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Takings Clause

Tara Leigh Grove
William & Mary Law School, tlgrove@wm.edu

be appropriate, but without further definition, it may also leave lower courts to take that step in the wrong direction — and thus jeopardize the individual liberty of private actors chilled by a vague standard.

H. Takings Clause

Regulatory Takings. — Ever since Justice Holmes declared in 1922 that a regulation of property that "goes too far . . . will be recognized as a taking,"[1] the Supreme Court has struggled to identify when a land use restriction steps over that line. The Court has for the most part eschewed categorical rules for determining when regulations go "too far," choosing instead to engage in "essentially ad hoc, factual inquiries,"[2] balancing the rights of property owners with the needs of society at large. Last Term, in *Palazzolo v. Rhode Island*,[3] the Court reaffirmed its skeptical attitude toward bright line rules in the takings context, holding that a state may not automatically bar an individual who acquires property encumbered by a preexisting land use regulation from bringing an inverse condemnation action to challenge that regulation.[4] But the *Palazzolo* majority left open the question of whether (and how) the timing of acquisition might figure into the "ad hoc, factual inquiries" undertaken in regulatory takings cases.[5] Concurring, Justice O'Connor advised against the adoption of a categorical rule excluding that factor from the constitutional analysis, urging the judiciary to resist "[t]he temptation to adopt what amount to per se rules in either direction."[6] Such categorical opposition to bright line rules,[7] however, obscures the fact that judicial consideration of the timing of acquisition would not further, and would actually tend to hinder, two core principles and policies underlying the Takings Clause. The Court should be wary of a per se preference for legal standards, for in some cases, a more contextual inquiry might demonstrate the desirability of a bright line rule.

Anthony Palazzolo's action for just compensation arose out of a refusal by the Rhode Island Coastal Resources Management Council, an agency created in 1971 to protect the state's coastal wetlands areas, to grant him a development permit for his coastal property.[8] Palazzolo first became involved with the property in 1959, when he, along with

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[1] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[2] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[3] 121 S. Ct. 2448 (2001).

[4] *Id.* at 2464.

[5] *Id.*

[6] *Id.* at 2467 (O'Connor, J., concurring).

[7] *Cf.* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 92 (1992) (noting Justice O'Connor's "affinity for standards, balancing, and linedrawing").

[8] *See Palazzolo*, 121 S. Ct. at 2456.

several associates, formed Shore Gardens, Inc. (SGI) to purchase and develop the shoreline parcels.[9] SGI's attempts to develop the land in the 1960s were unsuccessful, and in 1978 its corporate charter was revoked,[10] causing the wetlands property to pass automatically to Palazzolo, who was by then the corporation's sole shareholder.[11] Of course, by the time Palazzolo acquired the parcels, land use restrictions promulgated by the Rhode Island Council were in effect.[12] Pursuant to those regulations, the Council denied Palazzolo's two requests for development permits, finding that his proposal to build a private beach club did not qualify for the "special exceptions" the regulations provided for development projects serving a "compelling public purpose."[13] Palazzolo appealed the ruling as inconsistent with state administrative law principles, but the state courts affirmed the Council's decision.[14]

After losing his administrative appeal, Palazzolo filed an inverse condemnation action in state court, asserting that the state's wetlands regulations had deprived his property of "all economically beneficial use," and thus constituted a "total taking" for which the Fifth and Fourteenth Amendments required that he be paid just compensation.[15] After the trial judge denied his claims, Palazzolo appealed to the Supreme Court of Rhode Island.[16] The state's highest court found, as a preliminary matter, that Palazzolo's claim should be dismissed on ripeness grounds.[17] Nevertheless, the court went on to declare that regardless of any procedural bars, Palazzolo's action for just compensation would fail on the merits. Because Palazzolo could still develop the upland portion of his property (an area that retained a value of approximately $200,000), the coastal regulations had not deprived him of "all economically beneficial use" of his land.[18] But even if the sub-

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[9] *Id.* at 2455.

