

# CAVEAT EMPTOR: HOW THE PUBLIC TRUST DOCTRINE IMPACTS THE *PENN CENTRAL* TEST AND A BEACHFRONT LANDOWNER'S "BUNDLE OF RIGHTS"

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**Abstract:** Derived from ancient Justinian and English common law, the “public trust doctrine” vests ultimate and inalienable ownership of certain tracts of land in the state. Many states have incorporated some variation of the public trust doctrine into their statutes, constitutions, or common law. The application of the public trust doctrine, however, has been challenged as constituting a Fifth Amendment regulatory taking of private property under the United States Constitution, giving rise to the need for just compensation. This type of application of the public trust doctrine was at issue in the nearly decade-long saga culminating in the decision of *Palazzolo v. State*. The case featured an owner of marshland property who sought compensation for Rhode Island’s denial of his repeated development requests. The Rhode Island Superior Court in *Palazzolo* ultimately held that the state’s denial of the landowner’s requests did not constitute a regulatory taking. This Comment analyzes the role that the public trust doctrine played in the court’s weighing of the various factors in a regulatory takings analysis. Further, this Comment argues that the public trust doctrine, as applied in *Palazzolo*, represents a tremendously powerful means for states to set aside publically valuable swaths of land, a means capable of withstanding even a constitutional challenge.

## INTRODUCTION

In his article *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow’s Ear*, Professor of Law Patrick A. Parenteau observed that “[t]he coast is a people magnet.”<sup>1</sup> Professor Parenteau further stated that people have been drawn to coastlines for millennia to engage in commerce, recreation, and nearly everything in between.<sup>2</sup> As recently as 2010, thirty-nine percent of the U.S. population lived in “coastal shoreline counties.”<sup>3</sup>

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<sup>1</sup> Patrick A. Parenteau, *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow’s Ear*, 30 B.C. ENVTL. AFF. L. REV. 101, 102 (2002).

<sup>2</sup> *See id.*

<sup>3</sup> NAT’L OCEANIC & ATMOSPHERIC ADMIN., NATIONAL COASTAL POPULATION REPORT: POPULATION TRENDS FROM 1970 TO 2020, STATE OF THE COAST 3 (2013), <http://oceanservice.noaa.gov/facts/coastal-population-report.pdf> [<http://perma.cc/FB24-GLG2>].

Based on that figure, the population density of “coastal shoreline counties” is now over six times greater than the corresponding inland counties.<sup>4</sup>

In addition to the human inhabitants that reside there, coastlines are also the home of some of the most vibrant ecosystems on earth, such as salt marshes.<sup>5</sup> Because these marshes often form where fresh and salt water meet, they are essential for healthy fisheries, coastlines, and communities, providing essential food, refuge, or nursery habitat for more than seventy-five percent of fishery species.<sup>6</sup> Moreover, salt marshes protect coastlines from erosion by buffering wave action and trapping sediments, and they also reduce flooding by absorbing rainwater.<sup>7</sup> Further, marshes are known to improve water quality by filtering runoff water and metabolizing excess nutrients.<sup>8</sup>

Irrespective of the impact that humans have on marshes by way of development, scientists are concerned about the effects that climate change may have on marshes—rising sea levels act as a natural threat to marshes across the globe.<sup>9</sup> Further, the threat to marshes is heightened by “coastal squeeze.”<sup>10</sup>

In light of the tension between preserving marshlands and protecting the rights of beachfront landowners, state and municipal governments have searched for ways to balance these competing interests.<sup>11</sup> One such way is the “public trust doctrine.”<sup>12</sup> The public trust doctrine, however, has not been immune from challenge, particularly from regulatory takings claims.<sup>13</sup> A notable example of this conflict found its way up to the United States Supreme Court in *Palazzolo v. Rhode Island*.<sup>14</sup> The plaintiff, Anthony Palazzolo, was the owner of the parcel at the heart of this case.<sup>15</sup> The son of Sicilian immigrants,

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<sup>4</sup> *Id.* at 5.

<sup>5</sup> N.H. DEP’T OF ENVTL. SERVS., ENVIRONMENTAL FACTS SHEET: WHAT IS A SALT MARSH? 1 (2004), <http://des.nh.gov/organization/commissioner/pip/factsheets/cp/documents/cp-06.pdf> [<http://perma.cc/XYG6-4FLF>].

<sup>6</sup> *What Is a Salt Marsh?*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://oceanservice.noaa.gov/facts/saltmarsh.html> [<http://perma.cc/AEF4-4GTZ>].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Karen M. Thorne et al., *Ecological Effects of Climate Change on Salt Marsh Wildlife: A Case Study from a Highly Urbanized Estuary*, 28 J. COASTAL RES. 1477, 1478–79 (2012).

