the state trial *631 court's finding that his parcel retains $200,000 in development value under the State's wetlands regulations. He asserts, nonetheless, that he has suffered a total taking and contends the Council cannot sidestep the holding in *Lucas* "by the simple expedient of leaving a landowner a few crumbs of value." Brief for Petitioner 37.

[20] [21] Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation of the landowner **2465 in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle." *Lucas, supra*, at 1019, 112 S.Ct. 2886.

[22] In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L.Rev. 1165, 1192 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e.g.*, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra*, at 1016-1017, n. 7, 112 S.Ct. 2886, a sentiment echoed by some commentators, see, *e.g.*, Epstein, Takings: Descent and Resurrection, 1987 S.Ct. Rev. 1, 16-17 (1987); Fee, Unearthing the Denominator in Regulatory Takings Claims, 61 U. Chi. L.Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire *632 parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.

* * *

For the reasons we have discussed, the State Supreme Court erred in finding petitioner's claims were unripe and in ruling that acquisition of title after the effective date of the regulations barred the takings claims. The court did not err in finding that petitioner failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence. The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded.

The judgment of the Rhode Island Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice O'CONNOR, concurring.

I join the opinion of the Court but with my understanding of how the issues discussed in Part II-B of the opinion must be considered on remand.

Part II-B of the Court's opinion addresses the circumstance, present in this case, where a takings claimant has acquired title to the regulated property after the enactment of the regulation at issue. As the Court holds, the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction. Accordingly, the Court holds that petitioner's claim under

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Ante,* at 2464.

The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition *633 plays in a proper *Penn Central* analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. **2466 Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee 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.' " *Penn Central, supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)). The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "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." *Penn Central, supra,* at 124, 98 S.Ct. 2646 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962)). The outcome instead "depends largely 'upon the particular circumstances [in that] case.' " *Penn Central, supra,* at 124, 98 S.Ct. 2646 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958)).

We have "identified several factors that have particular significance" in these "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646. Two such factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered *634 with distinct investment-backed expectations." *Ibid.* Another is "the character of the governmental action." *Ibid.* The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. *Id.*, at 127, 98 S.Ct. 2646 ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner's use of the property"); see also *Yee v. Escondido*, 503 U.S. 519, 523, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (Regulatory takings cases "necessarily entai[l] complex factual assessments of the purposes and economic effects of government actions"). *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner's acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. 746 A.2d 707, 717 (2000). The court erred in elevating what it believed to be "[petitioner's] lack of reasonable investment-backed expectations" to "dispositive" status. *Ibid.* 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." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-a-vis the development sought by the **2467 claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. We *635 also have 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, such as a donee, heir, or devisee. Cf. *Hodel v. Irving*, 481 U.S. 704, 714-718, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to

redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost. As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking *636 has occurred. As before, the salience of these facts cannot be reduced to any "set formula." *Penn Central*, 438 U.S., at 124, 98 S.Ct. 2646 (internal quotation marks omitted). The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under *Penn Central* before deciding whether any compensation is due.

Justice SCALIA, concurring.

I write separately to make clear that my understanding of how the issues discussed in Part II-B of the Court's opinion must be considered on remand is not Justice O'CONNOR's.

The principle that underlies her separate concurrence is that it may in some (unspecified) circumstances be "[un]fai[r]," and produce unacceptable "windfalls," to allow a subsequent purchaser to nullify an unconstitutional partial taking (though, inexplicably, not an unconstitutional total taking) by the government. *Ante,* this page. The polar horrible, presumably, is the situation in which a sharp real estate developer, realizing (or indeed, simply gambling on) the unconstitutional excessiveness of a development restriction that a naive landowner assumes to be valid, purchases property at what it would be worth subject to the restriction, and then develops it to its full value (or resells it at its full value) after getting the unconstitutional restriction invalidated.

This can, I suppose, be called a windfall-though it is not much different from **2468 the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse). There is something to be said (though in my view not much) for pursuing abstract "fairness" by requiring part or all of that windfall to be returned to the naive original owner, who presumably is the "rightful" owner of it. But there is nothing to be said for giving *637 it instead to the *government*-which not only did not lose something it owned, but is both the *cause* of the miscarriage of "fairness" and the only one of the three parties involved in the miscarriage (government, naive original owner, and sharp real estate developer) which *acted unlawfully*-indeed *unconstitutionally.* Justice O'CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief.*

In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)) should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, see *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), no less than a total taking, is not absolved by the transfer of title.

Justice STEVENS, concurring in part and dissenting in part.

In an admirable effort to frame its inquiries in broadly significant terms, the majority offers three pages of commentary on the issue of whether an owner of property can challenge *638 regulations adopted prior to her acquisition of that property without ever discussing the particular facts or legal claims at issue in this case. See *ante,* at 2462-2464. While I agree with some of what the Court has to say on this issue, an examination of the issue in the context of the facts of this case convinces me that the Court has oversimplified a complex calculus and conflated two separate questions. Therefore, while I join Part II-A of the opinion, I dissent from the judgment and, in particular, from Part II-B.

I

Though States and local governments have broad power to adopt regulations limiting land usage, those powers are constrained by the Constitution and by other provisions of state law. In adopting land-use restrictions, local authorities must follow legally valid and constitutionally sufficient

procedures and must adhere to whatever substantive requirements are imposed by the Constitution and supervening law. If a regulating body fails to adhere to its procedural or substantive obligations in developing landuse restrictions, anyone adversely impacted by the restrictions may challenge their validity in an injunctive action. If the application of such restriction to a property owner would cause her a "direct and substantial injury," *e.g.*, **2469 Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77, 83, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), I have no doubt that she has standing to challenge the restriction's validity whether she acquired title to the property before or after the regulation was adopted. For, as the Court correctly observes, even future generations "have a right to challenge unreasonable limitations on the use and value of land." *Ante,* at 2463.

It by no means follows, however, that, as the Court assumes, a succeeding owner may obtain compensation for a taking of property from her predecessor in interest. A taking is a discrete event, a governmental acquisition of private property for which the State is required to provide just compensation. Like other transfers of property, it occurs at a *639 particular time, that time being the moment when the relevant property interest is alienated from its owner.[1]

Precise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy. For example, the amount of the award is measured by the value of the property at the time of taking, not the value at some later date. Similarly, interest on the award runs from that date. Most importantly for our purposes today, it is the person who owned the property at the time of the taking that is entitled to the recovery. See, *e.g.*, Danforth v. United States, 308 U.S. 271, 284, 60 S.Ct. 231, 84 L.Ed. 240 (1939) ("For the reason that compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment"). The rationale behind that rule is true whether the transfer of ownership is the result of an arm's-length negotiation, an inheritance, or the dissolution of a bankrupt debtor. Cf. United States v. Dow, 357 U.S. 17, 20-21, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).[2]

*640 II

Much of the difficulty of this case stems from genuine confusion as to when the taking Palazzolo alleges actually occurred. According to Palazzolo's theory of the case, the owners of his Westerly, Rhode Island, property possessed the right to fill the wetland portion of the property at some point in the not-too-distant past.[1] In **2470 1971, the State of Rhode Island passed a statute creating the Rhode Island Coastal Resources Management Council (Council) and delegating the Council the authority to promulgate regulations restricting the usage of coastal land. See 1971 R.I. Pub. *641 Laws, ch. 279, § 1 *et seq.* The Council promptly adopted regulations that, *inter alia,* effectively foreclosed petitioner from filling his wetlands. See *ante,* at 2456; cf. App. to Brief for Respondents 11-22 (current version of regulations). As the regulations nonetheless provided for a process through which petitioner might seek permission to fill the wetlands, he filed two applications for such permission during the 1980's, both of which were denied. See *ante,* at 2456.