[10] *Id.* at 2455–56. The state revoked SGI's charter for failure to pay corporate income taxes. *Id.* at 2456.

[11] *Id.* at 2456. After SGI acquired the property, Palazzolo bought out his associates and became the sole shareholder of SGI. *Id.* at 2455.

[12] *See id.* at 2456.

[13] *Id.* The Council denied Palazzolo's initial proposal to develop the property for lack of specificity. *Id.*

[14] *Id.*

[15] *Id.*; *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1029–32 (1992) (holding that, in most circumstances, when a regulation "deprives land of all economically beneficial use," the state must pay the property owner just compensation).

[16] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 711 (R.I. 2000).

[17] *Id.* at 714. Each of Palazzolo's applications for development permits proposed to develop the entire wetlands region. Given the ambitious nature of the plans, the state court could not rule out the possibility that the Council might have permitted a less grandiose project. Because the court could not determine the extent to which the regulations encumbered Palazzolo's property, it found that his claim was not ripe for judicial review. *See id.*

[18] *Id.* at 714–15.

stantial diminution in the value of Palazzolo's property might be said, in effect, to constitute a total taking,[19] his action would fail. Palazzolo had acquired the land from SGI when the coastal regulations were in effect, and had thus obtained property already encumbered by the land use limitations. Because Palazzolo had never acquired the right to fill the wetlands region, the state could not be said to have taken it from him.[20] Palazzolo's status as a post-enactment acquirer similarly doomed any partial takings claim under *Penn Central Transportation Co. v. City of New York*.[21] Observing that one prong of the *Penn Central* test was whether the state had interfered with a property owner's "reasonable investment-backed expectations," the state court found Palazzolo could not reasonably have expected to develop his land in violation of existing regulations.[22]

The Supreme Court affirmed in part, reversed in part, and remanded. Writing for the Court, Justice Kennedy[23] first found that Palazzolo's claim was ripe,[24] and then went on to consider the state's assertion that an individual who acquires a piece of property encumbered by a preexisting land use regulation should be automati-

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[19] The state court acknowledged that the $200,000 figure was substantially lower than the $3,150,000 profit Palazzolo had contemplated earning. *Id.*

[20] *See id.* at 715–17.

[21] 438 U.S. 104 (1978).

[22] *See Palazzolo*, 746 A.2d at 717. The *Penn Central* three-factor test advises a court evaluating a potential regulatory taking to consider: (1) the character of the government action; (2) the economic impact on the individual involved; and (3) whether or not the regulation unduly interfered with the property owner's investment-backed expectations. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The Court indicated one year after *Penn Central* that the third prong of the test would involve an objective inquiry. *See* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (identifying one factor of the *Penn Central* test as the degree to which a regulation has interfered with an owner's "*reasonable* investment-backed expectations") (emphasis added).

[23] Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined Justice Kennedy's opinion; Justice Stevens joined in part.

[24] *Palazzolo*, 121 S. Ct. at 2463. Justice Kennedy observed that the "central question" was whether a claimant had obtained a "final decision" from the relevant regulatory body regarding the extent to which it would authorize development on his property. *Id.* at 2458. The Council's refusal on two occasions to grant Palazzolo a permit, combined with the "unequivocal nature of the wetlands regulations," which exempted few development projects, "ma[de] plain" that the property owner would be unable to engage in any filling or development on his wetlands property. *Id.* at 2458–59. The Court found it immaterial that Palazzolo had not submitted any proposal to develop only the upland portion of his property. *See id.* at 2460. During the state court litigation, the government, in defending against Palazzolo's total takings claim, had assigned a set value of $200,000 to that parcel, the precise value used by Palazzolo in bringing his *Penn Central* partial takings action. *Id.* at 2457, 2460–61. Having already acknowledged the accuracy of the $200,000 figure, the state could not now maintain that the value of the upland region was in dispute. *Id.* at 2460. Because Palazzolo had taken the "reasonable and necessary steps" to establish the boundaries of permissible activity on his land, the Court found there was sufficient information to determine whether the state regulation had gone "too far." *See id.* at 2459–60. Thus, his claim was ripe for federal court review. *Id.* at 2460.