<sup>10</sup> *Id.* Salt marshes are typically found at low elevations, and if natural or man-made barriers prohibit salt marsh transgression to higher elevations, greater loss of marshlands will occur. *Id.* This phenomenon is known as “coastal squeeze.” See *id.*

<sup>11</sup> See Parenteau, *supra* note 1, at 117–18.

<sup>12</sup> See *id.*

<sup>13</sup> See *Palazzolo v. Rhode Island (Palazzolo V)*, 533 U.S. 606, 618 (2001). The public trust doctrine is an ancient common law doctrine that vests ownership rights of certain publically valuable tracts of land, such as land beneath tidal and navigable waters, in the states, rather than private entities, for public use and enjoyment. See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 459 (1892).

<sup>14</sup> *Palazzolo V*, 533 U.S. at 618.

<sup>15</sup> See Anthony Flint, *Landlocked on the Coast for 40 Years, Anthony Palazzolo Has Battled R.I. Over Property Rights, All the Way to the Supreme Court*, BOS. GLOBE, Nov. 3, 2002, at B1, <http://www>.

Palazzolo sought to develop land adjacent to a tidal pond along the Rhode Island coast.<sup>16</sup> To do so, he was required to obtain a permit from the state of Rhode Island, and was denied several times.<sup>17</sup> Following the final denial, Palazzolo filed suit, and subsequently carried his case from Rhode Island's Superior Court to the United States Supreme Court.<sup>18</sup> This Comment focuses on the remand of the *Palazzolo* case to the Rhode Island Superior Court from the Supreme Court, and argues that while the court correctly applied the factors articulated in *Penn Central Transportation Company v. City of New York* to the case, the result creates a tremendously powerful tool to aid in the protection of certain swaths of land.<sup>19</sup> As a result, this doctrine, as applied in *Palazzolo*, is capable of withstanding even a constitutional challenge.<sup>20</sup>

### I. FACTS AND PROCEDURAL HISTORY

On December 1, 1959, Anthony Palazzolo purchased an undivided one-half interest in the majority of a property located adjacent to Winnapaug Pond in Westerly, Rhode Island.<sup>21</sup> The following day, Palazzolo and the other half-interest owners, Natale Louis and Elizabeth D. Urso, transferred the property to Shore Gardens, Inc. ("SGI").<sup>22</sup> Between 1959 and 1961, SGI sold six parcels of the property, upon which homes were constructed.<sup>23</sup> On May 15, 1969, SGI acquired the remaining half-interest on the property.<sup>24</sup>

As a 446-acre saltwater tidal pond used for fishing and boating, Winnapaug Pond's "size and shallow depth make it a particularly fragile ecosystem."<sup>25</sup> Winnapaug Pond sits adjacent to Palazzolo's property, approximately half of which is below the mean high-water mark.<sup>26</sup> In addition, the vast majority of the Palazzolo property is salt marsh, comprised of "Matunuck mucky peat," making the land unable to support construction and thus unsuitable for

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law.uh.edu/faculty/mburke/Classes/Envtl\_Land\_Use\_Fall\_2003/Palazzolo\_Art\_Boston\_Globe.pdf [http://perma.cc/UYB5-LZG7].

<sup>16</sup> *Id.*

<sup>17</sup> See Petitioner's Brief on the Merits at 7, *Palazzolo V*, 533 U.S. 606 (2001) (No. 99-2047), 2000 U.S. S. Ct. Briefs LEXIS 665, at \*20.

<sup>18</sup> Flint, *supra* note 15, at 2; see *Palazzolo V*, 533 U.S. at 611; *Palazzolo v. State (Palazzolo IV)*, 746 A.2d 707, 711 (R.I. 2000); *Palazzolo v. Coastal Res. Mgmt. Council (Palazzolo II)*, 657 A.2d 1050, 1050 (R.I. 1995); *Palazzolo v. State (Palazzolo VI)*, No. 88-0297, 2005 R.I. Super. LEXIS 108, at \*12 (R.I. Super. Ct. July 5, 2005); *Palazzolo v. Coastal Res. Mgmt. Council (Palazzolo III)*, No. C.A. 88-0297, 1997 WL 1526546, at \*1 (R.I. Super. Ct. Oct. 24, 1997).

<sup>19</sup> See *infra* notes 79–115 and accompanying text.

<sup>20</sup> See *infra* notes 109–112 and accompanying text.

<sup>21</sup> *Palazzolo III*, 1997 WL 1526546, at \*1.

<sup>22</sup> *Id.* at \*2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*12.

