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### The Modest Impact of Palazzolo v. Rhode Island

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## THE MODEST IMPACT OF *PALAZZOLO V. RHODE ISLAND*

Gregory M. Stein<sup>\*†</sup>

### ABSTRACT

Before 2001, state and federal courts did not agree on the extent to which a property owner's regulatory takings claim should be weakened by the existence of legal restrictions on her use of the property at the time she acquired it. The *Palazzolo* Court addressed this doctrinal confusion but did not completely resolve it, offering six opinions that partially contradict each other. Some of this discord has persisted, with *Palazzolo* already cited in nearly 500 judicial opinions, and not always consistently.

This Article examines the impact *Palazzolo* has had on state and lower federal courts. After reviewing the law before *Palazzolo* and the Supreme Court's decision in that case, the Article offers suggestions as to how courts ought to interpret the contradictory opinions in *Palazzolo*. More specifically, cases arising at different points in the ripening process should be treated differently, and only a small subset of takings claims should benefit from *Palazzolo*'s relaxation of the notice rule.

Next the Article assesses the evidence, in an effort to determine whether courts interpreting *Palazzolo* have actually been following these suggestions. First, it examines the small number of claims in which an owner that probably would have lost before 2001 prevailed. It then compares these results with the far more numerous cases in which an owner that probably would have lost before 2001 still lost even after that decision.

The Article closes by offering a more generalized assessment of the effects of *Palazzolo*. It concludes that nearly all of the courts to cite *Palazzolo* have heeded its requirements, but only a few cases have turned out differently than they would have before 2001. The Court's ripeness rules dictate that few landowners should benefit from the holding in

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*Palazzolo*, and only a small number actually do benefit. Lower courts understand *Palazzolo*, they have been applying it correctly, and they should continue to do what they have been doing.

#### INTRODUCTION

Before the U.S. Supreme Court decided *Palazzolo v. Rhode Island*<sup>1</sup> in 2001, state and federal courts did not agree on the extent to which a property owner's regulatory takings claim should be weakened by the existence of legal restrictions on her use of the property at the time she acquired it. Regulatory agencies argued that owners could not reasonably form investment-backed expectations that they would be allowed to use property in ways that were already restricted at the time they first took title and thus should not be able to recover takings compensation in these cases. Owners responded that a restriction on one owner's property that amounts to a taking of property without just compensation does not suddenly become non-compensable merely because that owner happens to transfer the property to a successor owner. Most courts favored the first of these arguments, but the cases addressing these so-called "notice-rule" disputes were not unanimous.

*Palazzolo* confronted this doctrinal confusion but did not completely resolve it. The *Palazzolo* Court tackled a notice-rule problem as well as two other overlapping issues and responded by offering six opinions, with different majorities deciding each question and concurring Justices pointedly disagreeing with each other. Lower courts have struggled to interpret *Palazzolo*, and the case has been cited in judicial opinions nearly 500 times to date, and not always consistently.

This Article examines the effects of *Palazzolo v. Rhode Island* on state and lower federal courts. It describes how courts have addressed the notice-rule issue since 2001, seeks to ascertain whether judges have been able to elucidate any coherent doctrine from the Justices' confusing opinions, and tries to predict how courts will decide notice-rule cases in the future.

Part I describes the state of the law before *Palazzolo*, and Part II summarizes the badly fractured Court's attempt to resolve the notice-rule question in that 2001 case. Part III offers suggestions as to how courts ought to interpret *Palazzolo*, by emphasizing that cases at different points in the ripening process should be treated differently.

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

The Court has long held that direct condemnation claims and inverse physical takings claims are non-transferable,<sup>2</sup> and Part III suggests that facial regulatory takings claims and some as-applied regulatory takings claims differ little from physical takings claims. By contrast, successor owners that acquire property before their predecessors have sought to ripen a regulatory takings claim should be the primary beneficiaries of *Palazzolo*'s relaxation of the notice rule. In these settings, the first owner has had little opportunity to ascertain the precise effects that the land use control will have on the property.

Part IV assesses the evidence, in an effort to determine whether courts interpreting *Palazzolo* to date have actually been following these suggestions. Part IV.A introduces the lower court cases and begins to dissect the numbers. Part IV.B examines the few cases in which *Palazzolo* may have changed the outcome. These are claims in which an owner that prevailed probably would have lost before 2001. Part IV.C discusses some of the cases to arise soon after *Palazzolo* in which that decision probably did *not* change the outcome. These far more numerous cases are claims in which an owner that probably would have lost before 2001 still lost even after this decision. Part IV.D then addresses some of the more recent cases that fall within this same category, asking whether courts are following the dictates of *Palazzolo* or ignoring it and, if the latter, why this might be the case. Finally, Part IV.E discusses some unusual cases that do not fall into any of the patterns described in the three prior subparts.

Part V offers a more generalized assessment of the effect *Palazzolo* has had so far. Drawing on the evidence from the cases discussed previously, this Part ultimately concludes that even the most recent cases have been paying close attention to the demands of *Palazzolo*—in fact, they conform fairly closely to the predictions laid out in Part III. *Palazzolo* should not have affected the result in many cases, and it has not done so. Contrary to the arguments of critics of the lower courts, these courts have been following *Palazzolo* in ways these critics could have foreseen in 2001. For the most part, courts seeking to apply the confusing rule of *Palazzolo* have been getting it right and should continue to do what they have been doing.

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2. *Id.* at 628 (citing *Danforth v. United States*, 308 U.S. 271 (1939)).

I. THE NOTICE ISSUE BEFORE *PALAZZOLO*

The New York Court of Appeals decided four cases on the same day—February 18, 1997—addressing the notice rule. In all four cases, the court held that a person who acquires title with notice of existing land use regulations cannot successfully maintain a takings claim when the government enforces those regulations to the owner's detriment. For example, in *Gazza v. New York State Department of Environmental Conservation*, *Gazza* acquired a waterfront lot twelve years after it became subject to state wetlands regulations.<sup>3</sup> He sought two variances that would allow him to build a single-family residence within the tidal wetlands boundary, both of which were denied.<sup>4</sup> *Gazza* then commenced a proceeding in state court arguing that the denials constituted an uncompensated taking of his property.<sup>5</sup>

The New York Court of Appeals ruled in favor of the State. Five of the six judges who participated joined an opinion stating: "Petitioner cannot base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title . . . ."<sup>6</sup> In short, the State could not have taken a property interest from *Gazza* if that interest was never part of his bundle of property rights in the first place.

The court reached similar results in three other cases. In *Kim v. City of New York*, the court ruled in favor of the defendant, because "plaintiffs' title never encompassed the property interest they claim has been taken."<sup>7</sup> In *Anello v. Zoning Board of Appeals*, the court rejected the owner's claim, because a statute "encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her."<sup>8</sup> Finally, in *Basile v. Town of Southampton*, the court stated: "Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim

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3. *Gazza v. N.Y. State Dep't of Envtl. Conservation*, 634 N.Y.S.2d 740, 740 (App. Div. 1995).

4. *Gazza v. N.Y. State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1036 (N.Y. 1997).

5. *Id.* at 1037.

6. *Id.* at 1040.

7. *Kim v. City of New York*, 681 N.E.2d 312, 314 (N.Y. 1997).

8. *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 871 (N.Y. 1997).

was not owned by claimant here who took title after the redefinition of the relevant property interests.”<sup>9</sup>

Other courts had occasion to address this issue in the years before the Supreme Court’s decision in *Palazzolo*, and most of these results were in accord with the four New York cases.<sup>10</sup> The Iowa Supreme Court rejected a takings claim brought by property owners who were unable to use part of their land after discovering a Native American burial mound on it, because a state law that predated the plaintiffs’ acquisition of title prohibited disinterment of the burial mound and required maintenance of a buffer zone around it for its protection.<sup>11</sup> The Supreme Judicial Court of Massachusetts reached a similar result in *Leonard v. Town of Brimfield*.<sup>12</sup> That court denied compensation to an owner who was unable to use approximately 60% of her land after she bought property that was subject to restrictions on building in a flood plain.<sup>13</sup> And in the widely noted *Stevens v. City of Cannon Beach*, the Supreme Court of Oregon concluded that property owners had not suffered a taking because they were on notice when they acquired their property that they did not have exclusive use of the dry sand areas of their beach.<sup>14</sup> Several other states were in nearly complete agreement.<sup>15</sup>

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9. *Basile v. Town of Southampton*, 678 N.E.2d 489, 490–91 (N.Y. 1997).

10. For a general overview of the notice rule before *Palazzolo*, see Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89 (2000).

11. *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994).

12. *Leonard v. Town of Brimfield*, 666 N.E.2d 1300 (Mass. 1996).

13. *Id.* at 1303–04.

14. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Ore. 1993); *see also* *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (reaching a similar result under both Oregon and federal law).

15. *See, e.g.*, *Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1030–31 (Ind. 1998) (finding no taking of a prior nonconforming use when post-enactment buyers were on constructive notice of a change in the law at the time they acquired their property); *Myron v. City of Plymouth*, 562 N.W.2d 21, 23–24 (Minn. Ct. App. 1997) (holding that a post-enactment buyer cannot later bring a takings claim and noting that the buyer’s gamble presumably was reflected in the purchase price), *overruled by* *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 638 n.11, 642 (Minn. 2007) (overruling *Myron* based on *Palazzolo*; plaintiff’s claim nonetheless failed on the facts); *Claridge v. N.H. Wetlands Bd.*, 485 A.2d 287, 291 (N.H. 1984) (“A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights.”); *Grant v. S.C. Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995) (finding no taking after a state agency denied a fill permit to the property owner because the owner acquired the property after the state had designated it as critical area tidelands); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1998) (holding that an owner’s reasonable investment-backed expectations should have factored in zoning restrictions in effect at the time the owner acquired the property); *City of Va. Beach v. Bell*, 498

Other states reached similar results, if somewhat more equivocally or on somewhat more unusual facts. For instance, the Supreme Court of Connecticut, anticipating to some degree the outcome in *Palazzolo*, suggested in *Gil v. Inland Wetlands & Watercourses Agency* that a post-enactment buyer's expectations at the time of purchase are relevant to a takings claim but found the rule inapplicable to the case and remanded it.<sup>16</sup> The Supreme Court of Rhode Island largely agreed, in *Alegria v. Keeney*, holding that an owner's knowledge of wetlands restrictions at the time of his purchase is relevant in determining whether he reasonably could expect to develop property as though wetlands were not present,<sup>17</sup> although that court's subsequent holding in *Palazzolo v. State ex rel. Tavares* supported the government's position more strongly.<sup>18</sup> Some other state courts, and at least one federal court, were more or less in accord.<sup>19</sup>

Only the Michigan Court of Appeals appears to have been in full agreement with landowners bringing notice-rule claims. That court expressly stated, in *Guy v. Brandon Township*, that owners who were on notice of restrictions existing at the time of their acquisition nonetheless may challenge those rules, found a temporary taking by virtue of overly restrictive zoning, and remanded the case for a determination of compensation.<sup>20</sup> Note, however, that *Guy* relies in part on two prior

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S.E.2d 414, 417 (Va. 1998) (finding no taking when property owners acquired title after the city's dune protection ordinance became effective, even though the ordinance may have rendered their property economically valueless).

16. *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1373–75 (Conn. 1991).

17. *Alegria v. Keeney*, 687 A.2d 1249, 1253–54 (R.I. 1997).

18. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 714–17 (R.I. 2000) (dictum) (finding a regulatory takings claim unripe but discussing the merits of the claim anyway and finding no taking), *rev'd*, 533 U.S. 606 (2001).

19. *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 612 (M.D. Fla. 1989) (“By purchasing property with regulatory impediments and waiting to develop it, he took the risk that regulation would become more harsh in the face of increasing concern over dune ecology.”); *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm’n*, 903 P.2d 1246, 1263 (Haw. 1995) (recognizing the priority of certain “[t]raditional and customary rights” in property even if they are “deemed inconsistent with generally understood elements of the western doctrine of ‘property’”); *Karam v. State Dep’t of Env’tl. Prot.*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (noting that “the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter’s knowledge of the impediment to development” while simultaneously holding that the pre-enactment owners and the post-enactment buyers both were on notice of permitting requirement for dock construction and that the post-enactment buyers therefore could not assume that they would be immune from all expansions in this law over time), *aff’d*, 723 A.2d 943 (N.J. 1999) (per curiam); *Hoover v. Pierce County*, 903 P.2d 464, 468–70 (Wash. Ct. App. 1995) (holding that subsequent purchasers may not recover for a physical taking that occurred prior to their ownership).

20. *Guy v. Brandon Township*, 450 N.W.2d 279, 285–86 (Mich. Ct. App. 1989) (per curiam).



Michigan Supreme Court cases, both of which held merely that post-enactment buyers may challenge laws in effect at the time they acquired title.<sup>21</sup> Neither of these earlier Michigan cases had reached the separate question of whether the post-enactment buyer had suffered a taking without just compensation. This distinction is actually quite important, and numerous state courts—including several that had rejected takings claims by owners that acquired property after the challenged regulations became effective—had allowed these same owners to seek variances from or challenge the application or validity of these same regulations.<sup>22</sup>

In short, most cases to address the notice-rule question before *Palazzolo* had favored the government defendant's argument that an owner's knowledge of laws existing as of her acquisition date precluded her subsequent takings claim arising from the application of those laws. One state appeals court had ruled to the contrary on a questionable reading of its own state supreme court's prior decisions. And several states had found the owner's knowledge to be relevant to her claim, though not preclusive. Some of these opinions were less than clear, some involved facts that were not precisely on point, and several addressed plaintiffs who sought relief other than takings compensation.

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21. *Johnson v. Township of Robinson*, 359 N.W.2d 526 (Mich. 1984); *Kropf v. City of Sterling Heights*, 215 N.W.2d 179 (Mich. 1974).

22. *See, e.g., Leonard v. Town of Brimfield*, 666 N.E.2d 1300, 1303 & n.3 (Mass. 1996) (distinguishing between suits challenging the validity of land use regulations and suits seeking takings compensation); *Lopes v. City of Peabody*, 629 N.E.2d 1312, 1314–15 nn.7–8 (Mass. 1994) (allowing a post-enactment buyer to challenge the validity of an ordinance but avoiding discussion of whether that buyer also could bring a takings claim, as the latter question was not before it); *Myron v. City of Plymouth*, 562 N.W.2d 21, 24 (Minn. Ct. App. 1997) (allowing a post-enactment buyer to seek a variance while disallowing the same buyer's takings claim), *overruled by Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007) (overruling *Myron* based on *Palazzolo*; plaintiff's claim nonetheless failed on the facts); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 480 (N.Y. 1994) (upholding a challenge to certain rent stabilization provisions brought by post-enactment buyers); *Spence v. Bd. of Zoning Appeals*, 496 S.E.2d 61, 63 (Va. 1998) (allowing a post-enactment buyer to seek a variance even though the buyer had obtained the property for a reduced purchase price because the previous owner's variance application had been denied); *cf. Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995) (finding that a post-enactment buyer's knowledge of prior zoning restrictions is one factor in determining whether a zoning variance should be granted); *Friedenburg v. N.Y. State Dep't of Env'tl. Conservation*, 658 N.Y.S.2d 643, 644 (N.Y. App. Div. 1997) (distinguishing between suits that claim the government has taken property and suits that seek to annul administrative determinations as arbitrary and capricious). *See generally* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 360–66 (1998) (discussing this issue).