cally barred from bringing an action for just compensation.[25] The Court found that such a rule would give the state an inordinate amount of power over property rights. If subsequent purchasers were deemed to be on notice of whatever state regulations were in effect, and were thereby prevented from bringing an inverse condemnation action to challenge those regulations, the state would have unfettered power to "shape and define property rights and reasonable investment-backed expectations."[26] "The State," the Court declared, "may not put so potent a Hobbesian stick into the Lockean bundle."[27] Justice Kennedy explained that the central question was not whether the property owner could have anticipated the state's regulation, but instead whether the regulation was so "unreasonable or onerous" as to require payment of just compensation.[28] The timing of acquisition was not critical to that more objective analysis: "Just as a prospective enactment . . . can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title."[29]

The Court observed that the state's argument ignored the critical relationship between the pre-enactment property owner and the post-enactment purchaser. A pre-enactment owner who cannot bring a takings claim on her own behalf — perhaps because difficult financial circumstances prevent her from holding on to her land — should retain the right to transfer that cause of action against the government to a post-enactment purchaser.[30] The ability to transfer the potential claim for just compensation would allow the pre-enactment owner to sell the property for a higher price, and thereby recoup some of the losses suffered at the hands of the government. If the legal rule forbade a subsequent purchaser from bringing a takings action, the value

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[25] *Id.* at 2462.

[26] *Id.* Professor Laurence Tribe has identified the pitfalls of defining property rights in terms of individuals' subjective expectations, if those expectations depend solely upon existing positive law:

> To the degree that private property is to be respected in the face of republican and positivist visions, it becomes necessary to resist even an explicit government proclamation that all property acquired in the jurisdiction is held subject to government's limitless power to do with it what government wishes. . . . But this shows that the expectations protected by the [Just Compensation Clause] must . . . . achieve protected status not because the state has deigned to accord them protection, but because constitutional norms entitle them to protection.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-7, at 608 (2d ed. 1988).

[27] *Palazzolo*, 121 S. Ct. at 2462.

[28] *Id.*

[29] *Id.*

[30] *Cf. id.* at 2463 ("The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation.").

of the property would be significantly lower, and the previous owner would alone have to bear the economic burden imposed by the unconstitutional taking.[31] Not only would the wrong party sustain the injury, but the state would go unpunished for its unconstitutional action.[32] Such a legal rule would set up perverse incentives. As soon as the original owner transferred her property, the state would be absolved from having to pay compensation to *anyone* for an unconstitutional taking. The Court declared: "The State may not by this means secure a windfall for itself."[33]

Ultimately, however, the Court upheld the state supreme court's rejection of Palazzolo's total takings claim. Because the upland portion of Palazzolo's property retained some value, he had not been deprived of "all economically beneficial use" of his land.[34] The Court remanded the case to the state court for reconsideration of Palazzolo's partial takings claim under the three-factor *Penn Central* test in light of its decision that a property owner's status as a post-enactment purchaser is not an absolute bar to an inverse condemnation action.[35]

Concurring, Justice O'Connor suggested how the state court should apply the *Penn Central* test. Although she agreed with the Court's basic holding that a party's status as a post-enactment purchaser should not automatically nullify a claim, she insisted that the timing of acquisition should factor into the *Penn Central* analysis.[36] The existence of land use regulations would logically have some impact on the investment-backed expectations of an individual who acquired a piece of property encumbered by those regulations.[37] Principles of fairness and justice require courts to take that impact into account: "[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."[38]

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[31] *See id.* Professor Richard Epstein has made a similar observation:

> Even if adjustments in the price paid can protect the buyer against the risk, what then protects the *seller* against a capital loss upon enactment of the restriction, itself a partial taking, which is thereafter realized through the sale to a third party? Why is it that he must bear the loss when it is the state that has threatened to take private property?

RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 156 (1985).