The most natural reading of petitioner's complaint is that the regulations in and of themselves precluded him from filling the wetlands, and that their adoption therefore constituted the alleged taking. This reading is consistent with the Court's analysis in Part II-A of its opinion (which I join) in which the Court explains that petitioner's takings claims are ripe for decision because respondents' wetlands regulations unequivocally provide that there can be "no fill for any likely or foreseeable use." *Ante,* at 2459.[1] If it is the regulations themselves of which petitioner complains, and if they did, in fact, diminish the value of his property, they did so when they were adopted.

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,[1] in my judgment it is pellucidly clear *642 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.

His lack of standing does not depend, as the Court seems to assume, on whether or not petitioner "is deemed to have notice of an earlier-enacted restriction," *ante,* at 2462. If those early regulations changed the character of the owner's title to the property, thereby diminishing its value, petitioner acquired only the net value that remained after that diminishment occurred. Of course, if, as respondents contend, **2471 see n. 3, *supra,* even the prior owner never had any right to fill

wetlands, there never was a basis for the alleged takings claim in the first place. But accepting petitioner's theory of the case, he has no standing to complain that preacquisition events may have reduced the value of the property that he acquired. If the regulations are invalid, either because improper procedures were followed when they were adopted, or because they have somehow gone "too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922), petitioner may seek to enjoin their enforcement, but he has no right to recover compensation for the value of property taken from someone else. A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property.

The Court's holding in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), is fully consistent with this analysis. In that case the taking occurred when the state agency compelled the petitioners to provide an easement of public access to the beach as a condition for a development permit. That event-a compelled transfer of an interest in property-occurred *after* the petitioners had become the owner of the property and unquestionably diminished the *643 value of petitioners' property. Even though they had notice when they bought the property that such a taking might occur, they never contended that any action taken by the State before their purchase gave rise to any right to compensation. The matter of standing to assert a claim for just compensation is determined by the impact of the event that is alleged to have amounted to a taking rather than the sort of notice that a purchaser may or may not have received when the property was transferred. Petitioners in *Nollan* owned the property at the time of the triggering event. Therefore, they and they alone could claim a right to compensation for the injury.[2] Their successors in interest, like petitioner in this case, have no standing to bring such a claim.

III

At oral argument, petitioner contended that the taking in question occurred in 1986, when the Council denied his final application to fill the land. Tr. of Oral Arg. 16. Though this theory, to the extent that it was embraced within petitioner's actual complaint, complicates the issue, it does not alter my conclusion that the prohibition on filling the wetlands does not take from Palazzolo any property right he ever possessed.

The title Palazzolo took by operation of law in 1978 was limited by the regulations then in place to the extent that such regulations represented a valid exercise of the police power. For the reasons expressed above, I think the regulations barred petitioner from filling the wetlands on his property. At the very least, however, they established a rule that such lands could not be filled unless the Council *644 exercised its authority to make exceptions to that rule under certain circumstances. Cf. App. to Brief for Respondents A-13 (laying out narrow circumstances under which the Council retains the discretion to grant a "special exception"). Under the reading of the regulations most favorable to Palazzolo, he acquired no more than the right to a discretionary determination by the Council as to whether to permit him to fill the wetlands. As his two hearings before that body attest, he was given the opportunity to make a presentation and receive such a determination. Thus, the Council properly **2472 respected whatever limited rights he may have retained with regard to filling the wetlands. Cf. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001) (holding, in a different context, that, if a party's only relevant property interest is a claim of entitlement to bring an action, the provision of a forum for hearing that action is all that is required to vindicate that property interest); *Lopez v. Davis*, 531 U.S. 230, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (involving a federal statute that created an entitlement to a discretionary hearing without creating any entitlement to relief).[1]

Though the majority leaves open the possibility that the scope of today's holding may prove limited, see *ante*, at 2464 (discussing limitations implicit in "background principles" exception); see also *ante*, at 2465-2467 (O'CONNOR, J., concurring) (discussing importance of the timing of regulations *645 for the evaluation of the merits of a takings claim); *post*, at 2477 (BREYER, J., dissenting) (same), the extension of the right to compensation to individuals other than the direct victim of an illegal taking admits of no obvious limiting principle. If the existence of valid land-use regulations does not limit the title that the first postenactment purchaser of the property inherits, then there is no reason why such regulations should limit the rights of the second, the third, or the thirtieth purchaser. Perhaps my concern is unwarranted, but today's decision does raise the spectre of a tremendous-and tremendously capricious-one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land at the moment this legal question is permanently resolved.

IV

In the final analysis, the property interest at stake in this litigation is the right to fill the wetlands on the tract that petitioner owns. Whether either he or his predecessors in title ever owned such an interest, and if so, when it was acquired by the State, are questions of state law. If it is clear-as I think it is and as I think the Court's disposition of the ripeness issue assumes-that any such taking occurred before he became the owner of the property, he has no standing to seek compensation for that taking. On the other hand, if the only viable takings claim has a different predicate that arose later, that claim is not ripe and the discussion in Part II-B of the Court's opinion is superfluous dictum. In either event, the judgment of the Rhode Island Supreme Court should be affirmed in its entirety.

Justice GINSBURG, with whom Justice SOUTER and Justice BREYER join, dissenting.

A regulatory takings claim is not ripe for adjudication, this Court has held, until the agency administering the regulations at issue, proceeding in good faith, "has arrived at a final, definitive position regarding how it will apply [those *646 regulations] to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Absent such a final decision, a court cannot "kno[w] the nature and extent of permitted development" under the regulations, and therefore cannot say "how far the regulation[s] g[o]," **2473 as regulatory takings law requires. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 351, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Therefore, even when a landowner seeks and is denied permission to develop property, if the denial does not demonstrate the effective impact of the regulations on the land, the denial does not represent the "final decision" requisite to generate a ripe dispute. *Williamson County*, 473 U.S., at 190, 105 S.Ct. 3108.