## II. PALAZZOLO AND UNANSWERED QUESTIONS

*Palazzolo v. Rhode Island* presented facts similar to many of the lower court cases discussed above.<sup>23</sup> Shore Gardens, Inc. (SGI), acquired approximately twenty acres of coastal property in 1959.<sup>24</sup> While SGI owned the property, Rhode Island enacted legislation and regulations significantly limiting the use of certain coastal property, including much of that owned by SGI.<sup>25</sup> Rhode Island revoked SGI's corporate charter in 1978 for failure to pay corporate income taxes.<sup>26</sup> As a result, SGI's property passed by operation of law to its sole shareholder, Anthony Palazzolo. Palazzolo subsequently sought to fill the property and later requested a permit to build a private beach club.<sup>27</sup> The state's Coastal Resources Management Council rejected both proposals as violating the state's Coastal Resources Management Program and as not deserving of a special exception.<sup>28</sup> Palazzolo challenged the second of these denials in state court, seeking compensation for an inverse condemnation.<sup>29</sup>

The Rhode Island Supreme Court affirmed the trial court's ruling rejecting Palazzolo's claim.<sup>30</sup> The court concluded that his claim was not ripe but nevertheless proceeded to deny it on the merits for two different reasons.<sup>31</sup> The state supreme court concluded that Palazzolo had no right to challenge the application of regulations that predated his acquisition of the property.<sup>32</sup> The court also rejected Palazzolo's argument that he had been deprived of all economically viable use of his property, in violation of *Lucas v. South Carolina Coastal Council*, based on uncontradicted evidence that part of his property could still be used and was worth \$200,000.<sup>33</sup>

The state court determined that Palazzolo's acquisition of title with notice of existing limitations on land use undermined his argument in two related ways. Even if Palazzolo had been able to show, as *Lucas* demands, that he was deprived of all economically viable use of his property, his

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23. *Palazzolo v. Rhode Island*, 533 U.S. 606, 613–15 (2001).

24. *Id.* at 613.

25. *Id.* at 614.

26. *Id.*

27. *Id.* at 614–15.

28. *Id.*

29. *Id.* at 615–16.

30. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 717 (R.I. 2000), *rev'd*, 533 U.S. 606 (2001).

31. *Id.* at 714–17.

32. *Id.* at 717.

33. *Id.* at 714–17.

knowledge of the existing land use regime would demonstrate that “the proscribed use interests were not part of his . . . title to begin with.”<sup>34</sup> Under *Lucas*, such a showing demonstrates that Palazzolo was not actually deprived of any property right, because his estate never included the right to use the property in the manner he proposed. In addition, Palazzolo’s notice of these laws undercut his claim that his reasonable investment-backed expectations were constitutionally impaired under the more flexible test established in *Penn Central Transportation Co. v. New York City (Penn Central)*.<sup>35</sup> “In light of these [pre-existing] regulations, Palazzolo could not reasonably have expected that he could fill the property . . . .”<sup>36</sup>

The U.S. Supreme Court granted certiorari on three different issues: (i) whether the case was ripe; (ii) the extent to which Palazzolo’s notice of the relevant laws at the time he succeeded to title affected his reasonable investment-backed expectations; and (iii) whether Palazzolo had suffered a *Lucas*-type taking.<sup>37</sup> In ultimately deciding the case, the Justices authored a total of six opinions, thus offering mixed messages to future litigants seeking to interpret the Court’s views on the notice rule. Because three of the Justices would have rejected Palazzolo’s claims on ripeness grounds, they discuss the substantive notice-rule issue only in short passages in their dissents. Five of the remaining six Justices joined the Court’s opinion on the notice-rule issue, but two of those five—Justices O’Connor and Scalia—concurred separately to note their incompatible understandings of the meaning of that opinion.

On the notice-rule issue, the Court reversed the state court’s holding that Palazzolo’s prior knowledge of legal restrictions automatically barred his regulatory takings claim.<sup>38</sup> Justice Kennedy’s opinion for the five-member majority on this issue states that “[some] enactments are unreasonable and do not become less so through passage of time or title. . . . A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule.”<sup>39</sup> The Court observed that such an outcome also is unfair to the owner at the time the regulation

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34. *Id.* at 715 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)), *rev’d*, 533 U.S. 606 (2001).

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

36. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 717 (R.I. 2000), *rev’d*, 533 U.S. 606 (2001).

37. *Id.*, *cert. granted*, 531 U.S. 923 (Oct. 10, 2000) (No. 99-2047).

38. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626–30 (2001).

39. *Id.* at 627.

becomes effective, because that earlier owner might not be in a position to undertake and complete the lengthy process of ripening a takings claim.<sup>40</sup>

The Court's discussion of the notice issue contrasts more straightforward direct condemnations with inverse regulatory takings. When the government takes property directly, "any award goes to the owner at the time of the taking, and . . . the right to compensation is not passed to a subsequent purchaser."<sup>41</sup> These claims are fully developed at the time the government takes the property, and at that instant, "the fact and extent of the taking are known."<sup>42</sup> If there has been a direct taking, the government initiated the act and concedes that the taking occurred, and a court can readily determine when it occurred and who owned the property at that moment. The owner at the time of the taking is the only party entitled to recover compensation and may not transfer this fully ripened claim. Similarly, inverse physical takings crystallize at a distinct moment, and claims for inverse physical takings may not be transferred.<sup>43</sup>

As-applied inverse regulatory takings claims differ. By their very nature, these claims do "not mature until ripeness requirements have been satisfied, . . . [and] until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained."<sup>44</sup> Since the owner must clear the Court's ripeness hurdles before bringing a federal takings claim, "[i]t 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."<sup>45</sup> A party that acquires property with knowledge of a pre-existing limitation on its use thus cannot be categorically barred from subsequently bringing an as-applied regulatory takings claim. However, the Court has

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40. *Id.* at 627–28.

41. *Id.* at 628 (citing *Danforth v. United States*, 308 U.S. 271, 284 (1939)).

42. *Id.*; *cf.* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992) (noting that a pre-existing government easement would constitute a limitation on the owner's title).

43. *Palazzolo*, 533 U.S. at 628 (citing *Danforth*, 308 U.S. at 284); *see also* *United States v. Dow*, 357 U.S. 17, 25 (1958) ("[C]ertainty is not lacking under the rule . . . which fixes the 'taking' at the time of the entry into physical possession—a fact readily ascertainable whether or not the Government makes use of condemnation proceedings, and whether or not it ever files a declaration of taking."). For a general discussion of the different types of inverse condemnation claims, see James G. Greilsheimer & Cynthia Lovinger Siderman, *Inverse Condemnation*, in *EMINENT DOMAIN: A HANDBOOK OF CONDEMNATION LAW* 123, 124–30 (William Scheiderich, Cynthia M. Fraser & David Callies eds., 2011).

44. *Palazzolo*, 533 U.S. at 628; *see also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–25 (2002) (emphasizing the distinctions between physical takings and regulatory takings).

45. *Palazzolo*, 533 U.S. at 628.

“no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law . . . . 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.”<sup>46</sup> The Court concluded that there may be some circumstances in which a party who buys land with knowledge of a pre-existing limitation on her use of the property nonetheless may maintain an as-applied regulatory takings claim.<sup>47</sup>

The Justices explored this issue further in five additional opinions, at least two of which directly contradict one another. Justice Scalia penned a brief concurrence in which he declares that the state of the law when the owner obtained title should be completely irrelevant.<sup>48</sup> This concurrence responds pointedly to Justice O’Connor’s disagreement on this issue. “In my view,” Justice Scalia writes, “the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.”<sup>49</sup> The transfer of title does not undo the effect of a prior unconstitutional law, and the expectations of a successor owner need not account for the application of a law that takes property unconstitutionally. “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.”<sup>50</sup>

Justice O’Connor also joined the opinion of the Court but disagreed entirely with Justice Scalia. Her concurrence focuses on the interplay between the Court’s interpretation of the notice rule in *Palazzolo* and its discussion of investment-backed expectations in *Penn Central*, noting, “[t]he more difficult question is what role the temporal relationship between

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46. *Id.* at 629–30. Note that the Court is actually merging *Lucas* and *Penn Central* issues here. *Lucas* addresses cases in which the government’s actions deprive the owner of all or nearly all of the property’s value, while *Penn Central* addresses government actions that have less drastic effects. Under *Lucas*, the government’s only defense to an owner’s demonstration that she has been deprived of all economically viable use of her property is that the government restriction already formed an inherent limitation on the owner’s use of her property when she acquired it. *Lucas*, 505 U.S. at 1027–32. By contrast, under *Penn Central*, the primary question is the effect of an owner’s knowledge of existing law on her investment-backed expectations. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136–38 (1978). The *Palazzolo* Court states that “the two holdings together amount to a single, sweeping, rule,” and remands for further exploration of the *Penn Central* question. *Palazzolo*, 533 U.S. at 626.

47. *Palazzolo*, 533 U.S. at 629–30.

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

49. *Id.*

50. *Id.*

regulatory enactment and title acquisition plays in a proper *Penn Central* analysis.”<sup>51</sup> In contrast with the remaining three Justices in the five-member majority, who refuse to opine as to precisely how important an owner’s knowledge of prior law is, Justice O’Connor states that this factor should figure heavily in a court’s deliberations. Rejecting both Justice Scalia’s and Rhode Island’s more expansive—and opposing—positions, she observes that “it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.”<sup>52</sup>

Given that Justice O’Connor serves as the important fifth vote to reject the rule that notice of existing law bars a takings claim, her repeated emphasis on *Penn Central* and its balancing tests is of great importance. She cites that opinion nineteen times in her eight paragraphs, once calling it “[o]ur polestar.”<sup>53</sup> Referring to *Penn Central* and other cases, Justice O’Connor notes, “[u]nder 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.”<sup>54</sup> She summarizes her views by noting, “[c]ourts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred.”<sup>55</sup> To Justice O’Connor, then, the fact that an owner acquired property that was already subject to a restrictive law is one of the factors a court must consider in determining what the owner’s expectations are and whether they are reasonable.

Four Justices dissented on this issue, and three of them authored opinions. Justice Ginsburg, joined by Justice Souter and Justice Breyer,

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51. *Id.* at 632–33 (O’Connor, J., concurring).

52. *Id.* at 633.

53. *Id.* The Court reaffirmed *Palazzolo* a year later, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Justice Stevens’s opinion for the *Tahoe-Sierra* Court refers to *Penn Central* more than forty times and also approvingly cites Justice O’Connor’s *Palazzolo* concurrence five times. *Id.* at 315–42. More recently, the Court unanimously reaffirmed *Penn Central*, citing it repeatedly in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–48 (2005). Of course, the retirement of Justices O’Connor and Stevens from the Court, coupled with the fact that the Court has not decided a significant regulatory takings case since their departures, leaves open the question of how central a role her *Palazzolo* concurrence will play in the future.

54. *Palazzolo*, 533 U.S. at 633 (O’Connor, J., concurring).

55. *Id.* at 635–36. Justice O’Connor also notes, “[e]valuation 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.’” *Id.* at 634 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

found Palazzolo's claim unripe. But were it ripe, "I would, at a minimum, agree with Justice O'Connor, Justice Stevens, and Justice Breyer, that transfer of title can impair a takings claim."<sup>56</sup> Justice Breyer also dissented separately to highlight this point. He shares Justice O'Connor's view that the status of the law on the acquisition date is a factor in an owner's expectations, but he finds this factor to be even more relevant than she does, arguing that it matters greatly. To Justice Breyer, the owner acquiring regulated property holds expectations that "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."<sup>57</sup> Justice Stevens joined the Court in finding Palazzolo's claim to be ripe. But in those cases in which a landowner acquires regulated land and has not yet determined how the government will apply those regulations, "I would treat the owners' notice as relevant to the evaluation of whether the regulation goes 'too far,' but not necessarily dispositive."<sup>58</sup>

The Court's six opinions in *Palazzolo* raise difficult interpretation issues, but only Justice Scalia flatly rejects the argument that an owner's expectations as of the date of acquisition are relevant.<sup>59</sup> Five members of the Court support the argument that these expectations matter—perhaps very much—and three others fail to join Justice Scalia's concurrence that squarely rejects this argument.<sup>60</sup> One majority ruled, in accordance with Palazzolo's argument, that an owner's knowledge of existing law does not categorically bar that owner's regulatory takings claim, but a different majority stated that this knowledge is relevant to that claim and may weaken it considerably. On remand, the Rhode Island Superior Court followed both of these directives. While conceding that its own state supreme court's earlier holding had been reversed on the notice issue, the

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56. *Id.* at 654 n.3 (Ginsburg, J., dissenting) (citations omitted).

57. *Id.* at 655 (Breyer, J., dissenting).

58. *Id.* at 643 n.6 (Stevens, J., concurring in part and dissenting in part) (citing *id.* at 632–36 (O'Connor, J., concurring)).

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

60. One of these three, Justice Kennedy, had previously indicated that he shares some of the dissenters' views. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034–35 (1992) (Kennedy, J., concurring) (noting that "the test must be whether [a] deprivation is contrary to reasonable, investment-backed expectations" and adding that "courts must consider all reasonable expectations whatever their source"). However, his failure to join any of the four *Palazzolo* opinions advocating similar arguments raises the question of whether he still holds this view.

superior court directly cited Justice O'Connor's concurrence as it ruled in the State's favor once again.<sup>61</sup>

### III. TYPES OF REGULATORY TAKINGS CLAIMS IN THE AFTERMATH OF *PALAZZOLO*

Before the Court decided *Palazzolo*, there was some disagreement among state and lower federal courts as to the importance of an owner's knowledge of existing laws to the strength of that owner's ensuing regulatory takings claim.<sup>62</sup> Most courts that had addressed the issue had held or implied that if property was regulated when an owner acquired it, then that owner could not reasonably form investment-backed expectations that the property could be used without limitation. If a government body later enforced those laws to the detriment of the owner, the owner was deemed to have factored this possibility into her expectations when she obtained title to the land, fatally undercutting her takings claim.<sup>63</sup>

*Palazzolo* resolved this question but raised another one. By rejecting the notice rule, a majority of the Justices established that an owner in this situation is not precluded from bringing a regulatory takings claim later. But by failing to agree as to how important this owner's knowledge is, the Court offered scant—and contradictory—guidance to owners, regulators, and judges as to just how strong these post-*Palazzolo* claims are. This Part will begin to examine that question by distinguishing more finely among the different types of regulatory takings claims.

The *Palazzolo* Court made it clear that neither direct condemnation claims nor inverse physical takings claims can be transferred to successor owners. The owner at the time of the taking has a claim, and an owner who later succeeds to title obtains only the bundle of rights that has been reduced by the taking of some of the prior owner's property. This second owner does not own whatever property rights the government previously took and may not bring a claim for the loss of these rights. Any takings claim has already been crystallized, the existence of the taking can readily be

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61. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*14 & n.79 (R.I. Super. Ct. July 5, 2005) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)).

62. See *supra* Part I.

63. For purposes of clarity and consistency, I will refer throughout this Part to the pre-enactment owner as "he" and the post-enactment buyer as "she." Note, however, that many owners in takings cases are actually business entities.



established before the first owner transfers the property, and the date of the taking is easy to determine.

Most inverse takings claims, however, are regulatory claims and not physical ones. Regulatory takings are harder to identify, with the government usually denying that it has taken property at all. For this reason, regulatory takings claims must be ripened in accordance with the standard the Court established in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*<sup>64</sup> and reaffirmed in *Palazzolo*.<sup>65</sup> First, the owner must obtain a final decision from the administrative body charged with enforcing the regulation.<sup>66</sup> It is nearly impossible for a court to determine if a regulation has taken property until it knows exactly how that regulation will be applied to the owner's land, and the only way to answer this question is for the owner to apply for a permit and see that application through to a final decision. Second, if the administrative body ultimately denies the owner's permit, the owner must seek compensation at the state level.<sup>67</sup> If the state arbiter denies compensation, then the owner's federal claim is ripe. Until that point, a federal court cannot determine whether the alleged taking is an uncompensated one, and only uncompensated takings are prohibited by the Fifth Amendment.<sup>68</sup>

Regulatory takings claims take considerable time to ripen as the owner develops a detailed factual record. The point during the lengthy ripening process at which an owner transfers the property to a successor can have a significant impact on a court's assessment of the strength of the successor owner's expectations under *Palazzolo*. The remainder of this Part examines

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64. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186–97 (1985). For a general discussion of ripeness in regulatory takings claims, see Gregory M. Stein, *Regulatory Takings and Ripeness*, 48 VAND. L. REV. 1 (1995).

65. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618–26 (2001) (applying the *Williamson County* ripeness standards); *id.* at 645–48 (Ginsburg, J., dissenting) (agreeing that *Williamson County* applies but disagreeing with the Court's application of it); *cf.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Conservation*, 130 S. Ct. 2592, 2610 & n.10 (2010) (referring to ripeness questions as not jurisdictional, with no further discussion or citation of authorities on this point); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733–34 (referring to both prongs of the ripeness test as “prudential”). *But see id.* at 733 n.7 (referring to ripeness rules as both Article III and prudential mandates).

66. *Williamson Cnty.*, 473 U.S. at 186–94.

67. *Id.* at 194–97.

68. U.S. CONST. amend. V (stating, “nor shall private property be taken for public use, without just compensation”). The discussion in the text describes the process for ripening as-applied regulatory takings claims brought against state or local governments in federal court. The ripeness standards necessarily differ somewhat for claims against the United States, claims brought in state court, and facial claims.

claims arising when property is transferred at different points during the ripening process.

An original owner may not have formulated plans yet for his newly restricted property. Or he might have just formulated plans but not yet applied for a permit. This owner may have submitted the permit application but not yet received a response from the applicable regulatory body. The owner may have received a preliminary response and begun to negotiate with that body. The regulatory body may have denied the permit application, but that denial may be appealable to a higher-level administrative body, and *Williamson County* requires not just a decision, but a final decision. The owner may have received a final decision, thereby ripening his claim for compensation at the state level, but that state claim may be pending. Or the state court may have rejected the owner's claim for compensation, thereby completing the ripening process for the owner's federal takings claim.

The closer the owner is to the beginning of this process, the greater the remaining uncertainty as to the uses of the land that the government will ultimately allow. If the owner sells the property to a successor early in the ripening process, the successor owner may have as much uncertainty as the original owner did, or nearly as much.<sup>69</sup> Moreover, the original owner will not have had the opportunity to ripen the claim fully, and *Palazzolo* aims to protect successor owners most strongly in precisely this situation. A successor owner in this setting has a relatively strong claim under *Palazzolo*: She knows little more than her predecessor did, so her reasonable investment-backed expectations will differ little from his. Unlike the prior owner, she knows at the time she acquires the property that a new law restricts her ability to use it. But like her predecessor, she has little sense of just how much impact that law will have on her ability to use the land. A successor owner such as this one is the type most likely to benefit under the rule of *Palazzolo*.

Conversely, if the original owner is nearing the end of the ripening process without success, that owner knows that the permitted uses of his

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69. See generally Gregory M. Stein, *The Effect of Palazzolo v. Rhode Island on the Role of Reasonable Investment-Backed Expectations*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 41–74 (Thomas E. Roberts ed., 2002) [hereinafter Stein, *Role of Reasonable Investment-Backed Expectations*] (outlining different outcomes that might result from a successor owner's acquisition of property at different points in the ripening process); Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After Palazzolo and Tahoe-Sierra*, 69 *TENN. L. REV.* 891, 919–26 (2002) (focusing on claims in which an original owner transfers property to a successor owner early in the ripening process).

land are considerably more restricted than they used to be. He is running out of bites at the administrative apple, and most regulatory takings claims fail. At the same time, the successor owner knows that she is acquiring a bundle of property rights that is probably more restricted and less valuable than it used to be. If she pays a reduced price for the property that reflects the probable negative impact of these restrictions, then any expectations she may have as to a broader use are not backed by her investment; if she does not, then those expectations are not reasonable. This is the type of successor owner who should fare worst after *Palazzolo*.

To be more precise, this second plaintiff is one who should fare little better under *Palazzolo* as it was actually decided than she would have fared had the Supreme Court decided the case differently and simply affirmed the opinion of the Rhode Island Supreme Court. The reason for this is that her claim more closely resembles the direct condemnation and inverse physical taking claims that the *Palazzolo* Court confirms are non-transferable.<sup>70</sup> If the predecessor to the party who brings a federal regulatory takings claim has fully met the *Williamson County* ripeness requirements before he transfers the property, then “the fact and extent of the taking are known” before the transfer of ownership and, “[i]n 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.”<sup>71</sup> If, as the Court holds, “[i]t 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,”<sup>72</sup> then the Court is presumably implying that it would be less illogical and less unfair

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70. See generally Stein, *Role of Reasonable Investment-Backed Expectations*, *supra* note 69, at 49–60 (distinguishing among different types of takings claims based on how far they have progressed in the ripening process).

71. *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) (citing *Danforth v. United States*, 308 U.S. 271, 284 (1939)).

72. *Id.*; see also *id.* at 635 (O’Connor, J., concurring) (“[I]f existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.”) (footnote omitted); *id.* at 641–42 (Stevens, J., concurring in part and dissenting in part) (arguing that the taking was a facial one and thus only the prior owner could bring the claim); *id.* at 654 n.3 (Ginsburg, J., dissenting) (“If *Palazzolo*’s claim were ripe and the merits properly presented, I would, at a minimum, agree with Justice O’Connor, Justice Stevens, and Justice Breyer, that transfer of title can impair a takings claim.”) (citations omitted); *id.* at 655 (Breyer, J., dissenting) (“[M]uch depends upon whether, or how, the timing and circumstances of a change of ownership affect whatever reasonable investment-backed expectations might otherwise exist.”); *cf. id.* at 637 (Scalia, J., concurring) (arguing that a purchaser’s knowledge of existing restrictions should never be relevant to that purchaser’s takings claim).

to bar the transfer of a ripe claim. If the claim is not quite ripe at the time of the transfer but is nearly so, then *Palazzolo* does not bar the claim but should weaken it substantially.

If a successor owner acquires the property midway through the ripening process—after her predecessor has met only the first half of the ripeness test—and she then brings a claim in state court seeking just compensation in an effort to meet the second half of the ripeness test, then the predecessor's state claim was already ripe at the time he transferred the property and the successor's state compensation claim should be barred even after *Palazzolo*. The *Palazzolo* majority held that a successor owner's knowledge of the existence of restrictions is relevant—perhaps even highly relevant—to the strength of her claim,<sup>73</sup> and this owner's knowledge that her predecessor did not receive a permit should be fatal to her claim in state court. The successor is not only aware of the intervening law, she knows as well that the seller has received a final decision that he does not have permission to proceed. She cannot seek compensation for a completed taking from another owner. The prior owner would retain his ripe claim for compensation, of course, and the parties could factor its value into the sale price of the property: The purchaser would pay less, and the seller would receive less while retaining the claim for compensation against the government that he could still bring in state court. Facial regulatory takings claims would merit like treatment, since owners who bring these claims are alleging that the mere existence of the restriction takes property. Thus, any taking was already complete before the original owner transferred the property to his post-enactment successor.

The successor owner who acquires the property before the prior owner has met the first half of the ripeness test is the one who benefits most from *Palazzolo*. The prior owner has not yet received a final decision on his permit application, if he has even applied at all. The earlier in the ripening process the prior owner is, the stronger the successor's as-applied claim should be. The strongest claim should be that of the owner who acquires property shortly after a new restriction becomes effective, before the prior owner has formulated any plans for the property and before the agency implementing the new law has had time to develop an enforcement track record. Here, the transfer of the property matters least, and *Palazzolo*

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73. *Id.* at 626–30 (majority opinion).

suggests that the successor's reasonable investment-backed expectations should be least impaired by her knowledge of this new law.<sup>74</sup>

In summary, even after *Palazzolo*, most claims brought by owners who acquired property with knowledge of an existing legal limitation on its use should not turn out differently. The Justices could not agree on just how significant this knowledge is, and the murky standard they established suggests that in most cases, the successor owner's claim will still be weak. The Court stated directly that the rule of *Palazzolo* does not apply to direct condemnations or to inverse physical takings, because those takings have already been completed, the original owner has a ripe claim, and that claim is not transferable to a successor.<sup>75</sup> By this reasoning, though, other claims by successor owners should be similarly barred, including: (i) facial inverse regulatory takings claims; (ii) ripe as-applied inverse regulatory takings claims; and (iii) as-applied inverse regulatory takings claims that are unripe under only the second half of the ripeness test. In the first two of these cases, the federal takings claim is ripe because the extent of any taking is already known, and ripe claims cannot be transferred. In the third of these cases, any potential taking is complete, and the only open question is whether the state forum will order compensation; thus, the state claim for just compensation is ripe and similarly non-transferable.

The only claims that should benefit from the rule of *Palazzolo* are as-applied inverse regulatory takings claims that are unripe under the first half of the ripeness test. These are claims in which neither the seller nor the buyer knows exactly how the new law will be applied to the land. The successor owner's claim should be strongest in those settings in which the prior owner's permit application has progressed the least, if at all.<sup>76</sup> This conclusion becomes critically important in the next Part of this Article, which examines whether plaintiffs have been succeeding in greater numbers since *Palazzolo*. To the extent plaintiffs are faring no better, it may be because they are bringing exactly the types of claims that this Part has argued *should* fare no better.

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74. See *id.* at 627–28 (explaining the importance of the temporal relationships among the enactment of the regulation, the ripeness of the original owner's claim, and the transfer to the successor owner).

75. *Id.* at 628.

76. Stein, *Role of Reasonable Investment-Backed Expectations*, *supra* note 69, at 57 (footnote omitted) (“In cases of this type, because ‘an inverse condemnation claim [by the prior owner] alleging a regulatory taking cannot be maintained,’ the successor’s acquisition of title with knowledge of the preexisting legal limitation does not act as a complete bar to her successful maintenance of a federal takings claim.” (quoting *Palazzolo*, 533 U.S. at 628)).

IV. *PALAZZOLO* IN THE LOWER COURTS

This Part examines the extent to which owners are successfully bringing claims after *Palazzolo* that would have been barred by the notice rule in most jurisdictions before *Palazzolo*. If plaintiffs are prevailing now in cases they previously would have lost, then *Palazzolo* had the impact that landowners desired and worked a dramatically pro-landowner change in the law. But if most notice-rule claims are unsuccessful even after *Palazzolo*, it next becomes necessary to inquire why they fall short.

This last inquiry highlights the significance of the previous Part's examination of the relative strengths of different types of regulatory takings claims. It may be that the parties who have been bringing notice-rule claims since *Palazzolo* have not had particularly strong arguments to start with. These landowners may have raised precisely the types of claims that the previous Part suggests are the weakest, claims that would have failed before *Palazzolo* and that still fail today despite a favorable change in the law. Although courts frequently cite *Palazzolo*, fact patterns in which that case affects the result may arise only rarely. Because *Palazzolo* is not usually outcome-determinative, the decision may not be as far-reaching as its supporters initially hoped. Alternatively, it may turn out that lower courts pointedly refuse to follow the dictates of *Palazzolo*, thereby nullifying the Supreme Court's opinion. This would be a worrisome result, perhaps requiring a strong reaffirmation by the Supreme Court.

I have reviewed all of the state and lower federal court cases that cite *Palazzolo*. I begin in Part IV.A by providing a numerical overview of these cases, indicating how many refer to *Palazzolo*'s discussion of the notice rule, as opposed to other issues in the case. After paring down the large number of citing cases to the subset of cases specifically relevant to the notice-rule issue, I devote the rest of this Part to examining and discussing the most important of these cases. This discussion seeks to ascertain as accurately as possible how many cases came out differently as a result of *Palazzolo* and to analyze why *Palazzolo* may not have led to a different result in some of these cases.

Part IV.B focuses on the small group of cases in which a landowner would have lost before *Palazzolo* but now wins her case. For these owners, *Palazzolo* provides the welcome change in the law that advocates for property owners desired. If many influential cases fall into this first category, then *Palazzolo* was a seminal decision, changing the outcome for many property owners that previously would have lost.

Of course, there are likely to be cases in which a landowner that would have lost before 2001 still loses even now. In these cases, the owner's claim

presumably remained too weak even after *Palazzolo* bolstered it, and the Court's opinion had no impact on the ultimate outcome. Parts IV.C and D examine these cases, with Part IV.C focusing on the earlier cases and Part IV.D shifting the emphasis to more recent decisions. For the most part, the earlier cases that Part IV.C describes appear to be claims that were not strong to begin with. Part III demonstrated how the combination of *Palazzolo* and the Court's ripeness rules render some claims much weaker than others under the current interpretation of the notice rule. Despite the Court's statement that knowledge of pre-existing land use limitations is not a complete bar to the owner's claim, some claims are destined to fail even when boosted by arguments that *Palazzolo* now allows. Stated differently, the refusal by many courts to consider certain arguments prior to *Palazzolo* did not harm some plaintiffs in the end—their claims fail even after *Palazzolo*.

Part IV.D turns to more recent cases. Some of the plaintiffs in these cases present stronger facts, raising the question of whether the deciding courts intentionally disregarded *Palazzolo* and thus effectively nullified the Supreme Court's holding. *Palazzolo* strengthens the position of owners, and presumably some owners that would have lost earlier should prevail now as a result of that case. There are observers who believe that some of the more recent cases fall into this category and that improper behavior by judges barred some claims that should have succeeded. This subpart focuses closely on two of these recent cases and examines whether courts follow the rule of *Palazzolo* and properly arrive at the same result they would have reached prior to that case or whether they ignore law they should follow.

Finally, there might be cases in which a landowner would have won even before *Palazzolo*. That landowner presumably wins today as well, since *Palazzolo* further strengthens her case. For example, the plaintiff might have presented two alternative arguments, and the argument that did not raise notice-rule issues would have persuaded a court to rule in her favor even before *Palazzolo* despite whatever problems the notice-rule argument presented. Or perhaps the case arose in a jurisdiction such as Michigan, in which state courts were already following a rule similar to that of *Palazzolo*.<sup>77</sup> For cases that fall into this category, *Palazzolo* is not outcome-determinative, and the owner will presumably continue to prevail after *Palazzolo* reinforces her winning argument. *Palazzolo* is not

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77. See, e.g., *Guy v. Brandon Township*, 450 N.W.2d 279, 285–86 (Mich. Ct. App. 1989) (per curiam) (rejecting a self-created hardship defense).

significant to cases that fall in this category for the simple reason that it is redundant. Part IV.E examines these cases and also considers a handful of others that do not fit neatly into any of the categories described above.

#### A. Looking at the Numbers

According to a KeyCite analysis of *Palazzolo v. Rhode Island* that I have updated through April 20, 2012, state and lower federal courts have cited the case 492 times.<sup>78</sup> Of the cases that cite *Palazzolo*, a small number proved to be erroneous citations in which a court referred to another case but mistakenly listed reporter and page numbers that fall within the range of the *Palazzolo* opinion. I discounted cases that appear to be trivial, including those in which *Palazzolo* is cited to bolster a proposition that is well supported by other cases. For instance, a fairly large number of cases refer to *Palazzolo* merely for general principles of takings law, such as the fact that the Fifth Amendment has been incorporated against the states.<sup>79</sup>

*Palazzolo* addresses three distinct issues: whether the claim was ripe, whether *Palazzolo*'s notice of land use limitations in effect on his acquisition date barred his claim, and whether he had established a total taking of his property. This Article seeks to determine the impact of the decision on later cases that raise the second of these three issues. Thus, I did not include in my analysis cases that address only the other issues. Several cases discuss the notice rule in passing but then proceed to resolve other issues. I did not include in my final numerical totals any of these cases in which the notice rule was not a significant issue.<sup>80</sup> I also disregarded factual

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78. It is possible that this search missed cases in which *Palazzolo*'s holding changed the outcome but the court failed to cite the case, or failed to cite it accurately. There is no feasible way to measure the size of this effect, but it is probably slight. It is unlikely that any court would decide a case involving the notice rule after *Palazzolo* without actually citing that case, if for no other reason than the fact that the landowner's lawyer would emphasize it in her arguments to the court.

79. See, e.g., *Whittaker v. County of Lawrence*, 674 F. Supp. 2d 668, 679 (W.D. Pa. 2009), *aff'd*, No. 10-1138, 2011 WL 2745815 (3d Cir. July 15, 2011); *Trakansook v. Astoria Fed. Savings & Loan Assoc.*, No. 06-CV-1640, 2007 WL 1160433, at \*3 n.3 (E.D.N.Y. Apr. 18, 2007), *aff'd*, No. 07-2224-cv, 2008 WL 4962990 (2d Cir. Nov. 21, 2008).