[32] *See Palazzolo*, 121 S. Ct. at 2463 (noting that the government would be allowed, "in effect, to put an expiration date on the Takings Clause").

[33] *Id.*

[34] *See id.* at 2464–65.

[35] *Id.* at 2465.

[36] *Id.* at 2465–66 (O'Connor, J., concurring) ("[I]t would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.").

[37] *See id.* at 2467.

[38] *Id.*

Justice Scalia concurred separately "to make clear that my understanding of . . . the issues . . . is not Justice O'Connor's."[39] Justice Scalia suspected that Justice O'Connor, in focusing on "important indici[a] of fairness," was envisioning the "polar horrible" that savvy speculators who manage to predict that a particular piece of property is encumbered by an unconstitutional regulation would reap windfalls by, first, tricking naive property owners into selling their lands at low prices (that reflected the restriction on development) and then bringing the inverse condemnation actions themselves.[40] Even if some investors might reap such "windfalls" at the expense of innocent property owners, Justice Scalia argued, "there is nothing to be said for giving [the money] instead to the *government* — which not only did not lose something it owned, but . . . which acted *unlawfully* — indeed *unconstitutionally*."[41] Justice Scalia insisted that constitutional principles required courts to give *no* consideration to the timing of acquisition: "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."[42]

Justice Stevens filed a separate opinion, concurring in part and dissenting in part. He contended that the case should be dismissed, if at all, because it appeared that Palazzolo did not have standing to bring the suit.[43] Justice Stevens did agree with Justice O'Connor, however, that when a subsequent purchaser with standing brings a takings claim, his "notice" that the regulation was in place is "relevant to the evaluation of whether the regulation goes 'too far,' but not necessarily dispositive."[44]

Justice Ginsburg, joined by Justices Breyer and Souter, dissented, contending that the Court erred in finding that Palazzolo's case was ripe.[45] But she also went on to note that if the property owner's claim

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[39] *Id.* (Scalia, J., concurring).

[40] *Id.* at 2467.

[41] *Id.* at 2468 ("It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief . . . by making him turn over the 'unjust' profit *to the thief*.").

[42] *Id.*

[43] *Id.* at 2470 (Stevens, J., concurring in part and dissenting in part). Justice Stevens explained that a taking occurs at a set moment in time, and a court must identify that moment to determine which party was injured by the taking. *Id.* at 2469–70. Palazzolo's argument indicated that the state had impaired the use of his land by enacting the regulation. If so, then Palazzolo had no standing to bring a claim for just compensation because he had acquired the property after the taking and, thus, had not been injured by it. *Id.* at 2470–71. Justice Stevens concluded that, if the regulations were invalid, Palazzolo could, at most, sue to enjoin their enforcement. *See id.* at 2468.

[44] *Id.* at 2471 n.6.

[45] Justice Ginsburg argued that because none of Palazzolo's applications had been limited to the upland property, it was impossible to say with certainty what level of development might be

were ripe, she would "at a minimum, agree with Justice O'Connor . . . that transfer of title can impair a takings claim."[46]

The contention that the timing of an acquisition should factor into the analysis of a partial takings claim has tremendous surface appeal, as evidenced by the enthusiasm with which five Justices endorsed that position.[47] After all, the *Penn Central* test encourages courts to consider a property owner's "reasonable investment-backed expectations," expectations that would likely be influenced by the existence of a particular regulation, regardless of that regulation's actual constitutional validity. Because the Court has consistently regarded takings law as a series of "ad hoc, factual" inquiries,[48] it would seem illogical — incoherent, even — for the Court to adopt a per se rule excluding from the analysis a fact of such obvious importance.[49]

Nevertheless, not every aspect of a case that appears relevant as a matter of fact is relevant as a matter of constitutional law.[50] In order

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allowed on that land. *Id.* at 2473–74 (Ginsburg, J., dissenting). She assailed the Court's assertion that the State had somehow conceded the value of the property to be $200,000, pointing out that the State had *only* assigned a value to that parcel to undercut Palazzolo's total takings claim. *Id.* at 2474. Although Justice Ginsburg conceded that the Court could consider the *Penn Central* claim because it had been briefly addressed by the state courts, *id.* at 2475, she argued that it was "unfair" to allow Palazzolo now to use an element of the state's total taking defense to prove the ripeness of his partial takings claim. *Id.* at 2476 ("Casting away fairness (and fairness to a State, no less), the Court indulges Palazzolo's bait-and-switch maneuver.").