MacDonald illustrates how a highly ambitious application may not ripen a takings claim. The landowner in that case proposed a 159-home subdivision. 477 U.S., at 342, 106 S.Ct. 2561. When that large proposal was denied, the owner complained that the State had appropriated "all beneficial use of its property." *Id.*, at 352, n. 8, 106 S.Ct. 2561; see also *id.*, at 344, 106 S.Ct. 2561. This Court concluded, however, that the landowner's claim was not ripe, for the denial of the massive development left "open the possibility that some development [would] be permitted." *Id.*, at 352, 106 S.Ct. 2561. "Rejection of exceedingly grandiose development plans," the Court observed, "does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.*, at 353, n. 9, 106 S.Ct. 2561.

As presented to the Rhode Island Supreme Court, Anthony Palazzolo's case was a close analogue to *MacDonald*. Palazzolo's land has two components. Approximately 18 acres are wetlands that sustain a rich but delicate ecosystem. See 746 A.2d 707, 710, and n. 1 (R.I.2000). Additional acres are less environmentally sensitive "uplands." (The number of upland acres remains in doubt, see *ibid.*, because Palazzolo has never submitted "an accurate or detailed survey" of his property, see Tr. 190 (June 18-19, 1997).) Rhode Island's administrative agency with ultimate permitting authority *647 over the wetlands, the Coastal Resources Management Council (CRMC), bars residential development of the wetlands, but not the uplands.

Although Palazzolo submitted several applications to develop his property, those applications uniformly sought permission to fill most or all of the wetlands portion of the property. None aimed to develop only the uplands.[1] Upon denial of the last of Palazzolo's applications, Palazzolo filed suit claiming that Rhode Island had taken his property by refusing "to allow any development." App. 45 (Complaint ¶ 17).

As the Rhode Island Supreme Court saw the case, Palazzolo's claim was not ripe for several reasons, among them, that Palazzolo had not sought permission for "development only of the upland portion of the parcel." 746 A.2d, at 714. The Rhode Island court emphasized the "undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill." *Ibid.*

Today, the Court rejects the Rhode Island court's determination that the case is unripe, finding no "uncertainty as to *648 the [uplands'] permitted use." *Ante*, at 2460. The Court's conclusion is, in my view, both inaccurate and inequitable. It is inaccurate **2474 because the record is ambiguous. And it is inequitable because, given the claim asserted by Palazzolo in the Rhode Island courts, the State had no cause to pursue further inquiry into potential upland development. But Palazzolo presses other claims here, and at his behest, the Court not only entertains them, but also turns the State's legitimate defense against the claim Palazzolo

originally stated into a weapon against the State. I would reject Palazzolo's bait-and-switch ploy and affirm the judgment of the Rhode Island Supreme Court.

* * *

Where physical occupation of land is not at issue, the Court's cases identify two basic forms of regulatory taking. *Ante,* at 2457. In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), the Court held that, subject to "certain qualifications," *ante,* at 2457, 2464, denial of "*all* economically beneficial or productive use of land" constitutes a taking. 505 U.S., at 1015, 112 S.Ct. 2886 (emphasis added). However, if a regulation does not leave the property "economically idle," *id.,* at 1019, 112 S.Ct. 2886, to establish the alleged taking the landowner may pursue the multifactor inquiry set out in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 123-125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Like the landowner in *MacDonald,* Palazzolo sought federal constitutional relief *only* under a straightforward application of *Lucas.* See *ante,* at 2456; App. 45 (Complaint ¶ 17) ("As a direct and proximate result of the Defendants' refusal to allow *any* development of the property, there has been a taking" (emphasis added)); Plaintiff's Post Trial Memorandum in No. 88-0297 (Super.Ct., R.I.), p. 6 ("[T]his Court need not look beyond the *Lucas* case as its very lucid and precise standards will determine whether a taking has occurred."); *id.,* at 9-10 ("[T]here is *NO USE* for the property whatsoever ..... Not one scintilla of evidence was proffered *649 by the State to prove, intimate or even suggest a theoretical possibility of *any* use for this property-never mind a beneficial use. Not once did the State claim that there *is,* in fact, some use available for the Palazzolo parcel."); Brief of Appellant in No. 98-0333, pp. 5, 7, 9-10 (hereinafter Brief of Appellant) (restating, verbatim, assertions of Post Trial Memorandum quoted above).

Responding to Palazzolo's *Lucas* claim, the State urged as a sufficient defense this now uncontested point: CRMC "would [have been] happy to have [Palazzolo] situate a home" on the uplands, "thus allowing [him] to realize 200,000 dollars." State's Post-Trial Memorandum in No. 88-0297 (Super.Ct., R. I.), p. 81; see also Brief of Appellees in No. 98-0333A, p. 25 (hereinafter Brief of Appellees) (Palazzolo "never even applied for the realistic alternative of using the entire parcel as a single unitary home-site"). The State did present some evidence at trial that more than one lot could be developed. See *infra,* at 2476-2477. And, in a supplemental post-trial memorandum addressing a then new Rhode Island Supreme Court decision, the State briefly urged that Palazzolo's claims would fail even under *Penn Central.* See *ante,* at 2461. The evidence of additional uses and the post-trial argument directed to *Penn Central,* however, were underdeveloped and unnecessary, for Palazzolo himself, in his pleadings and at trial, pressed only a *Lucas*-based claim that he had been denied *all* economically viable use of his property. Once the State demonstrated that an "economically beneficial" development was genuinely plausible, *Lucas,* 505 U.S., at 1015, 112 S.Ct. 2886, the State had established the analogy to *MacDonald:* The record now showed "valuable use might still be made of the land." 477 U.S., at 352, n. 8, 106 S.Ct. 2561; see Brief of Appellees 24-25 (relying on *MacDonald*). The prospect of real development shown by the State warranted a ripeness dismissal of Palazzolo's complaint.

**2475 Addressing the State's *Lucas* defense in *Lucas* terms, Palazzolo insisted that his land had "no use ... as a result of *650 CRMC's application of its regulations." Brief of Appellant 11. The Rhode Island Supreme Court rejected Palazzolo's argument, identifying in the record evidence that Palazzolo could build at least one home on the uplands. 746 A.2d, at 714. The court therefore concluded that Palazzolo's failure to seek permission for "development only of the upland portion of the parcel" meant that Palazzolo could not "maintain a claim that the CRMC ha[d] deprived him of all beneficial use of the property." *Ibid.*

It is true that the Rhode Island courts, in the course of ruling for the State, briefly touched base with *Penn Central.* Cf. *ante,* at 2461. The critical point, however, underplayed by the Court, is that Palazzolo never raised or argued the *Penn Central* issue in the state system: not in his complaint; not in his trial court submissions; not-even after the trial court touched on the *Penn Central* issue-in his briefing on appeal. The state high court decision, raising and quickly disposing of the matter, unquestionably permits us to consider the *Penn Central* issue. See *Raley v. Ohio,* 360 U.S. 423, 436-437, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). But the ruling below does not change the reality essential here: Palazzolo litigated his takings claim, and it was incumbent on the State to defend against that claim, only under *Lucas.*

If Palazzolo's arguments in this Court had tracked his arguments in the state courts, his petition for certiorari would have argued simply that the Rhode Island courts got it wrong in failing to see that his land had "no use" at all because of

