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**PALAZZOLO, THE PUBLIC TRUST, AND THE PROPERTY
OWNER’S REASONABLE EXPECTATIONS:
TAKINGS AND THE SOUTH CAROLINA
MARSH ISLAND BRIDGE DEBATE**

ERIN RYAN*

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I. INTRODUCTION

South Carolina recently promulgated new guidelines regulating the State's consideration of requests by private marsh island owners to build bridges for vehicular access through publicly owned marsh and tidelands.¹ Many thousands of these islands hug the South Carolina coast, but they are surrounded by tidelands subject to South Carolina's formidable public trust doctrine, which obligates the State to manage submerged lands and waterways for the benefit of the public.² This piece evaluates the relationship between the public trust doctrine and the takings subtext³ to the debate over the new guidelines – a relationship that has become particularly interesting in the aftermath of a key Supreme Court takings decision, *Palazzolo v. Rhode Island*,⁴ in which the public trust doctrine made a late-breaking appearance on remand.

¹ S.C. CODE ANN. REGS. 30-12(N) (2006) (replacing the existing regulation declared invalid by the South Carolina Supreme Court for vagueness). The regulations were promulgated by the Office of Ocean and Coastal Resource Management (OCRM). See Office of Ocean and Coastal Res. Mgmt., Dep't of Health & Env'tl. Control, available at <http://www.scdhec.net/environment/ocrm> (last visited Feb. 4, 2007).

² See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). Traditionally, the common law doctrine has focused on protecting fishing and navigational values, although more modern articulations of the doctrine have also rendered protection for ecological, recreational, and scenic values associated with submerged lands. See, e.g., *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 712, 728 (Cal. 1983). Because other pieces in this symposium issue provide such careful treatments of the public trust doctrine, this essay defers to these sources for a fuller exposition of the doctrine. See, e.g., J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223 (2006). See also Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477 (2001).

³ Two kinds of alleged takings have surfaced in the South Carolina Marsh Island debate: (1) takings alleged when people who believe they own islands discover that, under the state's expansive public trust doctrine, they actually belong to the state, see generally *Op. S. C. Att'y Gen.*, 2003 S.C. AG LEXIS 231 (Dec. 5, 2003) (advising that, absent clear and convincing evidence of a grant of ownership by the sovereign, the state presumptively owns the marshlands); and (2) takings alleged when people who clearly do own private islands contemplate being denied permission to build a bridge over public tidelands to access them, see Ellison Smith, Attorney, Smith Bundy Bybee & Barnett, Presentation at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interest in Coastal and Marsh Islands (Sept. 8, 2006) available at <http://www.law.sc.edu/elj/2006symposium/> (last visited Feb. 4, 2006). This piece is exclusively concerned with the second category of alleged takings.

⁴ *Palazzolo v. State*, No. 88-0297, 2005 R.I. Super LEXIS 108 (R.I. Super. Ct. July 5, 2005) (holding the public trust doctrine is a background principle of property law and can block development on tidal lands), *remanded*, *Palazzolo v. State*, 785 A.2d 561 (R.I. 2001),

After exploring the takings-related anxiety embedded in the South Carolina bridge controversy, this essay reviews the *Palazzolo* saga through its ultimate disposition on remand, and analyzes its significance not only for the marsh island bridge debate but for the broader array of land use controversies that involve wetlands, tidelands, and other submerged lands. Rhode Island's successful reliance on the public trust doctrine in defending the *Palazzolo* claim on remand – bolstered by a related analysis in *McQueen v. South Carolina Coastal Council*⁵ – suggests that regulatory takings claims brought by disappointed bridge permit seekers are unlikely to succeed. Both decisions hold that the public trust doctrine forms part of the background principles of state law that inform private property owners' reasonable expectations about the potential uses of submerged lands.⁶ Because the property owner's "reasonable expectations" about development prospects are a central consideration in the legal analysis of a regulatory takings claim,⁷ recognition that the public trust doctrine limits their formation regarding submerged lands strengthens the position of the state in this and many other land use controversies that pit environmental protection of wetlands and tidelands against opposing private property interests.