[46] *Id.* at 2477 n.3. In a short dissent, Justice Breyer expressed concern about the potential for strategic behavior in total takings cases. Landowners might try to construct a total takings claim by selling (and perhaps repurchasing as separate pieces of property) portions of their land until they are left with a parcel entirely encumbered by regulation. *Id.* at 2477 (Breyer, J., dissenting). Justice Breyer suggested that the problem might be aggravated in the case of a subsequent purchaser, who would know which portions of her property were affected by an existing regulation. *Id.* at 2477–78; *cf.* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1054 (1992) (Stevens, J., dissenting) ("[T]here is no 'objective' way to define what [the] denominator [in a total takings inquiry] should be."); Frank L. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1193, 1233 (1967) (discussing the problem of identifying the relevant denominator).

[47] The five Justices were Justice O'Connor, *see Palazzolo*, 121 S. Ct. at 2465–66 (O'Connor, J., concurring), and the four dissenters, *see id.* at 2471 n.6 (Stevens, J., concurring in part and dissenting in part); *id.* at 2477 n.3 (Ginsburg, J., dissenting) (opinion joined by Justices Souter and Breyer); *id.* at 2477 (Breyer, J., dissenting). No other Justice expressly endorsed Justice Scalia's contention that the timing of acquisition was never relevant to a takings inquiry. *See id.* at 2467 (Scalia, J., concurring).

[48] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Subsequent cases have also noted the ad hoc nature of takings inquiries. *See Palazzolo*, 121 S. Ct. at 2466; E. Enters. v. Apfel, 524 U.S. 498, 523 (1998); *Lucas*, 505 U.S. at 1015; Yee v. City of Escondido, 503 U.S. 519, 529 (1992); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

[49] *See Palazzolo*, 121 S. Ct. at 2467 (O'Connor, J., concurring).

[50] Justice O'Connor herself has noted that certain factual circumstances may be constitutionally irrelevant in the equal protection context:

> We know that like race, gender matters. . . . [T]he import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional

to determine which factors are relevant to a constitutional balancing test, such as the "ad hoc" inquiry of just compensation law, courts should keep in mind one basic "rule" of the use of legal standards: the primary purpose of engaging in such contextual inquiries is to effectuate "the underlying purposes or background principles or policies at stake" in a particular legal regime.[51] So the factors most relevant to a constitutional standard-like analysis should be the ones that further judges' understanding of those underlying values.

Thus, in order to determine whether a particular factor merits a spot on the balancing scales of just compensation law, courts should ask how that factor relates to the values underlying the Takings Clause. Although articulating any fundamental principles may seem difficult given the complicated — perhaps even muddled — nature of takings jurisprudence, the Court has consistently reaffirmed one central aspiration: "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[52] The extent to which judicial consideration of the timing of acquisition furthers (or hinders) this recognized principle of takings law should suggest whether that factor is relevant as a matter of constitutional law.

At first glance, denying compensation to most, but not all, post-enactment purchasers seems fully consistent with that principle. On the one hand, a person who buys a piece of property when a regulation is in place can take into account the extent to which the regulation decreases the value of the property, and pay a lower price for the encumbered parcel. On the other hand, as Palazzolo's case illustrates, a post-enactment property holder who does not purchase her land on the open market may not similarly be able to safeguard her own interests, so it would be unfair to bar her from bringing an action for just compensation. Thus, a constitutional standard enabling courts to determine on a case-by-case basis whether a particular purchaser could have insulated herself from bearing the "public burden" may seem more likely to lead to substantively fair and just results than any hard and fast rule.