CRMC's rules. Brief of Appellant 11. This Court likely would not have granted certiorari to review the application of *MacDonald* and *Lucas* to the facts of Palazzolo's case. However, aided by new counsel, Palazzolo sought-and in the exercise of this Court's discretion obtained-review of two contentions he did not advance below. The first assertion is that the state regulations take the property under *Penn Central*. See Pet. for Cert. 20; Brief for Petitioner 47-50. The second argument is that the regulations *651 amount to a taking under an expanded rendition of *Lucas* covering cases in which a landowner is left with property retaining only a "few crumbs of value." *Ante,* at 2464 (quoting Brief for Petitioner 37); Pet. for Cert. 20-22. Again, it bears repetition, Palazzolo never claimed in the courts below that, if the State were correct that his land could be used for a residence, a taking nonetheless occurred.[2]

In support of his new claims, Palazzolo has conceded the very point on which the State properly relied to resist the simple *Lucas* claim presented below: that Palazzolo can obtain approval for one house of substantial economic value. Palazzolo does not merely accept the argument that the State advanced below. He now contends that the evidence proffered by the State in the Rhode Island courts supports the claims he presents here, by demonstrating that *only* one house would be approved. See Brief for Petitioner 13 ("[T]he uncontradicted evidence was that CRMC ... would not deny [Palazzolo] permission to build one single-family home on the small upland portion of his property." (emphasis deleted)); Pet. for Cert. 15 (the extent of development permitted on the land is "perfectly clear: one single-family home and nothing more").

As a logical matter, Palazzolo's argument does not stand up. The State's submissions **2476 in the Rhode Island courts hardly establish that Palazzolo could obtain approval for *only* one house of value. By showing that Palazzolo could have obtained approval for a $200,000 house (rather than, say, two houses worth $400,000), the State's submissions established only a floor, not a ceiling, on the value of permissible *652 development. For a floor value was all the State needed to defeat Palazzolo's simple *Lucas* claim.

Furthermore, Palazzolo's argument is unfair: The argument transforms the State's legitimate defense to the only claim Palazzolo stated below into offensive support for other claims he states for the first time here. Casting away fairness (and fairness to a State, no less), the Court indulges Palazzolo's bait-and-switch maneuver. The Court concludes that "there is no genuine ambiguity in the record as to the extent of permitted development on ... the uplands." *Ante,* at 2460-2461. Two theories are offered to support this conclusion.

First, the Court asserts, it is "too late in the day" for the State to contend the uplands give the property more than $200,000 in value; Palazzolo "stated" in his petition for certiorari that the property has "an estimated worth of $200,000," and the State cited that contention "as fact" in its Brief in Opposition. *Ante,* at 2460. But in the cited pages of its Brief in Opposition, the State simply said it "would" approve a "single home" worth $200,000. Brief in Opposition 4, 19. That statement does not foreclose the possibility that the State would *also* approve another home, adding further value to the property.

To be sure, the Brief in Opposition did overlook Palazzolo's change in his theory of the case, a change that, had it been asserted earlier, could have rendered insufficient the evidence the State intelligently emphasized below. But the State's failure to appreciate that Palazzolo had moved the pea to a different shell hardly merits the Court's waiver finding. The only precedent cited for the waiver, a footnote in *Lucas,* is not remotely on point. *Ante,* at 2460. The landowner in *Lucas* had invoked a "finding" of fact by the state court, and this Court deemed the State's challenge to that finding waived because the challenge was not timely raised. 505 U.S., at 1020-1022, n. 9, 112 S.Ct. 2886. There is nothing extraordinary about this Court's deciding a case on the findings made by a *653 state court. Here, however, the "fact" this Court has stopped the State from contesting-that the property has value of *only* $200,000-was never found by any court. That valuation was simply asserted, inaccurately, see *infra* this page and 2477, in Palazzolo's petition for certiorari. This Court's waiver ruling thus amounts to an unsavory invitation to unscrupulous litigants: Change your theory and misrepresent the record in your petition for certiorari; if the respondent fails to note your machinations, you have created a different record on which this Court will review the case.

The Court bolsters its waiver finding by asserting that the $200,000 figure is "well founded" in the record. *Ante,* at 2460. But, as earlier observed, an absence of multiple valuation possibilities in the record cannot be held against the State, for proof of more than the $200,000 development was unnecessary to defend against the *Lucas* claim singularly pleaded below. And in any event, the record does not warrant the Court's conclusion.

The Court acknowledges "testimony at trial suggesting the existence of an additional upland parcel elsewhere on the

property" on which a second house might be built. *Ante,* at 2460. The Court discounts that prospect, however, on the ground that development of the additional parcel would require a new road forbidden under CRMC's regulations. *Ibid.* Yet the one witness on whose testimony the Court relies, Steven M. Clarke, himself concluded that it *would* be "realistic to apply for" development at more than one location. **2477 Tr. 612 (June 25-26, 1997). Clarke added that a state official, Russell Chateauneuf, "gave [Clarke] supporting information saying that [multiple applications] made sense." *Ibid.* The conclusions of Clarke and Chateauneuf are confirmed by the testimony of CRMC's executive director, Grover Fugate, who agreed with Palazzolo's counsel during cross-examination that Palazzolo might be able to build "on two, perhaps three, perhaps four of the lots." *Id.,* at 211 (June 20-23, 1997); see also Tr. of Oral Arg. 27 ("[T]here *654 is ... uncertainty as to what additional upland there is and how many other houses can be built.").

The ambiguities in the record thus are substantial. They persist in part because their resolution was not required to address the claim Palazzolo presented below, and in part because Palazzolo failed ever to submit an accurate survey of his property. Under the circumstances, I would not step into the role of supreme topographical factfinder to resolve ambiguities in Palazzolo's favor. Instead, I would look to, and rely on, the opinion of the state court whose decision we now review. That opinion states: "There was undisputed evidence in the record that it would be possible to build *at least* one single-family home on the existing upland area." 746 A.2d, at 714 (emphasis added). This Court cites nothing to warrant amendment of that finding.[1]

* * *

In sum, as I see this case, we still do not know "the nature and extent of permitted development" under the regulation in question, *MacDonald,* 477 U.S., at 351, 106 S.Ct. 2561. I would therefore affirm the Rhode Island Supreme Court's judgment.

Justice BREYER, dissenting.

I agree with Justice GINSBURG that Palazzolo's takings claim is not ripe for adjudication, and I join her opinion in full. Ordinarily I would go no further. But because the Court holds the takings claim to be ripe and goes on to address some important issues of substantive takings law, I add that, given this Court's precedents, I would agree with Justice O'CONNOR that the simple fact that a piece of property has changed hands (for example, by inheritance) does not *655 always and *automatically* bar a takings claim. Here, for example, without in any way suggesting that Palazzolo has any valid takings claim, I believe his postregulatory acquisition of the property (through automatic operation of law) by itself should not prove dispositive.

As Justice O'CONNOR explains, under *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), much depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist. Ordinarily, such expectations will diminish in force and significance-rapidly and dramatically-as property continues to change hands over time. I believe that such factors can adequately be taken into account within the *Penn Central* framework.