80. I did, however, include cases in which *Palazzolo* is cited only in a concurrence or a dissent, in the belief that the decision of the court may have been affected by these other opinions even though the main opinion does not directly cite the case. The judges in the majority probably responded to the *Palazzolo* argument at some level even if they did not say as much.



outliers that are unlikely to have much future impact on regulatory takings doctrine.<sup>81</sup>

Of the 492 total citations, only 113 rely on *Palazzolo* to any significant extent for the purpose of resolving a notice-rule question. Moreover, in several instances, multiple opinions from within this group turned out to be the same case at different stages in the proceedings, such as an intermediate court opinion, a state supreme court reversal, and then a lower court opinion on remand. After consolidating all of these cases, the net number of state and lower federal court opinions to cite *Palazzolo* for purposes of resolving a notice-rule dispute is actually 100.

The case evaluations that follow require some judgment calls and a bit of guesswork. Some of the post-*Palazzolo* opinions address proceedings early in the litigation process, such as appellate court review of a lower court's granting of a motion for summary judgment, and end with the appeals court remanding the case for further proceedings that are never reported or that may still be underway. Some of these opinions offer alternative rationales for their holdings, making it difficult to assess the extent to which *Palazzolo* affected the outcome. In some, the factual presentation and legal analysis are inadequate for the reader to be able to determine reliably how the case might have fared before *Palazzolo*. Nonetheless, I seek here to make these appraisals as accurately as possible, in an effort to establish just how much of an impact *Palazzolo* has had and why.

*B. Cases in Which Palazzolo May Have Changed the Outcome:  
A Landowner That Would Have Lost Before Now Wins*

From the group of 100 relevant cases, I have found a maximum of fifteen—and possibly as few as three—in which *Palazzolo* may have been

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81. Some of these cases, while citing to *Palazzolo*, present fact patterns that are highly atypical of regulatory takings cases. See, e.g., *Page v. United States*, 51 Fed. Cl. 328, 340 (2001) (rejecting a claim that a regulatory change increasing the minimum square footage per ostrich egg in a quarantine station constitutes a regulatory taking), *aff'd*, 50 F. App'x 409 (Fed. Cir. 2002); *Sands N., Inc. v. City of Anchorage*, 537 F. Supp. 2d 1032, 1040–41 (D. Alaska 2007) (rejecting a claim that a minimum four-foot separation between patrons and dancers in an adult entertainment establishment constitutes a regulatory taking); *Church of Universal Love & Music v. Fayette County*, No. 06-872, 2008 WL 4006690, at \*14 (W.D. Pa. Aug. 26, 2008) (granting defendant's motion for summary judgment on a regulatory takings claim arising from a county's failure to issue a zoning exception to a church and noting that the church's website acknowledges that it became a church, in part, to circumvent local zoning rules); *Sharma v. Johnston*, No. 10-21560-Civ-LENARD, 2010 WL 5579885, at \*14 (S.D. Fla. Dec. 13, 2010) (rejecting a claim by a physician imprisoned for improperly prescribing drugs that the revocation of his medical license constitutes an uncompensated taking).

outcome-determinative. These are cases in which the plaintiff probably or certainly would have lost before *Palazzolo* but wins afterwards as a direct result of the Court's decision. The reason I present this figure as a range of numbers is that it is impossible to deduce how the court would have ruled before *Palazzolo* in most of the cases in this group. Courts do not ordinarily state how they might have decided a case if the law had taken a different path, and there are only three cases among these fifteen in which the court states explicitly that it held differently than it previously would have because of *Palazzolo*.<sup>82</sup> The claimants in the remaining cases thus might have prevailed even before *Palazzolo*, which means that in as many as twelve of these cases the Supreme Court's opinion may have changed nothing. For purposes of the discussion in this subpart, I have erred on the side of overinclusivity, counting all fifteen cases in an effort to assess the maximum impact that *Palazzolo* may have had.

These fifteen cases are largely unremarkable. More than half of these opinions come from trial courts, including state trial courts, federal district courts, and the U.S. Court of Federal Claims. Most of these cases did not generate published appeals or have not yet done so. Several cases present odd fact patterns that are unlikely to recur often and thus are of little precedential value. Most have been cited by other courts infrequently, with a few never having been cited at all. In short, there are only three reported cases nationwide since 2001 in which *Palazzolo* unquestionably changed the outcome in favor of the owner; there are twelve more in which *Palazzolo* may have changed the outcome or it is difficult to determine one

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82. *Heaphy v. State*, No. 03-45407-AA, 2004 WL 5573600 (Mich. Cir. Ct. Sept. 15, 2004) (expressly amending its findings in light of *Palazzolo*), *aff'd on other grounds*, *Heaphy v. Dep't of Env'tl. Quality*, No. 257941, 2006 WL 10064442 (Mich. Ct. App. Apr. 18, 2006); *see* discussion *infra* notes 111-13 and accompanying text. *Hinz v. City of Lakeland*, No. A06-1872, 2007 WL 2481021, at \*7 (Minn. Ct. App. Aug. 31, 2007) (rejecting a city's notice-rule defense in light of a recent Minnesota case that expressly overruled pre-*Palazzolo* state case law that had adopted the notice rule; the court concurrently reversed the trial court's finding that there was a categorical taking and remanded for further findings as to whether there was a *Penn Central* taking); *see* discussion *infra* note 119 and accompanying text. *Woodland Manor III Assocs. v. McCleod*, 786 A.2d 1075, 1075-76 (R.I. 2001) (reversing a prior holding in favor of the state in light of the intervening *Palazzolo* decision and remanding to Superior Court), *after remand as Woodland Manor, III Assocs. v. Reisma*, No. C.A. PC89-2447, 2003 WL 1224248, at \*5 (R.I. Super. Feb. 24, 2003) (allowing a successor owner's claim to proceed because a government request that a new development application be filed was still outstanding at the time of the transfer of the property and plaintiff thus alleged injury-in-fact); *see* discussion *infra* note 119 and accompanying text. A fourth case arguably falls into this category as well. *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 n.5 (1st Cir. 2002) (holding that a law requiring disclosure of trade secrets would work a regulatory taking even if a tobacco company knew of the statute at the time it invested in and developed the trade secret at issue).

way or the other; and none of these fifteen can be considered an important, consequential case within the overall body of regulatory takings law.<sup>83</sup>

Note that in several of these cases, the impact of *Palazzolo* may have been more subtle. These are cases in which the rule of *Palazzolo* allowed a claim that would have failed early in the proceedings to survive longer, and a final resolution was never published or the case is still in progress. It is possible that these claimants lost in the end or ultimately will lose, which means that the *Palazzolo* holding will have had no impact on the final outcome. It is also possible, however, that as a result of *Palazzolo*, some of these landowners settled or will eventually settle on terms that are more favorable than they otherwise would have received. I address this topic in greater detail below.<sup>84</sup> These few cases in which *Palazzolo* may have provided a more concealed benefit to the landowners, however, are largely insignificant in that most present atypical facts or unusual analysis and have been cited rarely or never.

Typical of the fifteen cases in this category is *MHC Financial Limited Partnership v. City of San Rafael*, an unreported case from the Northern District of California, in which the court cites *Palazzolo*'s notice-rule holding in evaluating a claim of reasonable investment-backed expectations and rejects the city's motion for summary judgment.<sup>85</sup> The court, citing to the *Palazzolo* majority, states directly that it fears "put[ting] an expiration date on the Takings Clause" and holds that the owner's knowledge of existing law as of its acquisition date does not automatically bar its claim.<sup>86</sup> The owners ultimately prevailed in this case at the trial level,<sup>87</sup> and the city

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83. Other commentators have reached similar conclusions. See, e.g., John D. Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. RPTR. NEWS & ANALYSIS 10,471, 10,476 (2009) ("Surprisingly, given the sturm und drang generated by repudiation of the notice rule, *Palazzolo* has had remarkably little impact on day-to-day litigation. Takings claims brought by purchasers with notice continue to be rejected on a fairly routine basis.").

84. See *infra* Part V.

85. *MHC Fin. Ltd. P'ship v. City of San Rafael*, No. C 00-3785 VRW, 2006 WL 3507937, at \*11–12 (N.D. Cal. Dec. 5, 2006). Note that the caption of this case appears to be incorrect, and the name of the plaintiff actually is "MHC Financing Limited Partnership." *Id.* at \*1.

86. *Id.* at \*11 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001)); *id.* at \*12 ("[A]lthough relevant, notice of the ordinance does not foreclose MHC's *Penn Central* claim."); *id.* at \*13 (denying the city's summary judgment motion "[d]ue to the innumerable factual questions entailed in this inquiry"). Note that the case involved several other issues, and the court did grant summary judgment to the city on some of them. *Id.* at \*15.

87. *MHC Fin., Ltd. v. City of San Rafael*, No. C-00-03785 VRW, 2008 WL 440282, at \*35–38 (N.D. Cal. Jan. 29, 2008). Once again, the caption of this case appears to be incorrect.

has appealed to the Ninth Circuit.<sup>88</sup> It is impossible to determine from the court's opinions whether the owners would have fared equally well even before *Palazzolo*, although it is at least possible that *Palazzolo* is the reason the owner's takings claims survived the government's summary judgment motion.

Similarly, in *Ciampi v. Zuczek*, a case arising in the same town as *Palazzolo*, the defendant moved for summary judgment, arguing that the owner was not entitled to compensation for a taking that occurred prior to his ownership, and the U.S. District Court for the District of Rhode Island rejected the motion.<sup>89</sup> The court offers two reasons. First, the court observes that the defense presupposes that the only type of taking that might have occurred is a physical occupation.<sup>90</sup> This portion of the court's opinion appears to assume that a regulatory taking should be treated differently in that the claim might pass to a successor owner, just as *Palazzolo* holds. Second, the court observes that the defense presumes but has not yet established that any taking occurred prior to the plaintiff's ownership.<sup>91</sup> Given the factual uncertainties presented, the court denied defendants' motion for summary judgment.<sup>92</sup>

Part of the problem the *Ciampi* court faces is an absence of facts at such an early stage of the proceedings. Note, however, that the court's reference to the question of whether the taking occurred before or during the time the plaintiff owned the property implies that a claim asserting a taking beforehand would be barred under the notice rule while a claim alleging a taking during the plaintiff's ownership would not. In the former case, the court suggests that the notice rule would apply and bar the claim, while in the latter case, the claim could proceed but the notice rule would not be relevant at all. If both of these statements are accurate, then *Palazzolo* did not affect the outcome. However, given that *Palazzolo* might allow the plaintiff's claim to proceed on at least one of the possible sets of facts, the Supreme Court's decision may have permitted this particular claim to survive longer than it otherwise would have.

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88. Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit of Final Judgment and Interlocutory Orders, *MHC Fin. Ltd. P'ship v. City of San Rafael*, No. 3:00-cv-03785 (9th Cir. Jul. 8, 2009), ECF No. 620.

89. *Ciampi v. Zuczek*, 598 F. Supp. 2d 257, 267 (D.R.I. 2009).

90. *Id.*

91. *Id.*

92. *Id.* at 268.

In *Rucci v. City of Eureka*,<sup>93</sup> another plaintiff's claim survived in federal district court longer than it might have prior to *Palazzolo*. The plaintiff in *Rucci* held only a contractual right to acquire the subject property rather than fee simple title.<sup>94</sup> After concluding that this contractual right constitutes property that is protected by the Takings Clause, the Eastern District of Missouri denied defendant's motion for summary judgment.<sup>95</sup> Note that the plaintiff here raised only a claim that he had been deprived of all economically viable use of the property he had contracted to buy.<sup>96</sup> Thus the case addresses just the question of whether an owner who is aware of legal limitations on the use of his land may nonetheless recover for a *Lucas*-type taking.<sup>97</sup>

The Court of Federal Claims has reached results similar to those observed in these federal district courts. In *McGuire v. United States*, the court recites that there is "no 'blanket rule' that prevents a claimant from challenging a regulation of property that was in effect at the time the claimant acquired an interest in the property,"<sup>98</sup> while acknowledging that existing rules do factor into an owner's expectations.<sup>99</sup> The court concludes that summary judgment on the question of plaintiff's partial regulatory takings claim is premature, given factual disagreements between the parties.<sup>100</sup> In particular, a significant factual issue appears to have been whether the government misled the owner into believing that he had greater rights than he actually had, rather than just the question of whether the government could legally impair his property rights.<sup>101</sup> Although there is some implication in the opinion that the notice rule would have barred the owner's claim otherwise, the owner's claim may have lasted longer than it might have before the decision in *Palazzolo*.

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93. *Rucci v. City of Eureka*, 231 F. Supp. 2d 954 (E.D. Mo. 2002).

94. *Id.* at 955.

95. *Id.* at 957–58.

96. *Id.* at 956.

97. *Id.* at 956–57. A claimant raising a *Lucas* claim cannot recover if "the proscribed use interests were not part of his title to begin with." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). Thus, pre-existing limitations on title may serve as a bar to claims of total takings. See generally Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322 (2005) (describing how *Lucas* has led to an increase in categorical defenses to takings claims).

98. *McGuire v. United States*, 97 Fed. Cl. 425, 441 (2011) (quoting *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350 (Fed. Cir. 2001) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001))).

99. *Id.*

100. *Id.* at 441–42.

101. *Id.*

Under a strong version of the notice rule, a plaintiff's knowledge of laws in existence at the time she acquired her property would prove fatal to her claim that a regulation unconstitutionally impaired her reasonable investment-backed expectations. If the Supreme Court had adopted such a rule, then the courts in all four of the cases just described could well have dismissed the landowners' claims at an early stage. The fact that all four claimants prevail—or at least endure—as a result of judicial opinions that cite *Palazzolo* suggests that that case might have altered the outcomes.

These four opinions are all from trial courts, and only one of them has any subsequent published history. Collectively, courts have cited these cases a total of nine times since they were published, and seven of those citations are by other trial courts. In short, these four cases in which *Palazzolo* might have changed the outcome have had little influence on the overall body of regulatory takings law. Despite their limited impact, these four cases are representative of the fifteen I have located in which *Palazzolo* may have allowed a notice-rule claim to succeed or survive longer than it would have under a contrary rule. The remaining eleven cases are similarly insignificant in that they involve fact patterns or judicial discussions that are atypical or present more common fact patterns but have been cited infrequently or never.

For example, in *Rochester Gas & Electric Corp. v. United States*, the United States, as defendant, may have been committing an ongoing taking by virtue of its failure to dispose of spent nuclear fuel and high-level radioactive waste.<sup>102</sup> The Court of Federal Claims held that a successor owner of a nuclear power plant may have a viable takings claim against the government.<sup>103</sup> The court allowed the successor's claim to proceed despite the successor's acquisition of the property with knowledge of the government's omission and knowledge that the prior owner had already brought a takings claim of its own.<sup>104</sup> This is an unusual fact pattern that arose in one group of closely related cases but is unlikely to appear again.<sup>105</sup>

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102. *Rochester Gas & Elec. Corp. v. United States*, 65 Fed. Cl. 431, 433 (2005).

103. *Id.* at 442.

104. *Id.* at 441–42 (granting original owner's motion for joinder and thereby allowing successor owner to pursue its own separate takings claim; original owner's claim, arising out of pre-transfer omissions by the government, is not transferable, but original owner may continue to pursue it).

105. More than sixty similar cases have been filed by other entities that are parties to similar contracts. *Id.* at 433. However, this fact pattern is quite unusual when viewed in the context of regulatory takings law overall and is unlikely to arise again in the future once this group of cases is resolved.