<sup>26</sup> *Id.* at \*9.

development.<sup>27</sup> Before any construction could occur, the marsh soil had to be removed and replaced with at least six feet of fill, the only exception being a small upland area of glacial remains near the pond shoreline, which is connected to the main road, Atlantic Avenue, by a gravel path.<sup>28</sup> There had been no developments on any of the marshlands owned by Palazzolo, with the exception of two houses constructed on a small upland section of glacial remains.<sup>29</sup> In contrast, there had been substantial developments on the lands bordering the northern, eastern, and western edges of the pond, some of which involved placing fill over existing wetlands.<sup>30</sup> Nonetheless, there was no evidence that any of the properties that required fill were developed without approval from any state entity.<sup>31</sup>

On March 29, 1962, Palazzolo submitted an application to the State of Rhode Island Department of Natural Resources, Division of Harbors and Rivers (“DHR”) to dredge the bottom of Winnapaug Pond and fill his property with the dredge, which would make his land suitable for construction.<sup>32</sup> The application was returned to Palazzolo because it lacked essential information.<sup>33</sup> A little more than a year later, on May 16, 1963, Palazzolo submitted a second application to DHR that was largely identical to the first, with the added request of building a bulkhead on his property.<sup>34</sup> After Palazzolo submitted a third application on April 29, 1966, seeking to dredge the pond and construct a recreational beach facility, DHR approved Palazzolo’s plan, permitting him to fill the marsh and either construct a bulkhead or recreational beach facility.<sup>35</sup> Yet, less than a year after issuing its approval of Palazzolo’s plans, DHR revoked the permit on November 17, 1971.<sup>36</sup>

In 1971, the Coastal Resources Management Council (“CRMC”) succeeded DHR as the regulator of the state’s coastal wetlands, and adopted the Coastal Resources Management Plan (“CRMP”) in 1976, prohibiting the filling of wetlands without special permission.<sup>37</sup> Later, the CRMC revised the CRMP to prohibit the filling, removing, or grading of coastal wetlands adja-

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at \*9–10; Petitioner’s Brief on the Merits, *supra* note 17, at 3.

<sup>29</sup> *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*12.

<sup>30</sup> *Id.* at \*10–11.

<sup>31</sup> *Id.* at \*11.

<sup>32</sup> *Palazzolo III*, No. 88-0297, 1997 WL 1526546, at \*2 (R.I. Super. Ct. Oct. 24, 1997).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*2–3. A “bulkhead” is a type of coastal structure designed to retain and reinforce upland soil from erosion or collapse. See U.S. ARMY CORPS OF ENG’RS, COASTAL STRUCTURES: TYPES, FUNCTIONS AND APPLICATIONS 33–37 (2012), [http://www2.housedems.ct.gov/Shore/pubs/2012-08-15/Coastal\\_Structure\\_Presentation\\_USACE.pdf](http://www2.housedems.ct.gov/Shore/pubs/2012-08-15/Coastal_Structure_Presentation_USACE.pdf) [<https://perma.cc/652J-BQGG>]. Bulkheads are commonly found on beachfront and coastal properties. See *id.*

<sup>35</sup> *Palazzolo III*, 1997 WL 1526546, at \*3.

<sup>36</sup> Petitioner’s Brief on the Merits, *supra* note 17, at 5.

<sup>37</sup> *Palazzolo III*, 1997 WL 1526546, at \*3.

cent to certain waters, unless the purpose of the change was to preserve or enhance the feature as a conservation area.<sup>38</sup>

In March of 1983, Palazzolo submitted an application to the CRMC that was nearly identical to the original 1962 proposal.<sup>39</sup> The request was denied, and Palazzolo did not appeal the rejection.<sup>40</sup> Palazzolo submitted another application to build a recreational beachfront facility in January of 1985 that largely mirrored the 1966 application to DHR.<sup>41</sup> This application was similarly rejected by the CRMC, and Palazzolo filed suit against CRMC in the Rhode Island Superior Court on June 15, 1988.<sup>42</sup> In this suit, Palazzolo argued that he was the owner of the subject property because he was the sole owner of SGI's stock; that a single-family dwelling or recreational beach facility were the only viable uses of his property; that CRMC approval was necessary for him to use *some* of his property; and that the CRMC's two denials constituted a taking of his property without just compensation by denying him all beneficial use of his land.<sup>43</sup>

After Palazzolo's initial claim was dismissed by the Rhode Island Superior Court, the Rhode Island Supreme Court reversed the dismissal and remanded the case back to superior court to evaluate Palazzolo's takings claims.<sup>44</sup> On remand, the superior court held that, because Palazzolo could not claim title to the land until 1978, and because the regulations that prohibited the filling of the wetlands were in place two years prior, Palazzolo could not plausibly argue that CRMC's denial of his application constituted a categorical taking of his property, and thus his takings claim was not ripe for review.<sup>45</sup> On appeal, the Supreme Court of Rhode Island upheld the ruling of the court below, and, after concluding that Palazzolo's lack of investment-backed expectations would be dispositive under the analysis articulated in *Penn Central Transportation Company v. City of New York*, the court found it unnecessary to consider other *Penn Central* factors.<sup>46</sup> Palazzolo appealed the court's decision, and the United States Supreme Court granted certiorari.<sup>47</sup>

Upon review, the Court affirmed the Supreme Court of Rhode Island's opinion that Palazzolo had not been deprived of all economic uses of his prop-

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<sup>38</sup> *Id.* at \*4.