Several *amici* have warned that to allow complete regulatory takings claims, see *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), to survive changes in land ownership could allow property owners to manufacture such claims by strategically transferring property until only a nonusable portion remains. See, *e.g.,* Brief for Daniel W. Bromley et al. as *Amici Curiae* 7-8. But I do not see how a constitutional provision concerned with " 'fairness and justice,' " **2478 *Penn Central, supra,* at 123-124, 98 S.Ct. 2646 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)), could reward any such strategic behavior.

All Citations

533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592, 52 ERC 1609, 69 USLW 4581, 69 USLW 4605, 32 Envtl. L. Rep. 20,516, 01 Cal. Daily Op. Serv. 5439, 2001 Daily Journal D.A.R. 6685, 14 Fla. L. Weekly Fed. S 458, 2001 DJCAR 3358

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Justice SCALIA's inapt "government-as-thief" simile is symptomatic of the larger failing of his opinion, which is that he appears to conflate two questions. The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power. The second question is whether the State must compensate a property owner for a diminution in value effected by the State's exercise of its police power. We have held that "[t]he 'public use' requirement [of the Takings Clause] is ... coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). The relative timing of regulatory enactment and title acquisition, of course, does not affect the analysis of whether a State has acted within the scope of these powers in the first place. That issue appears to be the one on which Justice SCALIA focuses, but it is not the matter at hand. The relevant question instead is the second question described above. It is to this inquiry that "investment-backed expectations" and the state of regulatory affairs upon acquisition of title are relevant under *Penn Central*. Justice SCALIA's approach therefore would seem to require a revision of the *Penn Central* analysis that this Court has not undertaken.

* Contrary to Justice O'CONNOR's assertion, *ante*, at 2467, n., my contention of governmental wrongdoing does not assume that the government exceeded its police powers by ignoring the "public use" requirement of the Takings Clause, see *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). It is wrong for the government to take property, *even* for public use, without tendering just compensation.

1 A regulation that goes so "far" that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle (with the consequence that the State must choose between adopting a new regulatory scheme that provides compensation or forgoing regulation). While some recent Court opinions have focused on the former remedy, Justice Holmes appears to have had a regime focusing on the latter in mind in the opinion that began the modern preoccupation with "regulatory takings." See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (because the statute in question takes private property without just compensation "the act cannot be sustained").

2 The Court argues, *ante*, at 2463, that a regulatory taking is different from a direct state appropriation of property and that the rules this Court has developed for identifying the time of the latter do not apply to the former. This is something of an odd conclusion, in that the entire rationale for allowing compensation for regulations in the first place is the somewhat dubious proposition that some regulations go so "far" as to become the functional equivalent of a direct taking. Ultimately, the Court's regulations-are-different principle rests on the confusion of two dates: the time an injury occurs and the time a claim for compensation for that injury becomes cognizable in a judicial proceeding. That we require plaintiffs making the claim that a regulation is the equivalent of a taking to go through certain prelitigation procedures to clarify the scope of the allegedly infringing regulation does not mean that the injury did not occur before those procedures were completed. To the contrary, whenever the relevant local bodies construe their regulations, their construction is assumed to reflect "what the [regulation] meant before as well as after the decision giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

3 This point is the subject of significant dispute, as the State of Rhode Island has presented substantial evidence that limitations on coastal development have always precluded or limited schemes such as Palazzolo's. See Brief for Respondents 11-12, 41-46. Nonetheless, we must assume that it is true for the purposes of deciding this question.
Likewise, we must assume for the purposes of deciding the discrete threshold questions before us that petitioner's complaint states a potentially valid regulatory takings claim. Nonetheless, for the sake of clarity it is worth emphasizing that, on my view, even a newly adopted regulation that diminishes the value of property does not produce a significant Takings Clause issue if it (1) is generally applicable and (2) is directed at preventing a substantial public harm. Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (owner of a powerplant astride an earthquake fault does not state a valid takings claim for regulation requiring closure of plant); *id.*, at 1035, 112 S.Ct. 2886 (KENNEDY, J., concurring in judgment) (explaining that the government's power to regulate against harmful uses of property without paying compensation is not limited by the common law of nuisance because that doctrine is "too narrow a confine for the exercise of regulatory power in a complex and interdependent society"). It is quite likely that a regulation prohibiting the filling of wetlands meets those criteria.

4 At oral argument, petitioner's counsel stated: "I think the key here is understanding that no filling of any wetland would be allowed for any reason that was lawful under the local zoning code. No structures of any kind would be permitted by Mr. Palazzolo to construct. So we know that he cannot use his wetland." Tr. of Oral Arg. 14.

5 See App. to Pet. for Cert. A-13 ("[T]he trial justice found that Palazzolo could not have become the owner of the property before 1978, at which time the regulations limiting his ability to fill the wetlands were already in place. The trial justice thus determined that the right to fill the wetlands was not part of Palazzolo's estate to begin with, and that he was therefore not owed any compensation for the deprivation of that right").

6 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. See *ante,* at 2465-2467 (O'CONNOR, J., concurring).

7 This is not to suggest that a regulatory body can insulate all of its land-use decisions from the Takings Clause simply by referencing long-standing statutory provisions. If the determination by the regulators to reject the project involves such an unforseeable interpretation or extension of the regulation as to amount to a change in the law, then it is appropriate to consider the decision of that body, rather than the adoption of the regulation, as the discrete event that deprived the owner of a pre-existing interest in property. But, if that is petitioner's theory, his claim is not ripe for the reasons stated by Justice GINSBURG in her dissenting opinion, *post* this page. As I read petitioner's complaint and the Court's disposition of the ripeness issue, it is the regulations themselves that allegedly deprived the owner of the parcel of the right to fill the wetlands.

1 Moreover, none proposed the 74-lot subdivision Palazzolo advances as the basis for the compensation he seeks. Palazzolo's first application sought to fill all 18 acres of wetlands for no stated purpose whatever. See App. 11 (Palazzolo's sworn 1983 answer to the question why he sought to fill uplands) ("Because it's my right to do if I want to to look at it it is my business."). Palazzolo's second application proposed a most disagreeable "beach club." See *ante,* at 2456 ("trash bins" and "port-a-johns" sought); Tr. 650 (June 25-26, 1997) (testimony of engineer Steven M. Clarke) (to get to the club's water, *i.e.,* Winnapaug Pond rather than the nearby Atlantic Ocean, "you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of marsh land or conservation grasses"). Neither of the CRMC applications supplied a clear map of the proposed development. See App. 7, 16 (1983 application); Tr. 190 (June 18-19, 1997) (1985 application). The Rhode Island Supreme Court ultimately concluded that the 74-lot development would have been barred by zoning requirements, apart from CRMC regulations, requirements Palazzolo never explored. See 746 A.2d 707, 715, n. 7 (2000).