But such a narrow focus on the interests of the post-enactment purchaser is likely to distract a court from recognizing that the *pre-enactment* property owner will "bear the public burden" if the Court

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law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.

J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 148–49 (1994) (O'Connor, J., concurring).

[51] Sullivan, *supra* note 7, at 60.

[52] Armstrong v. United States, 364 U.S. 40, 49 (1960). Numerous cases have reaffirmed this principle. *See, e.g.*, *Palazzolo*, 121 S. Ct. at 2458; *id.* at 2466 (O'Connor, J., concurring); *Eastern Enterprises*, 524 U.S. at 522; *Yee*, 503 U.S. at 523.

makes it difficult for subsequent purchasers to bring actions for just compensation. Judicial consideration of the timing of acquisition would reduce the market value of a property encumbered by land use regulations by decreasing the likelihood that post-enactment purchasers could succeed in bringing an inverse condemnation action. Pre-enactment property owners would have to accept lower prices for their lands and, as a result, bear a larger part of the loss caused by any unconstitutional state regulations. Factoring the timing of acquisition into the *Penn Central* analysis thus suffers from the same flaw as the absolute rule condemned by the Court in *Palazzolo*: it is likely to harm the previous owner, while the government and the subsequent purchaser escape essentially unscathed.

But perhaps judicial consideration of the timing of acquisition could nonetheless be justified as a means of deterring unethical private behavior. The judiciary might be well advised to deny compensation to a windfall-driven post-enactment purchaser who appears to have hoodwinked a more naive pre-enactment property holder into transferring her constitutional claim for an unjustly low price. Surely the principles of fairness and justice underlying the Takings Clause would not require — and, in fact, would seem to prohibit — awarding "just" compensation to the shrewd gambler. It thus seems quite sensible for the Court to decline to adopt a constitutional per se rule removing the timing of acquisition from the balancing scales of just compensation law, when a more standard-like approach might enable it to deter such inappropriate private behavior.

But that rationale ignores one of the core policies underlying the Just Compensation Clause — preventing unjust *governmental* interference with private property rights. The principles of fairness underlying the Takings Clause are not designed to police the conduct of private actors, however unjust that behavior may seem to some members of the Court. Like almost every other constitutional protection, the Clause aims instead to prevent the *government* from acting unjustly by interfering with constitutionally guaranteed entitlements.[53] A narrow emphasis on the "just deserts" of a particular property owner would obscure what Justice Kennedy properly recognized as the central inquiry: the reasonableness (or lack thereof) of the governmental regulation.[54] The focus of the inquiry should be the merits of the claim, not the merits of the claimant.

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[53] The exception is the Thirteenth Amendment, which applies to both private and public actors. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-15, at 924 (3d ed. 2000) (observing that the Thirteenth Amendment "is not subject to a state action requirement").

[54] *See Palazzolo*, 121 S. Ct. at 2462 ("The Takings Clause, . . . in certain circumstances, allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation.").

It is perplexing that several members of the Court seemed willing to open the takings inquiry to any apparently relevant circumstance, without regard to how judicial consideration of that factor might further (or hinder) the principles and policies underlying the Takings Clause. Perhaps those Justices' resistance to the supposed "temptation to adopt per se rules" was based on an assumption that standards are inherently superior to rules. It's true that in many instances, the use of flexible standards leaves the judiciary better equipped to further principles of fairness and justice by considering factors that would be foreclosed by bright line rules. The Supreme Court is understandably drawn to standard-like analyses in takings cases, each of which involves distinct — and often complex — circumstances. Conducting "ad hoc, factual inquiries" that take into account all relevant facts would seem the most promising way of ensuring overall substantive equality among these disparate claims.[55]

But courts still need to identify which factors are relevant. Before simply adding another item to the balancing scales of just compensation law, the Court should examine how judicial consideration of that factor would influence the values underlying the Takings Clause. Sometimes, particularly when a factor (like the timing of acquisition) sheds little light on the Court's primary inquiry (the reasonableness of the government's action), and in fact hinders a core principle behind the constitutional protection (the sharing of burdens), a bright line rule eliminating that factor from the balancing test might best serve "the