Similarly, in *Carpenter v. United States*, the same court denied defendant's motion to dismiss, citing *Palazzolo*.<sup>106</sup> The court initially appears to interpret the motion as arguing that plaintiff's knowledge of existing law "preclude[d]" her takings claim, and therefore had no choice but to deny the motion.<sup>107</sup> Later in the opinion, the court softens its understanding of defendant's argument, noting defendant's position that plaintiff's acquisition of the property after the enactment of the restrictive law is only "relevant" to her expectations.<sup>108</sup> The court denied the motion, noting that "the prior enactment of the legislation does not, in and of itself, cut off plaintiff's right to pursue her *Penn Central* claim at this early stage."<sup>109</sup> Like *Rochester Gas & Electric*, this case is one of a group of cases presenting an issue that is unlikely to arise in the future.<sup>110</sup>

Two other unusual cases arose in state trial courts. A Michigan trial court, in *Heaphy v. State*, seems to have misread the rule of *Palazzolo*—under which claims arising from pre-acquisition regulation are not automatically barred—to require the court to find a taking affirmatively.<sup>111</sup> That court's three-paragraph opinion includes the following statement: "*Palazzolo* . . . clearly held that plaintiff's acquisition of Lot 3 after the adoption of the restrictive legislation does not bar his taking claim. Accordingly, this Court does hereby amend its findings and further determines plaintiff's damages are to include Lot 3."<sup>112</sup> Although the court had apparently found a taking with respect to two other lots already, it completely disregarded any negative impact the owner's knowledge of the intervening laws may have had on her expectations with respect to the third lot. Recall, however, that Michigan is a state that was more inclined to

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106. *Carpenter v. United States*, 69 Fed. Cl. 718, 731–32 (2006) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).

107. *Id.* at 730.

108. *Id.* at 732.

109. *Id.*

110. *Carpenter* involves a takings challenge to legislation that limits prepayment of certain mortgage loans designed to encourage the provision of rental housing for low- and moderate-income families. *Id.* at 720–22. The potential compensation awards in this case and in others raising similar challenges are quite large, but once this group of related cases has been resolved, similar cases are unlikely to arise in the future.

111. *Heaphy v. State*, No. 03-45407-AA, 2004 WL 5573600, slip op. at 2 (Mich. Cir. Ct. Sept. 15, 2004), *aff'd on other grounds*, *Heaphy v. Dep't of Env'tl. Quality*, No. 257941, 2006 WL 1006442, at \*1 (Mich. Ct. App. Apr. 18, 2006).

112. *Id.*

follow a rule similar to that of *Palazzolo* even before the Supreme Court decided that case.<sup>113</sup>

In *Middleland, Inc. v. City Council of New York*, a case that seems to raise a *Lucas*-type taking, the court found a regulatory taking by the city against an owner that acquired the property with notice of a restrictive declaration severely limiting the owner's use of the property.<sup>114</sup> The offending declaration, apparently adopted privately to satisfy a condition to an earlier rezoning, required the land to be used as an accessory parking lot for an IBM manufacturing facility that had since closed.<sup>115</sup> The court order invalidated and canceled the declaration but did not require the city to pay compensation to the owner.<sup>116</sup>

Unusual fact patterns and legal analyses such as these are unlikely to arise in future regulatory takings cases, making it improbable that these opinions will be influential in the future. In fact, *Carpenter*, *Heaphy*, and *Middleland* have never been cited in another published judicial opinion. The other cases in this category are also factually atypical, inconsequential, or both. For example, one case involves a transfer from one trust to another with no new beneficiaries.<sup>117</sup> The court in that case held that *Palazzolo* does not bar the successor trust from bringing a claim but nevertheless reversed the lower court's finding of a taking and remanded the case for further factual determinations.<sup>118</sup> Five of the remaining six cases are similarly unusual or unremarkable.<sup>119</sup> The last of the fifteen cases in this category—

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113. See *supra* notes 20–22 and accompanying text.

114. *Middleland, Inc. v. City Council*, No. 6281/2006, 2006 WL 3956610, at \*9 (N.Y. Sup. Dec. 22, 2006).

115. *Id.* at \*4.

116. *Id.* at \*9.

117. *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 762–63 (Pa. 2002).

118. *Id.* at 775–76.

119. *Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 524–25 (2009) (denying both parties' motions for summary judgment so that the court may consider further the reasonableness of the owner's expectations, given that the owner proposed to operate in the heavily regulated solid-waste disposal industry); *Hinz v. City of Lakeland*, No. A06-1872, 2007 WL 2481021, at \*7 (Minn. Ct. App. Aug. 31, 2007) (rejecting a city's notice-rule defense in light of a recent Minnesota case that expressly overruled pre-*Palazzolo* state case law that had adopted the notice rule; the court concurrently reversed the trial court's finding that there was a categorical taking and remanded for further findings as to whether there was a *Penn Central* taking); *Woodland Manor III Assocs. v. McCleod*, 786 A.2d 1075, 1075–76 (R.I. 2001) (reversing a prior holding in favor of the state in light of the intervening *Palazzolo* decision and remanding to Superior Court), *after remand as Woodland Manor, III Assocs. v. Reisma*, No. C.A. PC89-2447, 2003 WL 1224248, at \*5 (R.I. Super. Feb. 24, 2003) (allowing a successor owner's claim to proceed because a government request that a new development application be filed was still outstanding at the time of the transfer of the property and plaintiff thus alleged injury-in-fact); *Varner v. City of Knoxville*, No. E2003-02650-COA-R3-CV, 2004 WL 2309142, at \*6 (Tenn. Ct. App. Oct. 14, 2004)



the only one in this group to be decided by a federal appeals court—addresses trade secrets rather than real property.<sup>120</sup>

*C. Early Cases in Which Palazzolo Did Not Change the Outcome:  
A Landowner That Would Have Lost Before Still Loses*

A considerably larger number of cases—at least forty-seven and possibly as many as fifty-three—appear to be notice-rule disputes in which *Palazzolo* did not change the outcome. In these cases, the relevant court ruled against the landowner and probably would have reached the same result even if *Palazzolo* had never been decided or if the *Palazzolo* Court had instead affirmed the Rhode Island Supreme Court’s strong version of the notice rule.<sup>121</sup> This number should be more reliable than the number I reached in Part IV.B. While it is often impossible to discern how a court would have ruled had the law been different,<sup>122</sup> the cases discussed below are all cases in which the landowner ultimately lost even after benefiting from the rule of *Palazzolo*. Since *Palazzolo* can only strengthen a landowner’s argument, plaintiffs who lost after that case was decided most likely would have lost beforehand.<sup>123</sup> *Palazzolo* interprets regulatory takings law in a way that helps certain plaintiffs, but it did not help these particular

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(vacating the trial court’s grant of partial summary judgment in favor of a landowner due to uncertainty as to why the court granted it, while acknowledging the relevance of *Palazzolo*); *City of Sherman v. Wayne*, 266 S.W.3d 34, 47 (Tex. App. 2008) (finding “no significance” in a city’s argument that a party acquiring land after a regulation becomes effective cannot maintain a regulatory takings claim).

120. *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 n.5 (1st Cir. 2002) (holding that a law requiring disclosure of trade secrets would work a regulatory taking even if a tobacco company knew of the statute at the time it invested in and developed the trade secret at issue).

121. *See supra* Part II.

122. Again, courts are sometimes quite clear that they would have ruled in favor of the government whether or not the landowner could benefit from *Palazzolo* arguments. *See, e.g.*, *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1348 (Fed. Cir. 2001) (denying, shortly after *Palazzolo*, a petition for rehearing from a party against whom it had ruled two months before the Supreme Court decided that case).

123. Note that a small number of cases in this group actually present plaintiffs who won their cases. These are cases in which the prevailing plaintiff is the pre-enactment owner, rather than the person to whom that party transferred title later. I include these cases in this group because they appear to follow the pattern set forth in Part III, and they state or imply that the post-enactment transferee would not have prevailed. *See, e.g.*, *Hansen v. United States*, 65 Fed. Cl. 76, 129–30 (2005) (holding that a sale by a property owner after his claim against the government for contamination of groundwater by pesticides had fully accrued does not deprive that former owner of his claim); *S. Lyme Prop. Owners Ass’n v. Town of Old Lyme*, 539 F. Supp. 2d 524, 536 (D. Conn. 2008) (allowing prior owner to bring a facial claim while noting that the current ownership of the land is irrelevant).

plaintiffs enough.<sup>124</sup> Despite the greater confidence the reader can have in the numbers presented in this subpart, some observers still might quibble with the numbers I provide here. My count represents my best estimate of how many cases have been decided since *Palazzolo* in which that case, while pertinent, probably did not change the outcome.

Not only is the number of cases in this category at least triple the number in the previous category and perhaps considerably higher, these cases are also far more weighty and noteworthy. A handful of these cases have been particularly influential, cited frequently and often helping to frame the outcome in subsequent cases. Many present fact patterns that are fairly typical of regulatory takings cases, which means that similar fact patterns are likely to arise in the future and give other courts further opportunities to cite these influential precedents. Several were decided by the Court of Appeals for the Federal Circuit, perhaps the most important court in the regulatory takings field other than the Supreme Court. In short, not only are there far more cases in which *Palazzolo*, while on point, did not affect the final outcome of a dispute, these cases are also considerably more significant within the overall body of regulatory takings law.

This subpart examines some of the earlier post-*Palazzolo* cases from the Federal Circuit and the Court of Federal Claims, continues with an important 2002 case from the Ninth Circuit, and then addresses selected cases from the state courts and from federal district courts. Part IV.D continues the discussion of cases in which a post-*Palazzolo* plaintiff loses by returning to two important later cases, one from the Ninth Circuit<sup>125</sup> and the other from the Federal Circuit.<sup>126</sup>

Typical of the important and weighty earlier cases are *Rith Energy, Inc. v. United States*<sup>127</sup> and *Appolo Fuels, Inc. v. United States*,<sup>128</sup> both decided by the Court of Appeals for the Federal Circuit soon after *Palazzolo*. In *Rith*, the court had originally held before *Palazzolo* that a coal mining company did not have reasonable investment-backed expectations that it would not be subject to the restrictions set forth in the Surface Mining Control and Reclamation Act (SMCRA)—enacted eight years before *Rith*

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124. See *supra* notes Part III.

125. *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011).

126. *CRV Enters., Inc. v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 2459 (2011).

127. *Rith*, 270 F.3d at 1347.

128. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004).

acquired interests in the coal leases at issue—in light of the heavily regulated nature of the coal mining industry.<sup>129</sup> This opinion relied heavily on three earlier cases from the Federal Circuit.<sup>130</sup> Two months after the court's initial decision in *Rith*, the Supreme Court decided *Palazzolo*, and *Rith* petitioned for a rehearing.<sup>131</sup>

The Federal Circuit summarizes *Rith*'s position as follows: “The implication of *Rith*'s argument seems to be that in assessing *Rith*'s investment-backed expectations, it was improper for this court to assign any weight to the regulatory regime established by SMCRA.”<sup>132</sup> The court responds that, even after *Palazzolo* rejected a broad interpretation of the notice rule, “the Court did not suggest that the reasonable expectations of persons in a highly regulated industry are not relevant to determining whether particular regulatory action constitutes a taking.”<sup>133</sup> This is particularly true in an industry such as coal mining: “A party in *Rith*'s position necessarily understands that it can expect the regulatory regime to impose some restraints on its right to mine coal under a coal lease.”<sup>134</sup> Before *Palazzolo*, the court had ruled in favor of the United States on the basis of precedent within the circuit, and “we do not believe [those cases] have been undermined by the Supreme Court's decision in *Palazzolo*.”<sup>135</sup> *Rith* has since been cited in thirty-six judicial opinions, including six from the Federal Circuit and one from the Supreme Judicial Court of Massachusetts.<sup>136</sup>

*Appolo*, also arising under SMCRA, is in accord. After reviewing and reaffirming its holding in *Rith*, the Federal Circuit continues by stating, “[l]ikewise, we conclude that *Appolo*'s reasonable investment-backed expectations are shaped by the regulatory regime in place as of the date it

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129. *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1364 (Fed. Cir. 2001)

130. *Id.* (citing and discussing cases and the relevant provisions of SMCRA).

131. *Rith*, 270 F.3d at 1347 (petition for rehearing en banc).

132. *Id.* at 1350.

133. *Id.*

134. *Id.* at 1351. See generally Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 13 (2003) (“Mere application of existing principles, even vague ones such as the rules of nuisance, to new circumstances should not be enough [to support a regulatory takings claim.]”); Eric D. Albert, *If the Shoe Fits, [Don't] Wear It: Preacquisition Notice and Stepping into the Shoes of Prior Owners in Takings Cases After Palazzolo v. Rhode Island*, 11 N.Y.U. ENVTL. L.J. 758, 766 (2003) (“To be efficient, a scheme of compensation to alleviate the burdens of a legal transition requires an inquiry into whether those affected knew beforehand what its impact would be.”).

135. *Rith*, 270 F.3d at 1353.

136. *E.g.*, *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004); *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865 (Mass. 2005).

purchased the leases at issue.”<sup>137</sup> The prior existence of SMCRA does not automatically doom Appolo’s claim, but it does reduce Appolo’s expectations. The court concludes “that Appolo’s lack of reasonable investment-backed expectations is coupled with government action designed to protect health and safety. As in *Rith*, we think that these factors taken together outweigh Appolo’s economic injury, even if it was severe.”<sup>138</sup>

Other Federal Circuit cases reach similar results for similar reasons. For example, in *Norman v. United States*, the court found no taking even after *Palazzolo* because the owners “purchased most of the land with full knowledge that portions of it were not subject to development.”<sup>139</sup> And in *Air Pegasus of D.C., Inc. v. United States*, the same court held that a heliport operator had no property right in navigable airspace over the nation’s capital, and thus the Federal Aviation Administration deprived the owner of nothing compensable when it imposed more stringent restrictions on helicopter flights after September 11, 2001.<sup>140</sup>

Cases from the Court of Federal Claims are in accord. That court relied heavily on *Rith* and *Appolo* in *Cane Tennessee, Inc. v. United States*.<sup>141</sup> *Cane Tennessee* was yet another case raising notice-rule issues under SMCRA, and the court held that the coal company’s uncertainty as to this restrictive law’s applicability “served to enlarge the risks associated with pursuing an investment in mining operations.”<sup>142</sup> This uncertainty actually undercut the plaintiff’s argument that it enjoyed reasonable investment-backed expectations that it would be permitted to mine.<sup>143</sup> In *Arctic King Fisheries, Inc. v. United States*, the same court held that, while the plaintiff held no property right in pollack fishing licenses that were revoked, it did own the fishing vessel that was affected by these revocations.<sup>144</sup> However,

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137. *Appolo*, 381 F.3d at 1349.

138. *Id.* at 1351 (citation omitted). Also relevant is *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1341–57 (Fed. Cir. 2001), which reaches a similar result relying in large part on a due process analysis. The *Appolo* court clarifies that the *Commonwealth Edison* discussion of reasonable investment-backed expectations applies equally well to takings claims. *Appolo*, 381 F.3d at 1349 n.5.

139. *Norman v. United States*, 429 F.3d 1081, 1093 (Fed. Cir. 2005).

140. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1219–20 (Fed. Cir. 2005). Although this claim involved the question of whether there was a property right at all, the plaintiff had raised the issue of whether its alleged property right was limited by virtue of the fact that it acquired this right with knowledge of the existing regulatory regime governing public airspace. *Id.* at 1210–12.

141. *Cane Tenn., Inc. v. United States*, 63 Fed. Cl. 715 (2005).

142. *Id.* at 730.