2 After this Court granted certiorari, in his briefing on the merits, Palazzolo presented still another takings theory. That theory, in tension with numerous holdings of this Court, see, *e.g.,* *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 643-644, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993), was predicated on treatment of his wetlands as a property separate from the uplands. The Court properly declines to reach this claim. *Ante,* at 2465.

3 If Palazzolo's claim were ripe and the merits properly presented, I would, at a minimum, agree with Justice O'CONNOR, *ante,* at 2465-2467 (concurring opinion), Justice STEVENS, *ante,* at 2471 (opinion concurring in part and dissenting in part), and Justice BREYER, *post* this page and 2478 (dissenting opinion), that transfer of title can impair a takings claim.

EXHIBIT 6

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Engquist v. Oregon Dept. of Agriculture, 9th Cir.(Or.), February 8, 2007

118 S.Ct. 1925
Supreme Court of the United States

Thomas R. PHILLIPS, et al., Petitioners,
v.
WASHINGTON LEGAL FOUNDATION et al.
No. 96–1578.

Argued Jan. 13, 1998.

Decided June 15, 1998.

Synopsis
Public interest group, Texas attorney, and Texas citizen brought action against justices of Texas Supreme Court, Texas Equal Access to Justice Foundation, and Foundation's chairman, challenging constitutionality of Texas' Interest on Lawyers Trust Account (IOLTA) program. The United States District Court for the Western District of Texas, James R. Nowlin, J., 873 F.Supp. 1, granted summary judgment to defendants. Plaintiffs appealed. The Court of Appeals for the Fifth Circuit, 94 F.3d 996, reversed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that under Texas law, interest income generated by funds held in IOLTA accounts is private property of owner of principal for purposes of Takings Clause.

Affirmed.

Justice Souter dissented and filed a separate opinion in which Justices Stevens, Ginsburg, and Breyer joined.

Justice Breyer dissented and filed a separate opinion in which Justices Stevens, Souter, and Ginsburg joined.

West Headnotes (7)

[1] Federal Courts⇐Property

Inasmuch as Federal Constitution protects rather than creates property interests, existence of property interest is determined by reference to existing rules or understandings that stem from independent source such as state law. U.S.C.A. Const.Amend. 5.

133 Cases that cite this headnote

[2] Eminent Domain⇐Property and Rights Subject of Compensation

At least as to confiscatory regulations, as opposed to those regulating use of property, state may not sidestep Takings Clause by disavowing traditional property interests long recognized under state law. U.S.C.A. Const.Amend. 5.

91 Cases that cite this headnote

[3] Property⇐Right of alienation

Fundamental maxim of property law is that owner of property interest may dispose of all or part of that interest as he sees fit.

23 Cases that cite this headnote

[4] Interest⇐Nature and grounds in general

Government has great latitude in regulating circumstances under which interest may be earned.

2 Cases that cite this headnote

[5] Interest⇐Funds in litigation or in custody of the law

Under Texas law, regardless of whether owner of principal has constitutionally cognizable interest in anticipated generation of interest by his funds, any interest that does accrue attaches as a property right incident to ownership of underlying principal.

52 Cases that cite this headnote

[6] Property ⇨Ownership and incidents thereof

Property is more than economic value; it also consists of group of rights which so-called owner exercises in his dominion of the physical thing, such as right to possess, use and dispose of it.

15 Cases that cite this headnote

[7] Eminent Domain ⇨Property and Rights Subject of Compensation

Under Texas law, interest income generated by funds held in Interest on Lawyers Trust Account (IOLTA) accounts is private property of owner of principal for purposes of Takings Clause. U.S.C.A. Const.Amend. 5; State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App., Art. 11, §§ 3, 4, 5(A); Equal Access to Justice Program Rules 4, 6, 7, 9(a).

156 Cases that cite this headnote

1926 *156 Syllabus

Under Texas' Interest on Lawyers Trust Account (IOLTA) program, an attorney who receives client funds must place them in a separate, interest-bearing, federally authorized "NOW" account upon determining that the funds "could not reasonably be expected to earn interest for the client or [that] the interest which might be earned ... is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest." IOLTA interest income is paid to the Texas Equal Access to Justice Foundation (TEAJF), which finances legal services for low-income persons. The Internal Revenue Service does not attribute such interest to the individual clients for federal income tax purposes if they have no control over the decision whether to place the funds in the IOLTA account and do not designate who will receive the interest. Respondents—a public-interest organization having Texas members opposed to the IOLTA program, a Texas attorney who regularly deposits client funds in an IOLTA account, and a Texas businessman whose attorney retainer has been so deposited—filed this suit against TEAJF and the other petitioners, alleging, *inter alia,* that the Texas IOLTA program violated their rights under the Fifth Amendment, which provides that "private property" shall not "be taken for public use, without just compensation." The District Court granted petitioners summary judgment, reasoning that respondents had no property interest in the IOLTA interest proceeds. The Fifth Circuit reversed, concluding that such interest belongs to the owner of the principal.

Held:

1. Interest earned on client funds held in IOLTA accounts is the "private property" of the client for Takings Clause purposes. The existence of a property interest is determined by reference to existing rules or understandings stemming from an independent source such as state law. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548. All agree that under Texas law the principal held in IOLTA accounts is the client's "private property." Moreover, the general rule that "interest follows principal" applies in Texas. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 162, 101 S.Ct. 446, 451, 66 L.Ed.2d 358. Petitioners' contention **1927 that *157 *Webb's* does not control because examples such as income-only trusts and marital community property rules demonstrate that Texas does not, in fact, adhere to the general rule is rejected. These examples miss the point of *Webb's.* Their exception by Texas from the "interest follows principal" rule has a firm basis in traditional property law principles, whereas petitioners point to no such principles allowing the owner of funds temporarily deposited in an attorney trust account to be deprived of the interest the funds generate. Petitioners' further contention that "interest follows principal" in Texas only if it is allowed by law does not assist their cause. They do not argue that Texas

law prohibits the payment of interest on IOLTA funds, but, rather, that interest actually "earned" by such funds is not the private property of the principal's owner. Regardless of whether that owner has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal. Petitioners' final argument that the money transferred to the TEAJF is not "private property" because IOLTA funds cannot reasonably be expected to generate interest income on their own is plainly incorrect under Texas' requirement that client funds be deposited in an IOLTA account "if the interest which might be earned" is insufficient to offset account costs and service charges that would be incurred in obtaining it. It is not that the funds to be placed in IOLTA accounts cannot generate *interest*, but that they cannot generate *net interest*. This Court has indicated that a physical item does not lack "property" status simply because it does not have a positive economic or market value. See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 437, n. 15, 102 S.Ct. 3164, 3175–3176, 3177, n. 15, 73 L.Ed.2d 868. While IOLTA interest income may have no economically realizable value to its owner, its possession, control, and disposition are nonetheless valuable rights. See *Hodel v. Irving*, 481 U.S. 704, 715, 107 S.Ct. 2076, 2083–2084, 95 L.Ed.2d 668. The United States' argument that "private property" is not implicated here because IOLTA interest income is "government-created value" is factually erroneous: The State does nothing to create value; the value is created by respondents' funds. The Federal Government, through its banking and taxation regulations, imposes costs on this value if private citizens attempt to exercise control over it. Waiver of these costs if the property is remitted to the State hardly constitutes "government-created value." In any event, this Court rejected a similar argument in *Webb's*, *supra*, at 162, 101 S.Ct., at 451. Pp. 1930–1933.