<sup>39</sup> Petitioner's Brief on the Merits, *supra* note 17, at 6.

<sup>40</sup> *Palazzolo III*, 1997 WL 1526546, at \*4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*4-5.

<sup>43</sup> *Id.* at \*5.

<sup>44</sup> *Palazzolo II*, 657 A.2d 1050, 1052 (R.I. 1995); *Palazzolo v. Coastal Res. Mgmt. Council (Palazzolo I)*, No. 86-1496, 1995 WL 941370, at \*7 (R.I. Super. Ct. Jan. 5, 1995).

<sup>45</sup> See *Palazzolo III*, 1997 WL 1526546, at \*19.

<sup>46</sup> *Palazzolo IV*, 746 A.2d 707, 717 (R.I. 2000); see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>47</sup> *Palazzolo V*, 533 U.S. 606, 611 (2001).

erty.<sup>48</sup> The Court, however, remanded the decision back to the Supreme Court of Rhode Island, holding that the lower court erred in finding that Palazzolo's takings claim was not ripe.<sup>49</sup> In finding Palazzolo's taking claim as ripe for review, the Court also instructed the lower court to consider the *Penn Central* takings factors on remand.<sup>50</sup> The lower court subsequently remanded the case to its original court—the Rhode Island Superior Court—to apply the *Penn Central* factors, resulting in the decision that is the focus of this Comment.<sup>51</sup>

## II. LEGAL BACKGROUND

*Shively v. Bowlby* was one of the first instances in which the United States Supreme Court recognized the “public trust doctrine.”<sup>52</sup> *Shively* held that the title and rights of land below the high-water mark are vested in the government for the public benefit.<sup>53</sup> Additionally, the Court noted that these rights are “governed by the laws of the several States.”<sup>54</sup> The Court reasoned that because lands under tide waters are incapable of cultivation or improvement in the way that lands above the high-water mark are, and because such lands are of great public value for commerce, navigation, and fishing, there is a compelling public interest in the states maintaining ultimate control over the use of such lands.<sup>55</sup> This was not necessarily a foreign concept to American jurisprudence; the roots of the public trust doctrine reach back to English common law: “At common law, the title and the dominion in lands flowed by tide were in the King for the benefit of the nation.”<sup>56</sup> Once the colonies were settled, similar publicly-held rights passed to the colonial governments.<sup>57</sup>

In Rhode Island, this very interest is the subject of Article I, Section 17 of the state's constitution, requiring the state to adopt all means necessary and proper by law to protect the natural environment along the shoreline for the public benefit.<sup>58</sup> Rhode Island courts have interpreted Article I, Section 17 as establishing the sort of state right and interest in coastal lands described in

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<sup>48</sup> *Id.* at 616.

<sup>49</sup> *Id.* at 632.

<sup>50</sup> *Id.* at 630; see *Penn Cent. Transp. Co.*, 438 U.S. at 124.

<sup>51</sup> *Palazzolo v. State*, 785 A.2d 561 (R.I. 2001); see *Penn Cent. Transp. Co.*, 438 U.S. at 124.

<sup>52</sup> See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

<sup>53</sup> *Id.* at 57–58 (noting that the public trust doctrine is an ancient common law doctrine vesting the ownership rights of certain tracts of publically valuable land in the states).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 57.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; see *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1042 (R.I. 1995) (noting that the public trust doctrine is “firmly and pervasively embedded in American jurisprudence”).

<sup>58</sup> R.I. CONST. art. I, § 17.

*Shively*.<sup>59</sup> This notion was reaffirmed in *Greater Providence Chamber of Commerce v. State*: “The public-trust doctrine holds that the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public.”<sup>60</sup> The Rhode Island Supreme Court in *Greater Providence Chamber of Commerce* further explained that the purpose of Rhode Island’s version of the public trust doctrine is to preserve the public rights of fishing, commerce, and navigation.<sup>61</sup>

In some instances, the invocations of the public trust doctrine have led to takings claims.<sup>62</sup> Any takings claim is ultimately rooted in the maxim articulated in the Fifth Amendment of the United States Constitution: “nor shall private property be taken for public use, without just compensation.”<sup>63</sup> Drawing upon the notion that government could hardly function if it were required to compensate for every diminution of property value, the United States Supreme Court developed a rough, three-part framework for analyzing takings claims in *Penn Central Transportation Company v. City of New York*.<sup>64</sup> In *Penn Central*, the Court held that the enactment of a city-wide law that limited the ability of landmark property owners to destroy or fundamentally alter the character of the landmarks did not constitute a Fifth Amendment taking for which compensation is owed.<sup>65</sup> The tripartite framework growing out of the case focuses on the character of the government action, the economic impact of the government action or regulation on the claimant, and the extent to which the government action has interfered with distinct investment-backed interests or expectations.<sup>66</sup>

The Court noted that although a taking may be more easily found in situations where the interference with one’s property involves a physical invasion by government, the *Penn Central* factors do not necessary preclude a takings claim in the event that a physical invasion has not occurred, pointing to the

<sup>59</sup> See *Shively*, 152 U.S. at 57–58; *Champlin’s Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003) (noting that the public trust doctrine grants the state title to all land below the high-water mark for the public benefit); *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999) (explaining that the state’s authority over the land is limited by Article 1, Section 17 of the Rhode Island Constitution); *Greater Providence Chamber of Commerce*, 657 A.2d at 1041 (“The public trust doctrine holds that the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public.”).