143. *Id.*

144. *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 371 (2004).

reasonably foreseeable changes in this heavily regulated industry did not work a regulatory taking of this trawler.<sup>145</sup> Commenting on the plaintiff's adoption of a fishing strategy that led it to lose its licenses, the court states, quite bluntly, "Plaintiff gambled . . . and it lost."<sup>146</sup> The same court also recognized, in *Palm Beach Isles Associates v. United States*, that the existence of the federal navigational servitude is a defense to a takings claim brought by an owner that wished to construct a residential housing development on a small parcel of upland adjacent to submerged land that it also owned.<sup>147</sup>

The Ninth Circuit, which faces a high volume of regulatory takings cases, is in accord. In *Daniel v. County of Santa Barbara*, prior owners had offered in writing to dedicate an easement for bicycles and pedestrians across the property at issue.<sup>148</sup> The county accepted one of these offers after the successor owners acquired the property.<sup>149</sup> The successors brought a regulatory takings claim, which both the Central District of California and the Ninth Circuit rejected.<sup>150</sup> The appellate court held that the county took nothing of value from the successor owners but merely exercised a written, recorded option that had been granted by the earlier owners.<sup>151</sup> In the court's words, "[t]he Daniels . . . cannot, by virtue of their purchase, obtain greater rights than those held by their predecessors in interest."<sup>152</sup>

The court indicates that this is a claim of either a regulatory or a physical taking, although it finds the former argument more plausible.<sup>153</sup> If this was a regulatory takings claim, then the first of the two ripeness prongs, requiring finality, was met when the prior owner received an administrative affirmance of the 1974 exaction.<sup>154</sup> As for the second prong, which demands that the owner pursue just compensation in a state forum, the resolution depends on whether California then had procedures in place for providing such compensation. If it did, then no one has pursued these

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145. *Id.* at 385.

146. *Id.* at 380.

147. *Palm Beach Isles Assocs. v. United States*, 58 Fed. Cl. 657, 686–87 (2003) (holding that the existence of the navigational servitude is a complete defense to a taking of submerged land and that the adjacent upland's proximity to the submerged land, rather than the permit denial itself, caused the loss of the upland's value), *aff'd without opinion*, No. 04-5047, 122 F. App'x 517 (Fed. Cir. Feb. 23, 2005).

148. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 378 (9th Cir. 2002).

149. *Id.*

150. *Id.*

151. *Id.* at 384.

152. *Id.* at 382.

153. *Id.* at 380–81.

154. *Id.* at 380–82.

procedures, the claim never ripened, and the limitations period for pursuing compensation has expired. If it did not, then pursuit of compensation was impossible and therefore not required, and the claim is similarly time-barred.<sup>155</sup> Alternatively, the Daniels' claim could be construed as the physical taking of an option for an easement. In this alternative, the physical taking meets the first ripeness prong, and analysis of the second prong is the same as if this were a regulatory taking, meaning that the claim once again fails for limitations reasons.<sup>156</sup>

The court squarely rejects the argument that the county's exercise of the option after the transfer of the property creates a new cause of action for the successor owners.<sup>157</sup> The taking—if there was one—occurred at the time the option was granted, and the most recent option was granted in 1987.<sup>158</sup> “Thus, when the Daniels purchased the property from the Bucklews, the offers to dedicate the easement had already been taken from their predecessors in interest, and the County's acceptance of one of those offers took nothing from the Daniels that had not already been taken.”<sup>159</sup> The Daniels presumably paid a price that reflected the reduction in property value caused by the recorded option.<sup>160</sup>

The Ninth Circuit addresses *Palazzolo* directly, noting:

*Palazzolo* rejected the state court's “blanket rule” that would have found no taking whenever a purchaser was aware of existing land-use regulations that reduced the market value of property. But *Palazzolo* did not adopt the converse of that rule. That is, it did not adopt a rule that would find a taking whenever there are pre-existing restrictions on land use that reduce market value. If that were the rule, no land-use restriction would ever be safe from a takings challenge.<sup>161</sup>

The different sequence of steps in *Daniel* and *Palazzolo* is thus quite significant, as Justice O'Connor had previously emphasized in her

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155. *Id.* at 381–82.

156. *Id.* at 382.

157. *Id.* at 382–84.

158. *Id.* at 382–83.

159. *Id.* at 383.

160. *Id.*

161. *Id.* at 384.

*Palazzolo* concurrence.<sup>162</sup> In *Palazzolo*, any regulatory taking would be completed in the future, when the government applied the relevant regulations to the successor owner in a particular way, and the notice rule would not necessarily bar the successor's claim. Here, by contrast, any taking, whether regulatory or physical, had been completed in full many years earlier, before the Daniels acquired the property. "Because the full value of the easement had already been taken from the Daniels' predecessors, [the County] took nothing of value from the Daniels."<sup>163</sup>

The Ninth Circuit's discussion here is precisely in accord with the analysis I endorsed in Part III of this Article and which I argued is implicit in *Palazzolo* itself. If there was an uncompensated physical taking, as may have been the case in *Daniel*, then the County fully completed its offending act many years ago. The taking was complete then, and a non-transferable takings claim belonged to the owner at the time of the taking and is now time-barred. A regulatory taking, by contrast, may have been completed, or the permitting process may still be in progress. If a regulatory taking has been completed, as also may have happened in *Daniel*, then the owner of the property at that time holds the non-transferable takings claim, which has now expired, just as if the claim were a physical one. If the permitting process is ongoing or if it has not yet even begun, then the new owners may complete the application process, ripen their claim, and pursue it.

State court cases similarly recognize and apply the rule of *Palazzolo* while continuing to find in favor of the government defendant. In *Serra Canyon Co., Ltd. v. California Coastal Commission*, the California Court of Appeal faced facts similar to those in *Daniel* and cited that case with approval while distinguishing *Palazzolo* much as *Daniel* had.<sup>164</sup> And just as in *Daniel*, the *Serra Canyon* facts are exactly in accord with the analysis in Part III. "The land use regulations challenged in *Palazzolo* had the potential to later effect a regulatory taking, once a specific proposal from a new owner was rejected. Here, Adamson acquiesced in the state's imposition of a condition, and accepted the benefit of the permit to which the condition attached."<sup>165</sup> In short, the current owner simply never owned the property right in question:

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162. *Palazzolo v. Rhode Island*, 533 U.S. 606, 632–33 (O'Connor, J., concurring) ("The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis.").

163. *Daniel*, 288 F.3d at 384.

164. *Serra Canyon Co. v. Cal. Coastal Comm'n*, 16 Cal. Rptr. 3d 110, 115–16 (Cal. Ct. App. 2004).

165. *Id.* (citation omitted).

By accepting title to property with full knowledge that it is subject to an existing, recorded [restriction], a landowner cannot claim that the exercise of the [restriction] amounts to a “taking.” To secure a benefit . . . , the prior landowner conveyed away the very interest that the present owner now claims is being “taken” . . . .<sup>166</sup>

*Dayspring Development, LLC v. City of Little Canada* applies a similar analysis.<sup>167</sup> In *Dayspring*, the original owner transferred the subject property to a limited liability company after the city had first denied plat approval and then rescinded the regulation in question.<sup>168</sup> The temporary takings claim was thus ripe when the prior owner still owned the property, and the issue was whether the successor owner could pursue the claim.<sup>169</sup> The Court of Appeals of Minnesota saw the case as similar to a physical taking because of the completion of all acts that were necessary to effect the purported taking, just as Part III recommends.<sup>170</sup> The court held that only the prior owner could pursue the claim, although it did imply that an affirmative assignment of the claim might suffice to transfer it to the successor owner.<sup>171</sup>

In *McQueen v. South Carolina Coastal Council*, the South Carolina Supreme Court, deciding the case for a second time after the U.S. Supreme Court vacated and remanded the state court’s earlier opinion in light of *Palazzolo*, again found no taking.<sup>172</sup> Prior state law held that the state holds presumptive title to submerged land just below the high water mark for the benefit of the public.<sup>173</sup> This rule applies to dry land that becomes submerged after acquisition.<sup>174</sup> *McQueen* purchased two lots that eroded significantly after he acquired them.<sup>175</sup> The court found no taking even after the state denied *McQueen*’s applications to backfill the lots and build

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166. *Id.* at 116.

167. *Dayspring Dev., LLC v. City of Little Canada*, No. A09-2289, 2010 WL 3306926 (Minn. Ct. App. Aug. 24, 2010).

168. *Id.* at \*5.

169. *Id.* at \*4.

170. *Id.* at \*4–5.

171. *Id.* at \*5; see also Stein, *supra* note 10, at 160–61 (discussing whether a claim that is unquestionably held by only the prior owner can be affirmatively transferred to the successor if the parties so agree).

172. *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 117, 120 (S.C. 2003).

173. *Id.* at 119–20.

174. *Id.* at 120.

175. *Id.*



bulkheads on them, because the state law rules inhered in McQueen's title even though his land was upland when he bought it.<sup>176</sup>

And on remand from the U.S. Supreme Court, the Superior Court of Rhode Island gave an overwhelming list of reasons why Palazzolo himself lacked reasonable investment-backed expectations that he could build on his land, despite the High Court's ruling in his favor on the notice-rule question.<sup>177</sup> The court concluded that "despite wishful thinking on Palazzolo's part, he paid a modest sum to invest in a proposed subdivision that he must have known from the outset was problematic at best. . . . Constitutional law does not require the state to guarantee a bad investment."<sup>178</sup>

These last two opinions provide the clearest possible examples of cases in which *Palazzolo* had no impact on the result, given that each court reaffirmed a pre-*Palazzolo* holding in favor of the government on remand after *Palazzolo* was decided.<sup>179</sup> The reasoning by the state courts may have differed somewhat before and after *Palazzolo*, but the Supreme Court's holding did not affect the ultimate result.<sup>180</sup> Other state court results are similarly unchanged by *Palazzolo*.<sup>181</sup>

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176. *Id.*

177. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*14 (R.I. Super. Ct. July 5, 2005).

178. *Id.* (footnote omitted).

179. *Id.* ("Palazzolo's *reasonable* investment-backed expectations were modest." (footnote discussing Justice O'Connor's Supreme Court concurrence omitted)); *McQueen*, 580 S.E.2d at 120. "We find no compensation is due. After reconsideration in light of *Palazzolo*, we reach the same conclusion we originally reached in this case . . ." *Id.*

180. Of course, landowners litigating since *Palazzolo* are less likely to lose on pure notice-rule grounds and more likely to lose (if, in fact, they do lose) because they are unable to show an unconstitutional impairment of their reasonable investment-backed expectations. To the extent that more owners survive longer, this may strengthen all owners' positions in settlement negotiations and may encourage more flexibility by regulatory bodies earlier in the land use process. In that sense, it is an overstatement to claim that *Palazzolo* had no impact at all on their claims. *See infra* Part V.

181. *See, e.g.,* *McDowell Residential Props., LLC v. City of Avondale*, No. 1 CA-CR 09-0301, 2010 WL 2602047, at \*3 (Ariz. Ct. App. June 29, 2010) (holding that a prior owner has standing to bring an inverse condemnation claim when it had assumed the costs in connection with the value lost by a subsequent owner that acquired the property with notice of an intervening dedication requirement); *Cole v. County of Santa Barbara*, No. 01003407, 2001 WL 1613856, at \*8 (Cal. Ct. App. Dec. 17, 2001) (holding that a prior owner acquiesced in a restriction and accepted benefits in return, and that the successor owner loses not because it was on notice of this restriction, but because the prior owner had already conveyed away the very right in question); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W. 2d 623, 638-39 (Minn. 2007) (holding that, although *Palazzolo* overruled a state case to the contrary, this owner had no reasonable investment-backed expectations that it could use the property for anything other than a golf course; any losses were caused by general market conditions and not by the city); *Miskowicz v. City of Oak Grove*, No. A04-82, 2004, WL 2521209, at \*4 (Minn. Ct. App. Nov. 9, 2004) (citing both *Palazzolo* and earlier state cases as holding that a regulatory taking does not occur until the

Federal district courts also cite *Palazzolo* while finding for the government. In *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*, for example, the court applied a method of analysis similar to that seen in *Rith* and *Appolo*, but here to residential property.<sup>182</sup> Despite the fact that the plaintiff organization represented homeowners rather than coal companies, the court emphasizes that “purchasers of land in the Tahoe Basin have known of the tremendous power conferred on TRPA by Nevada, California and the Federal government since at least 1980.”<sup>183</sup> The court feels comfortable treating residential development as a heavily regulated industry in this context, concluding that “this information was public knowledge and the average purchaser of land in the Basin, and particularly the shoreland, should have adjusted her investment backed expectations accordingly.”<sup>184</sup> Dozens of other cases from state and federal courts throughout the country, though less weighty or presenting facts that are not as directly on point, have reached similar results.

*D. More Recent Cases in Which Palazzolo Did Not Change the Outcome:  
Are the Lower Courts Following Palazzolo’s Dictates?*

Part IV.C demonstrated that a substantial number of state and federal courts across the nation have reached results in notice-rule cases that, while cognizant of the *Palazzolo* rule, are no different than they would have been before that case was decided. As that subpart showed, many of these cases are straightforward takings cases that are fairly typical. In some of the leading cases, courts have analyzed these claims precisely as Part III argues that they should: The more the government’s actions look like a direct taking or an inverse physical claim, the less likely it is that an owner will win a takings claim that raises notice-rule issues. While different people will disagree as to whether the Court reached an appropriate result in *Palazzolo* or whether the lower courts have been applying that case

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plaintiff has exhausted all administrative remedies; even though the law in question predates the plaintiffs’ ownership of land, they were the owners who obtained the final administrative denial and thus may bring the claim, which fails on the merits); *Johns v. Black Hills Power, Inc.*, 722 N.W.2d 554, 558 (S.D. 2006) (holding that a physical trespass was completed before the plaintiff acquired the property, the purchase price reflected the resulting diminution in value, and any claim belongs to the prior owner).

182. *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg’l Planning Agency*, 311 F. Supp. 2d 972, 992–98 (D. Nev. 2004).

183. *Id.* at 996.

184. *Id.* at 996–97.

properly, it seems apparent that the claims landowners are losing tend to be the weakest claims with the least favorable facts.

Two significant recent cases merit particular attention here: *Guggenheim v. City of Goleta*,<sup>185</sup> an en banc decision from the Ninth Circuit, and *CRV Enterprises, Inc. v. United States*,<sup>186</sup> arising in the Federal Circuit. In both of these cases, the landowner lost and the Supreme Court denied certiorari. In *Guggenheim*, these results ensued despite a blizzard of extremely supportive briefs in both the case and the petition for certiorari from property rights organizations well acquainted with the process of litigating regulatory takings claims. These supporting documents raise the question of whether these two important circuit courts have been applying *Palazzolo* correctly or, as the owners and some of their supporters argued, failing to apply it in cases in which they should have.

The facts of *Guggenheim* present some quirks that, while unusual, did not prove determinative of the outcome. Santa Barbara County imposed a mobile-home rent-control ordinance many years before the Guggenheims purchased their mobile-home park.<sup>187</sup> Five years after the Guggenheims acquired their property, the city of Goleta incorporated itself on territory from within the county that included the Guggenheims' land.<sup>188</sup> As a result of the incorporation process, the county's mobile-home rent-control ordinance may technically have lapsed for a matter of hours before being re-adopted by the new city.<sup>189</sup> The Guggenheims subsequently brought a facial challenge to the new ordinance, but not an as-applied challenge, claiming an uncompensated taking.<sup>190</sup> After a fairly protracted course of litigation, a Ninth Circuit panel reversed the district court's granting of the city's motion for summary judgment, but the court sitting en banc vacated that decision and affirmed the district court's grant of summary judgment for the city.<sup>191</sup>

The en banc court ruled in favor of Goleta, distinguishing *Palazzolo*, because of the important distinctions between facial claims such as this one

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185. *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011).

186. *CRV Enters., Inc. v. United States*, 626 F.3d 1241 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 2459 (2011).

187. *Guggenheim*, 638 F.3d at 1113–14.

188. *Id.* at 1115.

189. *Id.*

190. *Id.*

191. *Id.* at 1116.

and as-applied claims such as *Palazzolo*.<sup>192</sup> The court frames this distinction correctly, again in accordance with the analysis that Part III sets forth:

This difference matters because an as applied challenge necessarily addresses the period during which the administrative or judicial proceedings for relief occur, so justice may require that title transfers during the ripening period not bar the action. By contrast, there is no such extended period applicable to a facial challenge, because the only time that matters is the time the ordinance was adopted.<sup>193</sup>

The Guggenheims were not challenging the earlier county ordinances. Had they done so, they would have been bringing a notice-rule challenge to laws existing at the time they acquired their property. Rather, they challenged the re-adoption of this ordinance by the city after they already owned the property. So to some extent, this case looks like it falls outside of the category that is the subject of this Article.<sup>194</sup> Moreover, they brought only a facial challenge, reserving any possible as-applied claims for the future.