2. This Court leaves for consideration on remand the question whether IOLTA funds have been "taken" by the State, as well as the amount of "just compensation," if any, due respondents. P. 1934.

94 F.3d 996, affirmed.

*158 REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 1934. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, AND GINSBURG, JJ., joined, *post*, p. 1937.

Attorneys and Law Firms

Darrell E. Jordan, Dallas, TX, for petitioners.

Edwin S. Kneedler, Washington, DC, for United States as amicus curiae by special leave of the Court.

Richard A. Samp, Arlington, VA, for respondents.

Opinion

*159 Chief Justice REHNQUIST delivered the opinion of the Court.

Texas, like 48 other States and the District of Columbia,[1] has adopted an Interest on **1928 Lawyers Trust Account *160 (IOLTA) program. Under these programs, certain client funds held by an attorney in connection with his practice of law are deposited in bank accounts. The interest income generated by the funds is paid to foundations that finance legal services for low-income individuals. The question presented by this case is whether interest earned on client funds held in IOLTA accounts is "private property" of either the client or the attorney for purposes of the Takings Clause of the Fifth Amendment. We hold that it is the property of the client.

I

In the course of their legal practice, attorneys are frequently required to hold client funds for various lengths of time. Before 1980, an attorney generally held such funds in noninterest-bearing, federally insured checking accounts in which all client trust funds of an individual attorney were pooled. These accounts provided administrative convenience and ready access to funds. They were noninterest bearing because federal law prohibited federally insured banks and savings and loans from paying interest on checking accounts. See 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). When a lawyer held a large sum in trust for his client, such funds were generally placed in an interest-bearing savings account because the interest generated *161 outweighed the inconvenience caused by the lack of check-writing capabilities.

In 1980, Congress authorized the creation of Negotiable Order

of Withdrawal (NOW) accounts, which for the first time permitted federally insured banks to pay interest on demand deposits. § 303, 94 Stat. 146, as amended, 12 U.S.C. § 1832. NOW accounts are permitted only for deposits that "consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit." § 1832(a)(2). For-profit corporations and partnerships are thus prohibited from earning interest on demand deposits. See *ibid.* However, interpreting § 1832(a), the Federal Reserve Board has concluded that corporate funds may be held in NOW accounts if the funds are held in trust pursuant to a program under which charitable organizations have "the exclusive right to the interest." Letter from Federal Reserve Board General Counsel Michael Bradfield to Donald Middlebrooks (Oct. 15, 1981), reprinted in Middlebrooks, The Interest on Trust Accounts Program: Mechanics of its Operation, 56 Fla. B.J. 115, 117 (Feb. 1982) (hereinafter Federal **1929 Reserve's IOLTA Letter).[2]

Beginning with Florida in 1981, a number of States moved quickly to capitalize on this change in the banking regulations by establishing IOLTA programs. Texas followed suit in 1984. Its Supreme Court issued an order, now codified as Article XI of the State Bar Rules, providing that an attorney who receives client funds that are "nominal in amount or are reasonably anticipated to be held for a short period of time" must place such funds in a separate, interest-bearing NOW account (an IOLTA account). Tex. State Bar Rule, Art. XI, *162 § 5(A); Rules 4, 7 of the Texas Rules Governing the Operation of the Texas Equal Access to Justice Program. Client funds are considered "nominal in amount" or "held for a short period of time" if the attorney holding the funds determines that

"such funds, considered without regard to funds of other clients which may be held by the attorney, law firm or professional corporation, could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest on such funds for the client." Texas IOLTA Rule 6.

Interest earned by the funds deposited in an IOLTA account is to be paid to the Texas Equal Access to Justice Foundation (TEAJF), a nonprofit corporation established by the Supreme Court of Texas. Tex. State Bar Rule, Art. XI, §§ 3, 4; Texas IOLTA Rule 9(a). TEAJF distributes the funds to nonprofit organizations that "have as a primary purpose the delivery of legal services to low income persons." Texas IOLTA Rule 10. The Internal Revenue Service does not attribute the interest generated by an IOLTA account to the individual clients for federal income tax purposes so long as the client has no control over the decision whether to place the funds in the IOLTA account and does not designate who will receive the interest generated by the account. See Rev.Rul. 81–209, 1981–2 Cum.Bull. 16; Rev.Rul. 87–2, 1987–1 Cum.Bull. 18.

Respondents are the Washington Legal Foundation (WLF), Michael Mazzone, and William Summers. WLF is a public-interest law and policy center with members in the State of Texas who are opposed to the Texas IOLTA program. App. 26. Mazzone is an attorney admitted to practice in *163 Texas who maintains an IOLTA account into which he regularly deposits client funds. *Id.*, at 82. Summers is a Texas citizen and businessman whose work requires him to make regular use of the services of an attorney. In January 1994, Summers learned that a retainer he had deposited with his attorney was being held in an IOLTA account. *Id.*, at 85. In February 1994, respondents filed this suit against petitioners—TEAJF, W. Frank Newton, in his official capacity as chairman of TEAJF, and the nine Justices of the Supreme Court of Texas. Respondents alleged, *inter alia,* that the Texas IOLTA program violated their rights under the Fifth Amendment, by taking their property without just compensation.

The District Court granted summary judgment to petitioners, reasoning that respondents had no property interest in the interest proceeds generated by the funds held in IOLTA accounts. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation,* 873 F.Supp. 1 (W.D.Tex.1995). The Court of Appeals for the Fifth Circuit reversed, concluding that "any interest that accrues belongs to the owner of the principal." *Washington Legal Foundation v. Texas Equal Access to Justice Foundation,* 94 F.3d 996, 1004 (1996). Because of a split over whether the interest income generated by funds held in IOLTA accounts is private property for purposes of the Fifth Amendment's Takings Clause,[3] we granted certiorari. **1930 521 U.S. 1117, 117 S.Ct. 2535, 138 L.Ed.2d 1011 (1997).