II. TAKINGS ANXIETY AND THE SOUTH CAROLINA MARSH ISLAND BRIDGE CONTROVERSY

The State of South Carolina is no stranger to the special vexations of managing fragile coastlands, having famously (and unsuccessfully) defended in *Lucas v. South Carolina Coastal Council*⁸ its ambitious Beachfront Management Act,⁹ which attempted to protect eroding coastal resources by curtailing development of private waterfront lands.¹⁰ Accordingly, the new marsh island bridge guidelines arrive amidst an already charged debate about the appropriate balance of public and private interests in the management of South Carolina's unique coastal lands.

remanded, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *aff'g in part and rev'g in part*, *Palazzolo v. State ex rel. Tarvares*, 746 A.2d 707, (R.I. 2000). The Superior Court's final decision, No. 88-0297, is not reported in A.2.

⁵ *McQueen v. S.C. Dep't of Health & Envtl. Control*, 540 U.S. 982 (S.C. 2003).

⁶ *Palazzolo v. State*, No. 88-0297, 2005 R.I. Super LEXIS 108 at *25 (R.I. Super. Ct. July 5, 2005) (not reported in A.2); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119-120 (S.C. 1995).

⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978).

⁸ 505 U.S. 1003, 1015 (1992) (requiring compensation whenever a state regulation eliminates all economically viable use of a parcel of private property).

⁹ S.C. CODE ANN. § 48-39-280 (1988) (current version available at S.C. CODE ANN. § 48-39-280 (2006)).

¹⁰ *Lucas*, 505 U.S. at 1008-1009.

A. *South Carolina's Marsh Islands and the New Guidelines*

The South Carolina coastline pairs miles of ocean-fronting beach with some 3,500 marsh islands that buffer the mainland shore.¹¹ Many of these islands are privately owned,¹² but the prohibitive expense of bridge-building has ensured that until recently, only the largest and most developed coastal islands have been joined to the mainland by vehicular bridges.¹³ However, the recent boom in coastal property values has shifted priorities among many island owners, who are increasingly seeking State permission to erect vehicular bridges that promise easier access and more profitable sales.¹⁴

The former guidelines – criticized as too strict by many disappointed permit seekers and too permissive by many disappointed neighbors¹⁵ – were invalidated in 2005 by the South Carolina Supreme Court,¹⁶ which held them void for vagueness in failing to clearly establish which islands were subject to the regulations in the first place.¹⁷ In the chaos that followed dissolution of what regulatory guidance had once existed, clarion voices were raised by stakeholders on all sides of the issue.¹⁸

¹¹ See J. DAVID WHITAKER ET AL., S.C. DEP'T OF NATURAL RES., AN ECOLOGICAL CHARACTERIZATION OF COASTAL HAMMOCK ISLANDS IN SOUTH CAROLINA I (2004) (cataloging the ecological value of South Carolina's marsh islands), available at http://www.csc.noaa.gov/id/DNR_Final_1_report_December.pdf (last visited Feb. 4, 2006); see also S.C. Dep't of Natural Res., COASTAL ZONE AND MARINE ECOREGION TERRESTRIAL AND AQUATIC HABITATS 3 (2005), available at <http://www.dnr.sc.gov/cwcs/pdf/habitat/CoastalZoneHabitat.pdf> (last visited Feb. 4, 2006).

¹² See *Saving the Marsh Islands*, HERALD (Rock Hill), Nov. 23, 2004, at 5A. *But see New Safeguard for Marsh Islands*, POST AND COURIER (Charleston), Dec. 30, 2003, at 10A (reporting an opinion by the South Carolina Attorney General concluding marsh islands are presumptively owned by the state absent a specific title grant from the state).

¹³ See generally Bo Petersen, *Lawmakers Get a Fresh Look at Marsh Islands; Boat Tour an Effort to Push New Rules to Govern Development*, POST AND COURIER (Charleston), Mar. 7, 2006, at B1.

¹⁴ See WHITAKER ET AL., *supra* note 11, at 1.

¹⁵ Nancy Vinson, Dir. Water Quality and State Legislative Programs, Coastal Conservation League, Presentation at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interest in Coastal Marshes and Marsh Islands (Sept. 8, 2006) available at <http://www.law.sc.edu/elj/2006symposium/> (last visited Feb. 4, 2006).

¹⁶ S.C. Coastal Conservation League v. Dep't of Health & Env'tl. Control, 610 S.E.2d 482 (S.C. 2005) (holding S.C. CODE ANN. REGS. 30-12 N (2005) void for vagueness).

¹⁷ *Id.* at 486 (holding that the guidelines, which governed bridge permits for "small islands," failed to define adequately the qualifier "small").