<sup>60</sup> 657 A.2d at 1041.

<sup>61</sup> *Id.*

<sup>62</sup> See *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321–22 (2002); see also Parenteau, *supra* note 1, at 132 (noting *Tahoe-Sierra’s* place as the most recent case in a line of public trust doctrine takings cases).

<sup>63</sup> U.S. CONST. amend. V; see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

<sup>64</sup> See *Penn Cent. Transp. Co.*, 438 U.S. at 124; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>65</sup> *Penn Cent. Transp. Co.*, 438 U.S. at 138.

<sup>66</sup> *Id.* at 124.

Court's opinion in *Pennsylvania Coal Co. v. Mahon*.<sup>67</sup> Ultimately, the Court in *Penn Central* held that the New York City ordinance protecting certain landmarks did not constitute a taking because the restrictions it imposed were substantially related to the promotion of the general welfare, permitted reasonably beneficial use of the landmark site, and also afforded the owners opportunities to enhance the property.<sup>68</sup>

Since announcing the tripartite framework, the Court has been careful to note that the three categories of the analysis are intended to serve as guideposts, rather than as strict elements.<sup>69</sup> Ultimately, all takings analyses may be distilled to the maxim contained in *Pennsylvania Coal*: when a regulation goes too far, the courts will consider the regulation a taking.<sup>70</sup> This notion, articulated by Justice Oliver Wendell Holmes, Jr. in *Pennsylvania Coal*, was later interpreted by the Court in *Penn Central* as a general commandment to consider any facts it feels would be relevant to the inquiry of whether a regulation goes too far.<sup>71</sup>

The United States Supreme Court utilized the *Penn Central* analysis again in *Lucas v. South Carolina Coastal Council*, where the Court held that a law eliminating all economically beneficial use of land constituted a taking under the Fifth Amendment.<sup>72</sup> The Court in *Lucas* explained that takings analyses are generally *ad hoc*, fact-specific inquiries, but also noted: “[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>73</sup> The Court also explained, however, that a property owner may expect the uses of his property to be restricted by various measures enacted by the state in a legitimate use of its police powers.<sup>74</sup> In that regard, a government action must do no more than duplicate the result that could have been achieved in the courts; the *Lucas* Court thus held that the Fifth Amendment's Takings Clause does not require compensation when an owner is barred from using land in a manner that has already been prohibited by “existing rules or understandings.”<sup>75</sup>

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<sup>67</sup> *Id.* at 127; see *Pa. Coal. Co.*, 260 U.S. at 414 (holding that a Pennsylvania statute effectively destroyed the only property rights reserved by the claimant, constituting a taking without just compensation).

<sup>68</sup> *Penn Cent. Transp. Co.*, 438 U.S. at 138.

<sup>69</sup> See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002).

<sup>70</sup> See *Pa. Coal Co.*, 260 U.S. at 415.

<sup>71</sup> See *Penn Cent. Transp. Co.*, 438 U.S. at 124; *Pa. Coal. Co.*, 260 U.S. at 415.

<sup>72</sup> *Lucas v. S. C. Coastal Council*, 505 U.S. 1003, 1030 (1992); see *Penn Cent. Transp. Co.*, 438 U.S. at 124.

<sup>73</sup> *Lucas*, 505 U.S. at 1019.

<sup>74</sup> *Id.* at 1027.

<sup>75</sup> U.S. CONST. amend. V (providing that no private property shall be taken for public use without just compensation.); *Lucas*, 505 U.S. at 1029–30.



In that vein, the Court determined that it seemed unlikely that common-law principles would have prevented the owner from developing his beachfront property.<sup>76</sup> The Court also stated, however, that the question of whether common-law principles would have prevented the owner from developing his property should be answered by the state court, and the Court thus remanded *Lucas* to the lower court to consider whether any principles of South Carolina's nuisance or property law prohibited the claimant from developing his beachfront property.<sup>77</sup>

### III. ANALYSIS

In *Palazzolo v. State*, the Rhode Island Superior Court held that the state's employment of the public trust doctrine to bar Palazzolo from developing his land adjacent to Winnapaug Pond did not constitute a regulatory taking, and Palazzolo was therefore not owed compensation.<sup>78</sup> Even if the state had not cited the public trust doctrine, the court held that Palazzolo's proposed development would have constituted a public nuisance, which would preclude Palazzolo's takings claim in its entirety.<sup>79</sup>