Nonetheless, the earlier county ordinances are relevant to the extent they helped to shape the Guggenheims' expectations as to the use of their land, and it is for this reason that the case truly does raise issues of notice and expectations. The slight gap before the new city's rent-control ordinance took effect is of no import, since the Guggenheims' expectations had already been formed years earlier: Any short-lived change in the law during the transition from control by the county to control by the new city took place long after the Guggenheims had made the investment that established their reasonable investment-backed expectations. The Guggenheims may have speculated back then that rent control would end some day, but the Takings Clause protects only "the property we have, not the property we dream of getting."<sup>195</sup> If there was any possible compensable facial taking, it was suffered by the prior owners many years earlier.<sup>196</sup>

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192. *Id.* at 1118–22.

193. *Id.* at 1119.

194. "*Palazzolo v. Rhode Island* is of no help to the Guggenheims. They do not have the problem that *Palazzolo* solved." *Id.* at 1118 (footnote omitted).

195. *Id.* at 1121.

196. *Id.* at 1121–22. The Ninth Circuit also distinguishes *Guggenheim* from *Palazzolo* by noting that the Guggenheims purchased their land in an ordinary business transaction, while *Palazzolo* acquired his parcel as a result of the dissolution of the corporate former owner. *Id.* at 1118. Thus the Guggenheims planned their transaction and developed reasonable investment-backed expectations, while *Palazzolo* simply succeeded to ownership, much like one who takes property under a will. *Id.*

In *CRV*, the plaintiffs owned nine acres adjacent to a man-made slough, which gave them riparian rights under California law.<sup>197</sup> In 1999, as part of an environmental cleanup of a nearby parcel, the Environmental Protection Agency (EPA) issued a Record of Decision (ROD) under which it decided to install a log boom that would prevent navigation along part of the slough.<sup>198</sup> In 2002, one of the plaintiffs acquired the subject property from its prior owner, after a series of negotiations among seller, buyer, and EPA failed to result in an agreement that would allow the plaintiffs to build the marina development they planned.<sup>199</sup> The plaintiffs then brought an inverse condemnation claim against the United States.<sup>200</sup> The parties initially agreed to a dismissal of the claim without prejudice, given that the remediation plan had not yet been implemented.<sup>201</sup> When the log boom was finally constructed in 2006, the plaintiffs again filed suit against the United States in the Court of Federal Claims.<sup>202</sup>

The trial court held, and the Federal Circuit affirmed, that there was no physical taking because none of the remediation structures were physically located on CRV's property.<sup>203</sup> The log boom and anchors all were erected in the slough itself, which CRV did not own, and government action that limits the use of water without removing it is not a taking.<sup>204</sup> As for CRV's regulatory takings claim, the Federal Circuit concluded that CRV did not own the property at the time the taking is alleged to have occurred, and thus it lacked standing to bring a claim.<sup>205</sup> This result is dependent on the court's holding that the taking, if any, occurred in 1999, when EPA issued its ROD, and not seven years later, when the log boom was actually built.<sup>206</sup> The issuance of the ROD represented EPA's final decision, which means that the claim accrued and ripened then, and only the owner at the time of the taking—the prior owner—can bring the claim.<sup>207</sup>

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(noting that Palazzolo, unlike the Guggenheims, had not “bought the property for a low price reflecting the economic effect of the regulation”).

197. *CRV Enters., Inc. v. United States*, 626 F.3d 1241, 1243 (Fed. Cir. 2010), *cert denied*, 131 S. Ct. 2459 (2011).

198. *Id.* at 1244.

199. *Id.* at 1244–45.

200. *Id.* at 1245.

201. *Id.*

202. *Id.*

203. *Id.* at 1245–48.

204. *Id.*

205. *Id.* at 1248–50.

206. *Id.* at 1250.

207. *Id.*; *see also* *Hansen v. United States*, 65 Fed. Cl. 76, 129–30 (2005) (holding that a sale by

One of the briefs supporting CRV's unsuccessful petition for certiorari argues that the court's opinion contradicts *Palazzolo* by denying some parties that take title after a regulation is adopted the ability to challenge that regulation.<sup>208</sup> The brief notes that the Federal Circuit "considered" *Palazzolo* but then reached a contradictory conclusion without any citations.<sup>209</sup> This holding, the brief continues, "contravenes *Palazzolo*, threatens fundamental rights, and demands reexamination,"<sup>210</sup> and "abrogates" *Palazzolo* and is "irreconcilable" with it.<sup>211</sup> In short, the brief is accusing the Federal Circuit of misreading, or possibly even nullifying, a Supreme Court case.<sup>212</sup>

This brief misunderstands the types of claims that *Palazzolo* and *CRV* raised, as Part III of this Article emphasizes. In *CRV*, the claim ripened while CRV's predecessor still owned the property. Because any taking has already occurred, the owner at the time of the alleged taking can be determined, the statute of limitations has started to run, and the government will need to pay interest on any award running from this date until the time of payment. Any taking, in short, is complete, and the claim cannot be transferred.<sup>213</sup> In *Palazzolo*, by contrast, the prior owner had not yet ripened a claim at the time *Palazzolo* succeeded to ownership, and the predecessor thus could not have brought a takings claim. This means that the only way to avoid putting an "expiration date" on the Takings Clause is to allow the successor owner to pursue a building permit if he chooses and, if he is unsuccessful and does not receive compensation at the state level, to bring an as-applied takings claim in federal court.<sup>214</sup>

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a property owner after his claim against the government for contamination of groundwater by pesticides has fully accrued does not deprive that former owner of his claim).

208. Brief for Cato Inst. et al. as Amici Curiae Supporting Petitioners, *CRV Enters., Inc. v. United States*, 626 F.3d 1241 (Fed. Cir. 2010) (No. 10-1151), 2011 WL 1536717, at \*6, \*10.

209. *Id.* at \*10.

210. *Id.* at \*11.

211. *Id.* at \*19.

212. The accusation applies to the Ninth Circuit as well, since the brief also notes the same concerns with that court's *Guggenheim* holding. *Id.*

213. The Assignment of Claims Act prohibits the transfer or assignment of any claim against the United States. Assignment of Claims Act, 31 U.S.C. § 3727 (2006), cited in *CRV*, 626 F.3d at 1249 n.7, *cert. denied*, 131 S. Ct. 2459 (2011).

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

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

There is room for disagreement about whether the issuance of the ROD in this case was enough of a government action to complete a taking. That portion of the holding, in fact, is somewhat troubling in light of the parties' earlier stipulation that the claim was not ripe at that point, raising the question of whether the government is now estopped from arguing otherwise.<sup>215</sup> The court concludes, however, that the plaintiff simply did not own the property at the time of the taking, when the ROD was issued.<sup>216</sup> And there is case law support in the Federal Circuit for the position that the issuance, rather than the implementation, of an ROD is the relevant date for determining the time of a taking.<sup>217</sup> The taking occurred in full before CRV owned the property, and only the owner at that time may bring the claim arising from this completed taking. In sum, the stipulation as to ripeness is immaterial to the case, as CRV acquired the property after the taking had already been completed. The ROD may have taken property, but it did not take property from CRV.<sup>218</sup>

The nullification point is an important one, however, and merits additional discussion. This Part has noted the large number of influential cases in which *Palazzolo*, though important to various courts' discussions, had no apparent impact on their results. One plausible inference from these opinions is that *Palazzolo* was not as significant a case as observers initially believed, just as this Article suggests. Another possible implication of these cases, raised by the brief in support of CRV, is that these courts are ignoring the rule of *Palazzolo* and instead reaching a result that they prefer despite incompatible case law from the U.S. Supreme Court.<sup>219</sup>

An examination of the many regulatory takings cases decided since *Palazzolo* offers scant support for this second possible conclusion. To begin with, it is unlikely that such a large number of judges from state and federal courts around the country would all hold an important Supreme Court case in such low regard that they would refuse to follow it, not to mention their judicial oaths. The opinions ruling in favor of governments even after

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215. *CRV*, 626 F.3d at 1248–49.

216. *Id.* at 1250.

217. *Id.* at 1249–50 (citing *Goodrich v. United States*, 434 F.3d 1329, 1331–32 (Fed. Cir. 2006)).

218. *Id.* at 1250 (“That claim, if it existed, was owned by the prior owner.”).

219. Those who argue in support of a strong “judicial takings” doctrine raise similar arguments. See, e.g., Michael J. Fasano, *A Divided Ruling for a Divided Country in Dividing Times*, 35 VT. L. REV. 495, 503 (2010) (bemoaning the ways in which “‘result-oriented’ decisions found in the jurisprudence of a jurisdiction” can “mangle precedent in order to enable a court to reach a preordained decision, often from a desire to achieve a particular state policy objective” and arguing that “such decisions could be utilized to nullify takings claims legitimately grounded in reversals of existing precedent”).

*Palazzolo* provide lucid discussions of the case and typically distinguish it in ways that this Article argues are completely proper. The judges plainly take their roles seriously and seek to justify difficult decisions in settings in which both sides make credible arguments. That is what judges are supposed to do, and, whatever the results, some observers are going to be every bit as unhappy as the non-prevailing party presumably is. Multi-judge appeals courts or appellate panels rendered many of these opinions without any dissent, and some of these opinions come from courts that are widely viewed as receptive to regulatory takings claims from landowners. It is unlikely that more than 100 judges from across the country—a group that had little or no choice in finding regulatory takings cases on their dockets—would all decide to nullify *Palazzolo* so soon after it was decided.

Of all the cases to cite *Palazzolo* in that time, I have found only three in which a credible argument can be made that the court nullified that case. I have just noted two of these cases: *Guggenheim* and *CRV*. While *CRV* was a unanimous opinion from a three-judge panel of the Federal Circuit, *Guggenheim* came from a far more fractured court. That case was initially decided in favor of the landowners by a divided three-judge panel of the Ninth Circuit, and the final opinion reversing the panel was issued by a divided court sitting en banc, with a strongly worded dissent authored by Judge Bea and joined by Chief Judge Kozinski and Judge Ikuta. The third case, *Prosser v. Kennedy Enterprises, Inc.*, comes from the Supreme Court of Montana, and I will discuss it below.<sup>220</sup>

The dissenters in *Guggenheim* do not mince words. Judge Bea begins his detailed dissent, which is considerably longer than the court's opinion, by stating that “the majority misapplies the Supreme Court's analysis of regulatory takings claims. It ignores two essential elements of that analysis, and fails to follow the Court's instructions on the one element it uses to disqualify the claim.”<sup>221</sup> Focusing more directly on the majority's *Palazzolo* analysis, Judge Bea accuses the court of “ignor[ing]” it.<sup>222</sup> Later on, in his analysis of the majority opinion, he disagrees with the court's distinction between facial and as-applied cases, stating that the court is raising factual differences that are immaterial to the analysis, “no more significant than that the *Palazzolo* land was in Rhode Island and the *Guggenheim* land was in California,” and with “no justification or legal support for why these

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220. *Prosser v. Kennedy Enters., Inc.*, 179 P.3d 1178 (Mont. 2008).

221. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1123 (9th Cir. 2010) (en banc) (Bea, J., dissenting).

222. *Id.* at 1123–24.



proposed distinctions matter.”<sup>223</sup> The dissent states that the court dismisses one of the landowners’ contentions “without any citation of authority . . . (without a citation to any case, statute, or even a law review article).”<sup>224</sup> In addition, “the majority, perhaps sensing its vulnerability . . . , attempts to distract the reader by introducing an entirely irrelevant consideration into the analysis.”<sup>225</sup> In the summary of his analysis of investment-backed expectations, Judge Bea describes the majority as adopting “a static and somewhat simplistic view of law, politics, and economics.”<sup>226</sup>

These are strong words, accusing the majority of incompetence at best and intellectual dishonesty at worst. They also misunderstand the court’s analysis. A majority of the judges sitting en banc, like so many of the other judges in the cases discussed above, merely acknowledged the timing and sequencing issues that are so essential in determining whether a notice-rule case succeeds or fails. In *Palazzolo*, the key transfer of property occurred during the time when the as-applied claim was ripening, which means that only the successor owner could bring the claim.<sup>227</sup> The prior owner did not have a claim that was ripe before it transferred the land to Palazzolo. And as noted above, “[t]his difference matters because an as applied challenge necessarily addresses the period during which the administrative or judicial proceedings for relief occur, so justice may require that title transfers during the ripening period not bar the action.”<sup>228</sup> Palazzolo should not necessarily win his case on the merits, but it would be unfair to disqualify him on notice-rule grounds from bringing his claim when his predecessor never had a ripe takings claim that it could bring.

The Guggenheims, by contrast, challenged only the city law that took effect after they owned the property, and they challenged it only facially.<sup>229</sup> Because they owned the property before the city law took effect, *Palazzolo*’s discussion of the notice rule is off the point. But if that city law merely re-enacted an earlier identical county law that predates the

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223. *Id.* at 1129 (footnote omitted).

224. *Id.* at 1130.

225. *Id.* at 1131 (referring to the reasonable investment-backed expectations of the mobile-home tenants).

226. *Id.* The dissent’s use of the term “static” is puzzling. Elsewhere, the dissent accuses the court of “adopting a view of the law and of the economic effects of the Goleta ordinance that is static and provides no opportunity for change or innovation.” *Id.* at 1124. Yet the dissent’s approach, which would require the city to pay the Guggenheims for the effect of a change in the law, would certainly limit change more than the court’s actual holding does.

227. *Id.* at 1119 (majority opinion) (discussing *Palazzolo*).

228. *Id.*

229. *Id.* at 1118–19.

Guggenheims' acquisition of title, the facial claim belongs to the prior owner and is non-transferable. Many of the cases that I discuss above, from a wide variety of jurisdictions, support this type of analysis, which also accords with the argument Part III presents and with *Palazzolo* itself.

The *Guggenheim* dissenters undoubtedly have strong feelings about this case, which led them to deliver such a strongly worded dissenting opinion. But this court is no more fractured than the Supreme Court was in *Palazzolo* itself, when it authored six opinions disagreeing about the extent to which an owner's notice of laws existing at the time he acquired title should impair his reasonable investment-backed expectations. A majority of the Ninth Circuit followed an analytical pattern that flows naturally from *Palazzolo* and that many courts throughout the country have adhered to in their own discussions. The *Guggenheim* dissenters' intimations that the majority sought to nullify *Palazzolo* are incorrect and unfair.

*Prosser v. Kennedy Enterprises, Inc.*, the only other case in which a nullification argument could plausibly be made, presents odd facts and a majority opinion that may simply have misapplied *Palazzolo*.<sup>230</sup> The case is factually atypical in that it is a claim raised by neighbors of a casino who argued that a city's approval of that casino violated city ordinances and constituted a nuisance.<sup>231</sup> It is not a takings claim at all, and *Palazzolo* is cited only because Prosser purchased her property after the city adopted the resolution approving the casino.<sup>232</sup> In fact, the court cites *Palazzolo* merely for the proposition that an award of compensation belongs to the owner at the time of the taking, suggesting that Prosser is the wrong plaintiff.<sup>233</sup> The only justice to raise the notice-rule issue is one of the dissenters.<sup>234</sup> He suggests that some of the diminution in the value of Prosser's property occurred after she acquired the property and that it was impossible to assess the actual loss until later, when the city failed to take action against the casino.<sup>235</sup> The majority seems to believe that Prosser's claim is not viable because she was aware of the city's actions at the time of her acquisition, a view that might contradict *Palazzolo*. The dissent sees her claim as a formerly unripe one that now has become viable under *Palazzolo*. This

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230. *Prosser v. Kennedy Enters., Inc.*, 179 P.3d 1178 (Mont. 2008).

231. *Id.* at 1180–81.

232. *Id.* at 1182.

233. *Id.*

234. *Id.* at 1199 (Nelson, J., dissenting).