II

[1] The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. *164 v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585–586, 41 L.Ed. 979 (1897), provides that "private property" shall not

"be taken for public use, without just compensation." Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

All agree that under Texas law the principal held in IOLTA trust accounts is the "private property" of the client. Texas IOLTA Rule 4 (discussing circumstances under which "client funds" must be deposited in an IOLTA account); Texas Bar Rule 1.14(a) (lawyers "shall hold funds ... belonging in whole or in part to clients ... separate from the lawyer's own property"); see also Brief for United States as *Amicus Curiae* 10 ("There can be no doubt that the client funds underlying the IOLTA program are the property of respondents"). When deposited in an IOLTA account, these funds remain in the control of a private attorney and are freely available to the client upon demand. As to the principal, then, the IOLTA rules at most "regulate the use of [the] property." *Yee v. Escondido*, 503 U.S. 519, 522, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153 (1992). Respondents do not contend that the State's regulation of the manner in which attorneys hold and manage client funds amounts to a taking of private property. The question in this case is whether the interest on an IOLTA account is "private property" of the client for whom the principal is being held.[4]

*165 The rule that "interest follows principal" has been established under English common law since at least the mid-1700's. *Beckford v. Tobin*, 1 Ves.Sen. 308, 310, 27 Eng.Rep. 1049, 1051 (Ch. 1749) ("[I]nterest shall follow the principal, as the shadow the body"). Not surprisingly, this rule has become firmly embedded in the common law of the various States.[5] The Court of Appeals in **1931 this case, two of the three *166 judges of which are Texans, held that Texas also follows this rule, citing *Sellers v. Harris County*, 483 S.W.2d 242, 243 (Tex.1972) ("The interest earned by deposit of money owned by the parties to the lawsuit is an increment that accrues to that money and to its owners"). Indeed, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980), we cited the *Sellers* opinion as demonstrative of the general rule that "any interest ... follows the principal."

[2] In *Webb's*, we addressed a Florida statute providing that interest accruing on an interpleader fund deposited in the registry of the court " 'shall be deemed income of the office of the clerk of the circuit court.' " *Id.*, at 156, n. 1, 101 S.Ct., at 448, n. 1 (quoting Fla. Stat. § 28.33 (1977)) (emphasis deleted). The appellant in that case filed an interpleader action in Florida state court and tendered the sum at issue, nearly $2 million, into court. In addition to deducting $9,228.74 from the interpleader fund as a fee "for services rendered," the clerk of court also retained the more than $100,000 in interest income generated *167 by the deposited funds. We held that the statute authorizing the clerk to confiscate the earned interest violated the Takings Clause. As we explained, "a State, by *ipse dixit*, may not transform private property into public property without compensation" simply by legislatively abrogating the traditional rule that "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." 449 U.S., at 164, 101 S.Ct., at 452. In other words, at least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law. See *id.*, at 163–164, 101 S.Ct., at 451–453; see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S.Ct. 2886, 2900–2901, 120 L.Ed.2d 798 (1992).

Petitioners nevertheless contend that *Webb's* does not control because Texas does not, in fact, adhere to the "interest follows principal" rule, "at least if elevated to the level of an absolute legal rule." Brief for Petitioners 22. They point to several examples, such as income-only trusts and marital community property rules, where under Texas law interest does not follow principal. According to petitioners, the IOLTA program is simply another exception to the general rule.

[3] We find these examples insufficient to dispel the presumption of deference given the views of a federal court as to the law of a State within its jurisdiction. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204, 76 S.Ct. 273, 276–277, 100 L.Ed. 199 (1956). Petitioners' examples miss the point of our decision in *Webb's*. Texas' exception of income-only trusts and certain marital property from the general rule that "interest **1932 follows principal" has a firm basis in traditional property law principles. Permitting the owner of a sum of money to distribute to a designated beneficiary the interest income generated by his principal is entirely consistent with the fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit. *United *168 States v. General Motors Corp.*, 323 U.S. 373, 377–378, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to ... dispose of it"). Similarly, the Texas rules governing the distribution of marital assets have a historical pedigree tracing back to the marital property laws adopted by

the Texas Congress only four years after Texas became an independent republic. W. McClanahan, Community Property Law in the United States § 3:23, pp. 123–124 (1982). But petitioners point to no "background principles" of property law, *Lucas, supra*, at 1030, 112 S.Ct., at 2901, that would lead one to the conclusion that the owner of a fund temporarily deposited in an attorney trust account may be deprived of the interest the fund generates.

[4] [5] Petitioners further contend that "interest follows principal" is an incomplete explication of the Texas rule. Reply Brief for Petitioners 11. Petitioners explain that interest follows principal in Texas only if the interest is "allowed by law or fixed by the parties." *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex.1985). We fail to see how this assists petitioners' cause. We agree that the government has great latitude in regulating the circumstances under which interest may be earned. As we explained in *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979), "anticipated gains ha[ve] traditionally been viewed as less compelling than other property-related interests." But petitioners do not argue that the payment of interest on client funds deposited in an attorney trust account is not "allowed by law" in Texas. Rather, they argue that interest actually "earned" by funds held in IOLTA accounts, Texas IOLTA Rule 9, is not the private property of the owner of the principal. However, regardless of whether the owner of the principal has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal.

*169 Finally, petitioners argue that the interest income transferred to the TEAJF is not "private property" because the client funds held in IOLTA accounts "cannot reasonably be expected to generate interest income on their own." Brief for Petitioners 18. As an initial matter, petitioners' assertion that client funds held in IOLTA accounts cannot be expected to generate interest income is plainly incorrect under the express terms of the Texas IOLTA rules. Texas IOLTA Rule 6 requires that client funds held by an attorney be deposited in an IOLTA account "if the interest which might be earned" is insufficient to offset the "cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest on such funds for the client." In other words, it is not that the client funds to be placed in IOLTA accounts cannot generate *interest*, but that they cannot generate *net interest*.

Whether client funds held in IOLTA accounts could generate net interest is a matter of some dispute. As written, the Texas IOLTA program requires the calculation as to net interest to be made "without regard to funds of other clients which may be held by the attorney." Texas IOLTA Rule 6. This provision would deny to an attorney the traditional practice of pooling funds of several clients in one account, a practice which might produce net interest when opening an account for each client would not. But in the District Court, petitioners agreed that this portion of the rule was not to be enforced, and that an attorney could make the necessary calculation on the basis of pooled accounts. Petitioners made a similar concession during oral argument here. Tr. of Oral Arg. 13–16. We accept this concession but find that it does not avail petitioners.

1933 [6] We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. For example, in *Loretto v. Teleprompter Manhattan CATV* ***170* *Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), we held that a property right was taken even when infringement of that right arguably *increased* the market value of the property at issue. *Id.*, at 437, n. 15, 102 S.Ct., at 3177, n. 15. Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value, see *id.*, at 435, 102 S.Ct., at 3175–3176; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use and dispose of it," *General Motors, supra*, at 378, 65 S.Ct., at 359. While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property. See *Hodel v. Irving*, 481 U.S. 704, 715, 107 S.Ct. 2076, 2083, 95 L.Ed.2d 668 (1987) (noting that "the right to pass on" property "is itself a valuable right"). The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected.

The United States, as *amicus curiae*, additionally argues that "private property" is not implicated by the IOLTA program because the interest income generated by funds held in IOLTA accounts is "government-created value." Brief for United States as *Amicus Curiae* 20. We disagree. As an initial matter, this argument is factually erroneous. The interest income transferred to the TEAJF is not the product of increased efficiency, economies of scale, or pooling of funds by the government. Indeed, as noted above, the State has conceded at oral argument that if an attorney could in any way (such as pooling of client funds) earn interest for a client, he is ethically obligated to do so rather than place the funds in an IOLTA