In weighing the character of the government action, the economic effects of the regulations on Palazzolo, and Palazzolo's reasonable investment-backed expectations, the court was required to confront the question of whether the public trust doctrine limited the title of the land originally acquired by Palazzolo.<sup>80</sup> The court agreed with the state's assertion that the public trust doctrine applied to Palazzolo's land because Winnapaug Pond is a tidal body of water, and because approximately half of his property sits below the mean high-water mark.<sup>81</sup> Moreover, the court did not find any evidence on the record to suggest that the state had modified the applicability of the public trust doctrine to Palazzolo's property.<sup>82</sup> Turning to the further takings analysis mandated by the United States Supreme Court, the court noted that the public trust doctrine substantially impacted Palazzolo's title to the land, even if it did not serve as a total bar to his takings claim.<sup>83</sup>

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<sup>76</sup> *Lucas*, 505 U.S. at 1031.

<sup>77</sup> *Id.*

<sup>78</sup> *Palazzolo VI*, No. 88-0297, 2005 R.I. Super. LEXIS 108, at \*59 (R.I. Super. Ct. July 5, 2005).

<sup>79</sup> *Id.* at \*24 ("Because clear and convincing evidence demonstrates that Palazzolo's development would constitute a public nuisance, he had no right to develop the site as he has proposed. Accordingly, the State's denial to permit such development cannot constitute a taking.")

<sup>80</sup> *See id.* at \*25.

<sup>81</sup> *Id.* at \*26.

<sup>82</sup> *See id.* at \*29 ("Palazzolo has not shown any such legislative action in relation to the property in question. Nor has there been either express or implied state approval or acquiescence to the filling of tidal waters upon which [Palazzolo] has relied to his detriment.")

<sup>83</sup> *Id.* at \*30 ("Although the public trust doctrine cannot be a total bar to recovery as to this takings claim, it substantially impacts [Palazzolo]'s title to the parcel in question and has a direct rela-

Subsequently, the court concluded that the state's invocation of the public trust doctrine did not rise to the level of a government action resembling a taking.<sup>84</sup> The state's denial of Palazzolo's plans was not a physical taking, and its restriction on use constituted something akin to a partial regulatory taking.<sup>85</sup> In addition, the public trust doctrine was not directed at Palazzolo in particular, as it impacted all owners of property along the marsh equally; the regulatory scheme's legitimacy weakened Palazzolo's claim that a taking of his property had occurred.<sup>86</sup>

From there, the court considered the economic impact of the state's denial on Palazzolo.<sup>87</sup> Even with the assumption that the public trust doctrine did in fact diminish the value of Palazzolo's property, the court explained that such a diminution in value does not itself give rise to a taking for which compensation is owed.<sup>88</sup> Further, the court found Palazzolo's monetary claims unconvincing.<sup>89</sup> The court reasoned that Palazzolo would actually profit *more* if he were to develop the one lot on his property left untouched by the public trust doctrine and sell the lot with the undeveloped marsh, rather than develop it in the manner that he proposed.<sup>90</sup>

Finally, the court evaluated Palazzolo's reasonable investment-backed expectations regarding his marsh property, concluding that Palazzolo's reasonably understood expectations were modest, at best.<sup>91</sup> Here, the applicability of the public trust doctrine serves as a critical factor in the court's analysis.<sup>92</sup> Because half of his property was subject to the public trust doctrine, and because the state never modified or waived the development restrictions that applied to Palazzolo's property by way of the public trust doctrine, Palazzolo never actually possessed the right to develop half of his property in the first place.<sup>93</sup> Further, both Palazzolo and the property's previous owner, Urso, were seemingly aware of the land's questionable value.<sup>94</sup> As an attorney, Urso might have even

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tionship to [Palazzolo]'s reasonable investment-backed expectations . . ."); see *Palazzolo V*, 533 U.S. 606, 632 (2001).

<sup>84</sup> See *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*34.

<sup>85</sup> *Id.* (citing *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322–23 (2002)).

<sup>86</sup> *Id.* at \*36 (citing *Alegria v. Keeney*, 687 A.2d 1249, 1254 (R.I. 1997)).

<sup>87</sup> See generally *id.* at \*37–48 (weighing the various economic factors of the regulation's application to Palazzolo).

<sup>88</sup> *Id.* at \*48 (“However, pecuniary loss or diminution in value is not controlling on the issue of confiscation because a property owner does not have a vested property right in maximizing the value of his property.”) (internal citation and quotation marks omitted).

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at \*43–48.

<sup>91</sup> *Id.* at \*55–56.

<sup>92</sup> See *id.*

<sup>93</sup> *Id.* at \*54–55.