235. *Id.*

unusual case is hardly evidence of widespread nullification by American courts.<sup>236</sup>

### *E. Other Types of Cases*

This subpart examines other cases that cite *Palazzolo*'s notice-rule holding and that do not fall into either of the two categories examined above. Keep in mind that Parts IV.B and C sought to be overly inclusive, which means that some of the cases considered there may not actually have fallen into the categories addressed in those subparts. The parties or the court did not provide enough facts or analysis for the reader to be able to decide for certain, and I included them in those subparts and not in this one because I did not wish to overlook any cases that may have been relevant there. The cases discussed in this subpart, by contrast, almost certainly do not fall into either of those earlier two categories.

For the most part, the cases addressed in this subpart are so unusual and inconsequential that they merit and receive little attention here. They do not fit within either of the more important categories discussed above, their facts or legal arguments are atypical of regulatory takings claims, they offer little insight into the ongoing impact of *Palazzolo* on the lower courts, and they are unlikely to have any significant influence on regulatory takings law in the future. In some of these cases, the court appears to have misread or misapplied *Palazzolo*. And in some of these cases, the plaintiff would have prevailed even before *Palazzolo*, so it is relatively pointless to examine the effects of a case that further strengthens a legal argument that was already a winner. I present this very brief subpart to point out that not every case fits neatly into one of the two opposing categories described above, emphasize that some cases are out of the ordinary, and allow each reader to assess for themselves whether they agree with the way in which I have categorized the many cases that cite *Palazzolo*.

In *Martin Marietta Materials, Inc. v. Brainard*, for example, some of the regulatory restrictions impairing the plaintiff's use of its land predated its acquisition of ownership while other restrictions did not.<sup>237</sup> In addition, there was a question as to whether the federal court had supplemental jurisdiction over the state law takings claim.<sup>238</sup> The court's somewhat

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236. *Prosser* has been cited in a total of 12 judicial opinions, all from state and federal courts in Montana.

237. *Martin Marietta Materials, Inc. v. Brainard*, No. 1:06-cv-0825-DFH-TAB, 2007 WL 4232184, at \*12–13 (S.D. Ind. Nov. 28, 2007).

238. *Id.* at \*11.

confusing opinion addressing this unusual combination of facts denies defendant's motion for summary judgment, leaving open the possibility that notice-rule issues might arise later in the proceedings.<sup>239</sup>

*Pascoag Reservoir & Dam, LLC v. Rhode Island* is a case in which the state adversely possessed the plaintiff's land, and the plaintiff brought a takings claim seeking compensation.<sup>240</sup> The state defended unsuccessfully by arguing that the owner knew that the law of adverse possession was an underlying state law principle.<sup>241</sup> In other words, landowners in Rhode Island can bring inverse condemnation claims against the government if the government adversely possesses their property. However, because the plaintiff here delayed too long in bringing its takings claim against the state, that claim was time-barred.<sup>242</sup> And in *United States v. 191.07 Acres of Land*, the court focuses on the notice rule at the compensation phase of a takings claim.<sup>243</sup> The court cites *Palazzolo* while noting that the determination of the highest and best use of the property for purposes of determining just compensation factors in pre-existing laws.<sup>244</sup>

Some notice-rule cases fail on ripeness grounds, thereby depriving the court of the opportunity to reach the substantive takings issue.<sup>245</sup> Others question whether the plaintiff has a sufficient property right to be able to bring a claim at all.<sup>246</sup> These cases, only some of which even raise obvious notice-rule issues, are just too unusual to be of much use for purposes of assessing the impact of *Palazzolo*.

There is one other relatively insignificant group of cases for which *Palazzolo* did not change the outcome. In these cases, the plaintiff would have prevailed even before *Palazzolo* was decided, and the extra arrow in its quiver that *Palazzolo* provides has no impact on the result. For example,

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239. *Id.* at \*14.

240. *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F. Supp. 2d 206, 209 (D.R.I. 2002), *aff'd*, 337 F.3d 87 (1st Cir. 2003).

241. *Id.* at 226.

242. *Id.* at 228–29.

243. *United States v. 191.07 Acres of Land*, 482 F.3d 1132, 1136–38 (9th Cir. 2007).

244. *Id.* at 1137–38.

245. *See, e.g., Schooner Harbor Ventures, Inc. v. United States*, 92 Fed. Cl. 373, 384 (2010), *aff'd without opinion*, No. 2010-5134, 2011 WL 1491338 (Fed. Cir. Apr. 20, 2011) (per curiam).

246. *See, e.g., Gebman v. New York*, No. 07-cv-1226, 2008 WL 2433693, at \*5 (N.D.N.Y. June 12, 2008) (holding that a contract vendee does not have standing to bring a claim); *Kobobel v. State Dep't of Natural Res.*, 249 P.3d 1127, 1139 (Colo. 2011) (en banc) (holding that well owners do not have a constitutionally protected property right in the water from their wells); *Gacke v. Pork Xtra, LLC*, No. LACV019489, 2001 WL 35818480, at n.1 (Iowa Dist. Ct. Aug. 1, 2001) (noting that the takings compensation owed to a lessee is limited to the value of the remaining term of the lease), *rev'd on other grounds*, 684 N.W.2d 168 (Iowa 2004).

in *State ex rel. Shemo v. City of Mayfield Heights*, the Supreme Court of Ohio partially granted the city's motion for reconsideration but noted that even if a *Palazzolo* analysis applies, the court's original holding of a taking remains valid.<sup>247</sup> The landowner won before, and the city's belief that *Palazzolo* might warrant reconsideration by the court was "misplaced."<sup>248</sup> In *Pulte Land Co. v. Alpine Township*, the Court of Appeals of Michigan upheld the trial court's finding of a taking despite the township's notice-rule defense.<sup>249</sup> The appeals court relies heavily on pre-2001 Michigan cases, citing *Palazzolo* only once,<sup>250</sup> and also refers to the successor owner's purchase for only \$5,000 as "no investment to speak of" and "essentially receiv[ing] the property as an inheritance."<sup>251</sup> Recall that Michigan is a state in which landowners generally fared well even before *Palazzolo*.

*KCI Management, Inc., v. Board of Appeal* is in agreement.<sup>252</sup> In *KCI*, the court held that a post-enactment buyer can maintain an as-applied challenge to the validity of a zoning law that was already effective when it purchased the property, citing to both *Palazzolo* and earlier Massachusetts case law.<sup>253</sup> Finally, note the odd case, *East Cape May Associates v. Department of Environmental Protection*, in which the plaintiff actually prevailed before *Palazzolo* but then suffered a partly unfavorable remand afterwards, a result that initially seems puzzling given that *Palazzolo* strengthens the legal position of landowners.<sup>254</sup> Although the court correctly applies *Palazzolo*'s notice-rule holding, the court appears to have remanded in part because it disagreed with the lower court's application of substantive regulatory takings law.<sup>255</sup> To the extent the owner's legal position was actually worsened after *Palazzolo*, it was not as a result of the notice-rule portion of that case's analysis.

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247. *State ex rel. Shemo v. City of Mayfield Heights*, 775 N.E.2d 493, 495–96 (Ohio 2002).

248. *Id.* at 496.

249. *Pulte Land Co. v. Alpine Township*, Nos. 259759, 261199, 2006 WL 2613450, at \*6 (Mich. Ct. App. Sept. 12, 2006) (per curiam).

250. *Id.* at \*3–4 (relying primarily on Michigan cases that predate *Palazzolo*).

251. *Id.* at \*6.

252. *KCI Mgmt., Inc. v. Bd. of Appeal*, 764 N.E.2d 377 (Mass. App. Ct. 2002).

253. *Id.* at 380–81 (citing a Massachusetts case that predates *Palazzolo*).

254. *E. Cape May Assocs. v. State Dep't of Env'tl. Prot.*, 777 A.2d 1015 (N.J. Super. App. Div. 2001).

255. *Id.* at 1024, 1032 (finding that "[t]he trial court's determination that ECM's property has been 'taken,' . . . ignores fundamental regulatory taking principles" and citing *Palazzolo*'s non-notice-rule holdings for support).

V. THE OVERALL EFFECT OF *PALAZZOLO*

As this Article has shown, *Palazzolo v. Rhode Island* has had only a minimal impact on decisions by state and lower federal courts addressing the notice rule. Part IV.B reviewed the relevant cases and demonstrated that at most fifteen cases—and possibly as few as three—have turned out differently because of *Palazzolo* and that none of these cases has been particularly weighty. Conversely, Part IV.C found between forty-seven and fifty-three cases, many of them quite prominent, in which *Palazzolo* did not change the result. These were all cases in which *Palazzolo* was sufficiently relevant that the court cited it as part of a discussion of the notice rule, but they were also cases in which a post-enactment buyer did not prevail. That subpart and the following one proceeded to discuss the leading cases from among this group of far more influential holdings.

Because I have erred on the side of inclusivity in interpreting cases in Part IV.B, I may actually be overstating the impact of *Palazzolo*. Many of the cases that subpart addresses—perhaps as many as twelve of the fifteen—arguably did not turn out differently after *Palazzolo*. I arrived at the number fifteen only by assuming, for cases in which the fact presentation or legal analysis was incomplete, that the plaintiffs would have lost these cases before 2001. Moreover, in several of those opinions, the court remanded the case for further proceedings that were never reported or have not yet concluded. We do not know whether the landowner ultimately will or did prevail, or on what terms. It is entirely possible that some of those plaintiffs survived longer only to lose anyway or to settle on terms that were not particularly favorable. Thus the number fifteen is a maximum, perhaps overstating the true number considerably.

Conversely, although Part IV.C also required judgment calls as to what might have happened if the law were different, the cases noted there are all cases in which the plaintiff lost. While it may be similarly difficult to know precisely how some of the cases in this category would have turned out before *Palazzolo*, it is largely accurate to describe these cases as litigation in which the owner lost even after making a *Palazzolo* argument. It is a safe assumption that any landowner that loses a notice-rule case after *Palazzolo* would have lost that same case before. In none of these opinions did *Palazzolo* transform what would otherwise have been a loss into a victory.

Although *Palazzolo* has plainly had only a modest impact on the outcomes of reported cases, I want to be careful not to overstate my argument. The Supreme Court's collection of opinions may well have changed the legal background against which all parties involved in the land

use process operate. A judge becomes involved in a land use dispute only when the lengthy process of negotiation and litigation finally brings a ripe case to her docket. Many parties navigate their way through the administrative stages of the permitting process for years, and it is likely that *Palazzolo* has shifted the center of gravity toward owners in these administrative negotiations.<sup>256</sup>

To be more precise, the perception by participants in the land use process that *Palazzolo* favors owners more than prior law did—a perception that this Article has shown to be largely inaccurate—may have caused government officials to favor owners more than they did previously. Owners may well believe themselves to be in a position of greater strength as a direct result of *Palazzolo*. Government officials sitting across the table from them may share that view. Some of these officials surely became more inclined to award variances or conditional use permits to owners whose applications had previously been turned down, and some owners whose administrative appeals were denied may have received just compensation sooner and without a fight.

Moving back earlier in the process, it is entirely possible that officials involved in making initial permitting decisions became more likely to award permits to applicants after *Palazzolo*, and to do so earlier in the process than they had before, out of concern that any refusal was more likely to lead to a just compensation award after that case was decided. Moving still earlier in the process, it is also possible that owners who might have decided not to pursue a permit before 2001 became more assertive after that date. These owners might have believed that they were more likely to receive the permit they desired if they were making the request of an official with a newly augmented fear of liability. Moving even earlier, it is possible that prospective buyers who would not have purchased particular parcels in the past, because they knew that their awareness of existing restrictions could impair their likelihood of receiving a permit or prevailing on a takings claim, will buy that land today. They may have concluded that they will receive either the permit they desire or a compensation check from the government. And moving still earlier, it is even possible to imagine that legislators began drafting laws differently in light of *Palazzolo*. In other words, it is not possible to assess the complete effect of *Palazzolo* without knowing how thousands of individual permit applications around the

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256. For an early discussion of how Supreme Court cases influence local land use decisions, see Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103 (2001).

country have progressed over a period of years, and it would be virtually impossible to gather detailed nationwide information of this type.

At the same time, it is also possible that these perceptions favoring landowners throughout the process will now begin to reverse themselves, if they have not already begun to do so. Those permit applicants who were buoyed by the *Palazzolo* holding and have been negotiating since then from a position of greater strength may realize, after reviewing evidence such as that presented in this Article, that their newfound muscle is illusory. Conversely, those government officials who have become more apprehensive about denying permits to applicants since *Palazzolo* may awaken to the fact that their position has not been weakened as much as they initially thought.

What this Article does show is that trial and appellate courts around the nation have been reaching the same results in the notice-rule cases they decided after 2001 as they had in the cases they decided before that date. Most regulatory takings plaintiffs have always lost their cases, and most regulatory takings plaintiffs continue to lose their notice-rule claims even after *Palazzolo*. Before *Palazzolo*, a certain type of knowledge was automatically fatal to an owner's claim in many jurisdictions. Even after *Palazzolo*, that same knowledge weakens her claim, and often weakens it substantially. A party's knowledge that certain uses were unlikely to be approved affects the way in which a court will later assess that party's reasonable investment-backed expectations. And some of the landowners whose claims survive longer than they would have in the past probably lose in the end anyway, after an even longer and more expensive dispute is ultimately resolved against them.

To the extent that notice-rule cases mostly turn out just as they would have beforehand, this result was entirely predictable from a careful reading of the Court's six opinions in *Palazzolo*. State and lower federal courts have not been ignoring the case but rather have been applying it precisely as it is written. Part III demonstrates that only a small subset of regulatory takings claims should turn out any differently after *Palazzolo*, and the cases that owners are losing since that decision are cases they could have predicted would fail. Court watchers who believed in 2001 that *Palazzolo* would change the takings landscape may have needed to review the Court's six opinions more closely. Plaintiffs are continuing to lose notice-rule cases at



nearly the same rate as before. This is not because judges ignore the law, but because they apply it properly.<sup>257</sup>

#### CONCLUSION

It seems unlikely that landowners bringing notice-rule claims will suddenly start to prevail in larger numbers. After many dozens of cases, the sample of reported decisions to date is probably fairly random and representative of cases that will arise in the future. If anything, one would think that the plaintiffs who pursued their cases to the point that a court published an opinion were those with the strongest arguments. The regularity with which these disproportionately robust claims fail may discourage future plaintiffs. The fact that even this skewed sample of cases has led to so few judicial victories by owners reinforces the view that regulatory takings claims, which were unlikely to succeed before *Palazzolo*, remain unlikely to succeed today, even with a more relaxed version of the notice rule in place. To the extent that owners, their lawyers, and others are unhappy with that truth, the solution lies not in *Palazzolo* but elsewhere in the substantive law of regulatory takings.

Nonetheless, advocates for property owners have become anxious for the Court to revisit *Palazzolo*, as some of their petitions for certiorari indicate. This Article responds to the argument that lower courts have failed to follow the requirements of that case. Courts facing notice-rule claims are aware of *Palazzolo*, they cite it appropriately most of the time, and they nearly always reach results that are entirely in accord with it. This still leaves open the question of whether the Court ought to re-examine the notice-rule issue. Any knowledgeable observer of regulatory takings law can supply his own list of preferred tweaks or overhauls, and I do not seek here to set forth my own views as to whether it would be desirable to revisit *Palazzolo*.

But to the extent that revisiting *Palazzolo* is a question of judicial economy, I suggest that no changes are necessary. The initial result in that case, with its six partially contradictory opinions, is not an easy read, and lawyers and judges new to the field surely struggle with the case. But with

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257. Not all observers agree with this conclusion, of course. See, e.g., J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. REV. 351, 417 (2005) (“[M]any state and lower federal courts seem content to proceed as if *Palazzolo* and *Tahoe-Sierra* were never decided.”).

some effort, it is possible to parse these six opinions and ascertain the rule of *Palazzolo*. In fact, hundreds of judges have succeeded in doing exactly this and have developed a body of case law in the lower courts that is remarkably cogent. From a purely functional point of view, the Supreme Court seems to have offered an understanding of the notice rule that is as workable as any other and that operates smoothly. Despite the occasional puzzling case, the lower courts by and large have interpreted *Palazzolo* coherently and consistently, and there is no evident need for any type of reaffirmation. So far, the Supreme Court appears to agree.