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Of course, even if the timing of acquisition were excluded from the analysis, a post-enactment purchaser would still take into account the very real possibility that a regulation might be upheld, and would thus pay a reduced price for a piece of land. As a result, a post-enactment purchaser is likely to suffer less of an economic injury than the pre-enactment property holder. This difference might seem particularly relevant to the calculation of the "just compensation" due to each set of owners. In *Olson v. United States*, 292 U.S. 246 (1934), the Supreme Court explained that a property owner should be placed "in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Id.* at 255. Courts might find that a smaller amount of compensation is necessary to restore a post-enactment purchaser to her ex ante position. *See also* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 529 (2001) (arguing that the main distinction between pre- and post-enactment purchasers is the compensation due each set of owners). But this approach would let the government "off the hook" for part of its unconstitutional taking, and thus interfere with a major policy of just compensation law. So courts should hesitate before they turn what has traditionally been a question of "whether" there has been an unconstitutional taking into a concern about "how much" compensation is due. *Cf.* Michelman, *supra* note 46, at 1233 ("[T]he test poses not nearly so loose a question of degree; it does not ask 'how much,' but rather . . . 'whether or not' . . . the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.").

[55] *Cf.* Sullivan, *supra* note 7, at 62 ("[Rules] force the decisionmaker to treat differently cases that are actually substantively alike in terms of the underlying principle or policy, and to treat similarly cases that are different.").

underlying purposes or background principles or policies at stake."[56] Therefore, when making the choice between a more rule-like or more standard-like approach, courts should not display a categorical preference for one legal formula, but should "resist[]" the "temptation to adopt what amount[s] to [a] *per se* rule[] in either direction."[57]

II. FEDERAL JURISDICTION AND PROCEDURE

A. Attorney Fee Awards

Prevailing Party. — Attorney fee-shifting statutes, designed to augment plaintiffs' incentives to litigate by creating exceptions to the longstanding "American Rule,"[1] have subsidized meritorious civil rights cases for decades.[2] In 1976, Congress magnified the importance of fee-shifting by making attorney fee awards available to virtually all "prevailing" plaintiffs in civil rights cases.[3] Their path lighted only by sparse congressional guidance,[4] federal courts responded by awarding fees based on the catalyst theory,[5] under which a plaintiff "prevails" if the defendant, in response to the initiation of the lawsuit, voluntarily affords the plaintiff at least partial relief.[6] Last Term, in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[7] the Supreme Court rejected the catalyst theory, holding that only plaintiffs who secure judgments on the merits or court-ordered consent decrees qualify for attorney's fees as statutory

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[56] *Id.* at 60.

[57] *Palazzolo*, 121 S. Ct. at 2467 (O'Connor, J., concurring).

[1] Under the American Rule, a "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

[2] *See generally* Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 233 (describing the history and theory of fee-shifting).

[3] *See* Civil Rights Attorney's Fees Award Act, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (1994 & Supp. IV 1998)) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."). The act was an explicit rejoinder to *Alyeska*. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). Section 1988(b) allows fee-shifting for civil rights claims arising under a variety of federal civil rights statutes. *See* 42 U.S.C. § 1988(b).

[4] *See* H.R. REP. NO. 94-1558, at 1 (1976) (describing the purposes of fee-shifting statutes, but giving few specifics on the definition of "prevailing party"); S. REP. NO. 94-1011, at 5 (1976) (noting that "parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief").

[5] *See* Daniel L. Lowery, Comment, *"Prevailing Party" Status for Civil Rights Plaintiffs: Fee-Shifting's Shifting Threshold*, 61 U. CIN. L. REV. 1441, 1467–69 (1993) (describing the catalyst theory and citing lower court cases).

[6] *Id.* No judgment or other judicial action is necessary under the catalyst theory. *Id.*

[7] 121 S. Ct. 1835 (2001).