<sup>94</sup> *Id.* at \*51 (“The obvious challenges to profitable development . . . of the salt water marsh on the shore of Winnapaug Pond undoubtedly weighed heavily in Urso's practical decision to sell out to

been aware of the public trust doctrine's applicability to the parcel, yet he did not disclose that fact to Palazzolo in the sale.<sup>95</sup> Even so, the court seemed uninterested in considering whether Palazzolo knew the public trust doctrine would be material in a takings analysis, and limited its discussion to whether the public trust doctrine applied at all.<sup>96</sup> Finding that the public trust doctrine applied, the court held that Palazzolo's claim failed the third prong of the takings analysis articulated in *Penn Central Transportation Company v. City of New York* and Palazzolo's claim collapsed.<sup>97</sup>

Palazzolo's lack of reasonable investment-backed expectations and the fact that the Coastal Resources Management Plan ("CRMP") regulations did not bar him from constructing a dwelling on the upland portion of his property were key factors in the court's decision in *Palazzolo*.<sup>98</sup> At the core of this evaluation, however, was the court's weighing of the testimony of several expert witnesses tasked with appraising the land's value, who ultimately concluded that Palazzolo had not demonstrated a severe enough adverse economic impact to sustain a takings claim.<sup>99</sup> Diminution in value is relevant for the purposes of determining the amount of compensation owed, assuming a taking has been proven.<sup>100</sup> Yet, the *Penn Central* analysis is itself something of an *ad hoc* test, with the three prongs intended to serve as guideposts rather than strict elements.<sup>101</sup> Thus, in a *Penn Central* takings analysis, a court is relatively free to consider anything that it might find relevant in determining whether a regulation "goes too far," which supports the conclusion that the Rhode Island Superior Court applied the test correctly.<sup>102</sup> While none of the factors in the analysis are intended to be dispositive on their own—and the court did not claim in *Palazzolo v. State* that any one factor was in fact dispositive—the fact that

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Palazzolo. Urso must have known that massive filling of the site was required and permission of the state would be needed for such filling. These problems were known, or reasonably should have been known, by Palazzolo as early as his initial investment and must be factored into any determination of 'reasonable investment-backed expectations.'").

<sup>95</sup> See *id.* at \*49.

<sup>96</sup> See *id.*

<sup>97</sup> *Id.* at \*57; see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

<sup>98</sup> See Parenteau, *supra* note 1, at 128–29.

<sup>99</sup> See *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*43–48 (noting that Palazzolo's land appraiser failed to account for the diminished amenity value, resulting in an unreliable figure for the land's worth); see also Petitioner's Brief on the Merits, *supra* note 17, at 37 (demonstrating that courts cannot avoid the *Lucas v. South Carolina Coastal Council* holding by finding for landowners where there exists only "a few crumbs of value").

<sup>100</sup> See *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*39–40.

<sup>101</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) ("In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in . . . essentially ad hoc, factual inquiries.'") (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124).

<sup>102</sup> See *Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002); *Penn Cent. Transp. Co.*, 438 U.S. at 124; *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*34.

Palazzolo could not claim complete title to half of his land led the court to find little basis for any significant reasonable investment-backed expectations.<sup>103</sup> This finding thus framed the court's discussion of the other two *Penn Central* factors.<sup>104</sup>

In arguing that the denial of his development requests deprived him of all economically beneficial use of his land, Palazzolo's takings claim rested upon the assumption that he owned the title to his entire marsh property at the outset.<sup>105</sup> Indeed, any claim by Palazzolo asserting that the CRMP regulations *took* a portion of his property assumed that he possessed a right that could be taken at all.<sup>106</sup> As the court later concluded, Palazzolo's assumption of total ownership proved incorrect, as the state's public trust doctrine gave the state, rather than Palazzolo, the right to determine whether the marsh would be developed.<sup>107</sup> Given the fact that Palazzolo never truly possessed the full bundle of rights that he believed he did, it is difficult to say that the state's prohibition on marsh development, absent approval, took anything from Palazzolo that would require compensation.<sup>108</sup>

Framed a different way, the right to develop the marsh, and all economic benefit connected with it, never belonged to Palazzolo in the first place.<sup>109</sup> Even if the regulation caused the value of Palazzolo's land to drop as much as ninety percent—potentially enough to favor a conclusion that a taking had occurred—the existence of the CRMP regulations and associated lack of complete title to the marshland would have been enough to provide ample warning to Palazzolo that his land held far less developmental value than he believed.<sup>110</sup> The inescapable conclusion to be drawn from this is that the vesting of ownership of certain tracts of land in the public for the public's benefit will be quite influential in a *Penn Central* analysis, even when one of the other factors may

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<sup>103</sup> See *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*49; see also *Penn Cent. Transp. Co.*, 438 U.S. at 124 (noting that, in applying such an *ad hoc* formula, the extent to which a regulation interferes with distinct investment-backed expectations is a relevant consideration); Parenteau, *supra* note 1, at 117 (predicting that Palazzolo's takings claim would fail due to his lack of reasonable investment-backed expectations vis-à-vis the marsh property).

<sup>104</sup> See *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*49; see also *Penn Cent. Transp. Co.*, 438 U.S. at 124; Parenteau, *supra* note 1, at 117.

<sup>105</sup> See Petitioner's Brief on the Merits, *supra* note 17, at \*50–51.

<sup>106</sup> See Parenteau, *supra* note 1, at 117.

<sup>107</sup> *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*57.

<sup>108</sup> See *id.*; Parenteau, *supra* note 1, at 117.

<sup>109</sup> See Parenteau, *supra* note 1, at 117.

<sup>110</sup> See *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348 (Fed. Cir. 2004) (“For purposes of this analysis, we assume the accuracy of Appollo’s claim that it lost approximately 78% of lease 5A’s value and 92% of lease 14A’s value. Even so, we conclude in light of the other two *Penn Central* factors that there has been no partial regulatory taking.”).

point towards a different outcome.<sup>111</sup> If anything, *Palazzolo* showcases the public trust doctrine as a powerful means of protection for certain tracts of environmentally or publicly significant land, capable of withstanding even challenges on constitutional grounds.<sup>112</sup>

The court's extended discussion vis-à-vis the alleged loss in value appears to be little more than a formality in practice, as mere diminution of value has not been viewed as sufficient to sustain a takings claim, with *Lucas v. South Carolina Coastal Council* being the only exception.<sup>113</sup> The court hinted at this, opening its analysis with the evaluation of the regulation's economic impact by noting that the formula for computing the correct amount of compensation is in no way enough to demonstrate that compensation is indeed owed.<sup>114</sup> Moreover, the court's conclusion with regard to the economic effects of the regulation on *Palazzolo* could hardly be construed as a surprise, as the United States Supreme Court affirmed the earlier Rhode Island Supreme Court ruling that *Palazzolo* failed to establish a deprivation of all economic value.<sup>115</sup>

#### CONCLUSION

In light of *Palazzolo*'s murky title to the marshland, it may be tempting to view his decade-long quest in the courts as quixotic. What the final *Palazzolo v. State* decision more pointedly demonstrates, however, is the strength of the public trust doctrine. Even if we assume that Urso was aware of the public trust doctrine at the time of the sale of land to *Palazzolo*, it is not clear that Urso made it known to *Palazzolo* that his land would be subject to the public trust doctrine or what the implications of that would be. Even if Urso was aware that the public trust doctrine applied and failed to disclose that fact, the court's opinion does not seem to consider whether the claimant of a takings claim *knew* about restrictions to be material to the question of whether a compensable taking had occurred. The public trust doctrine may apply to a parcel—even if the owner is not aware of its existence—and bar the landowner from receiving compensation merely because of the public trust doctrine's applicability.

Therefore, it could certainly be said that the restrictions on development that accompanied the Coastal Resources Management Plan in 1976 made ex-

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<sup>111</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Appolo Fuels, Inc.*, 381 F.3d at 1351 (“As in [an earlier decision], we think these factors taken together outweigh [plaintiff]’s economic injury, even if it was severe.”).

<sup>112</sup> See Parenteau, *supra* note 1, at 117.

<sup>113</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); Donald C. Guy & James E. Holloway, *Finding the Development Value of Wetlands and Other Environmentally Sensitive Lands Under the Extent of Interference with Reasonable Investment-Backed Expectations*, 19 J. LAND USE & ENVTL. L. 297, 316 (2004). See generally *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*43–48 (considering the public trust doctrine’s adverse impact on *Palazzolo*’s land in reaching its conclusion).

<sup>114</sup> See *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*39–40.

<sup>115</sup> See *Palazzolo V*, 533 U.S. 606, 632 (2001); *Palazzolo VI*, 2005 R.I. Super. LEXIS 108, at \*57.

plicit that which was implicit in the public trust doctrine. Had Palazzolo known about the limits that the public trust doctrine placed on his “bundle of rights” as the owner of the predominately marshland property, one might wonder whether the numerous rejections of his proposals would have come as such a surprise to Palazzolo that he felt compelled to file suit. While the Rhode Island Superior Court hints at the fact that Palazzolo knew that developing the land would be a proverbial “uphill battle” in the *Palazzolo v. State* decision, it is entirely possible that Palazzolo would have avoided purchasing the property from Urso in the first place had he known about the public’s ancient right to title in half of the marsh property.

Given that there does not seem to be any requirement of sellers to notify potential buyers of beachfront property that a portion of their property might be subject to the public trust doctrine, it might make sense to bring the public trust doctrine out from the proverbial implicit “background” and require disclosure where it may apply. Indeed, had this been a requirement when Urso sold his property, the incident may have been avoided entirely, as Palazzolo would surely have been on notice of the issues relating to his title over the land. The public trust doctrine certainly serves the public’s interest in protecting littoral land, and the *Palazzolo v. State* decision illustrates the tremendous hidden power of this ancient doctrine.