¹⁸ See, e.g., *Insist on Island Protections*, POST AND COURIER (Charleston), Mar. 12, 2006, at A10; Tommy Howard, *Marsh Islands Legislation Pending*, GEORGETOWN TIMES, Apr. 17, 2006, available at

Coastal conservation advocates urged the State to limit bridge-building in the coastal zone as much as possible, fearing the establishment of a vast network of bridges that would fragment the tidelands and damage vulnerable features of the coastal ecosystem.¹⁹ (After all, it was the precarious state of South Carolina's coast that had motivated the coastal management agency to take the drastic step of foreclosing all development on the now-famous oceanfront Isle of Palms parcel belonging to David Lucas.)²⁰ Meanwhile, property rights advocates urged the State not to further impede the realization of land owners' investment-backed expectations regarding valuable waterfront properties.²¹ (After all, Lucas's victory at the Supreme Court was considered a vindication of property owners' conviction that state regulation had already gone too far in burdening coastal landowners for the benefit of the general public.)²² Debate over the future direction of the regulatory guidelines was contentious, and the result uncertain.²³

Forged in the clash of this contest, the new guidelines seek a renewed balance between these competing interests – one that provides meaningful protection for the important public commons associated with coastal lands²⁴ while remaining vigilant on behalf of private property rights (or at least against further takings liability on the part of the State). The guidelines foreclose the possibility of bridges to all islands measuring less than one acre in area or lying either less than 100 or more than 1500 feet from shore.²⁵ Other claims are subjected to a balancing algorithm that considers the size of the island, its distance from shore, and other pertinent details

http://www.zwire.com/site/news.cfm?newsid=16488698&BRD=2081&PAG=461&dept_id=385210&rfti=6 (last visited Feb. 4, 2006).

¹⁹ See *Restore Protections to Islands*, POST AND COURIER (Charleston), Mar. 5, 2005, at 12A; cf. WHITAKER ET AL., *supra* note 11, at 100 (cataloging the ecological values of South Carolina's marsh islands). On the basis of the rich biological diversity that exists on small marsh islands, the authors of the study urge policymakers that "[i]slands should not be exempted from protection based upon size." *Id.*

²⁰ *Lucas*, 505 U.S. at 1008.

²¹ See generally Bo Petersen, *Marsh Island Bridges in Flux; House Panel on Tuesday Considers Controversial Rules*, POST AND COURIER (Charleston), Apr. 16, 2006, at B1; Jacob Jordan, *Proposed State Rules at Center of Dispute Over Coastal Land*, THE STATE (Columbia), Mar. 19, 2006, at F1.

²² See, e.g., Gilbert Halverson, Editorial, *Radical Environmentalists Stepping All Over Bill of Rights*, CAPITAL TIMES (Madison), Oct. 19, 1994, at 11A.

²³ Jordan, *supra* note 21, at F1.

²⁴ See, e.g., Ruhl & Salzman, *supra* note 2; Erin Ryan, *New Orleans, the Chesapeake, and the Future of Environmental Assessment: Overcoming the Natural Resources Law of Unintended Consequences*, 40 U. RICH. L. REV. 981 (2006).

²⁵ S.C. CODE ANN. REGS. 30-12(N)(2) (2006).

suggesting either the potential for great ecological harm to public trust values if a bridge were erected or great personal harm to the owner if a sought-after permit were denied.²⁶

The new guidelines imply that nearly 54% of all marsh islands (or 1,862 separate islands) would be automatically denied bridge permits because they are smaller than one acre in size.²⁷ Of the remaining 46%, a sizeable percentage would also fail the requirements regarding distance from shore.²⁸ Given the tenor of the debate preceding promulgation of the new guidelines, we might expect considerable unhappiness among potentially large numbers of island owners. Accordingly, there has been no shortage of speculation about the potential for new takings litigation along the South Carolina coast.²⁹

B. Takings Anxiety Along the Coast

Still, one might fairly ask whether the “takings” question even properly arises in this context. The very nature of the government’s action in denying permission for an island owner’s proposed bridge is not suggestive of the classical regulatory taking, in which a government regulation denies an owner certain economically valuable use of her private property in service of some legitimate public purpose. The bridge guidelines don’t even directly regulate an owner’s use of her own land; rather, they address the way in which the State uses *its* land – i.e., whether to use public trust tidelands for the support of a bridge to a private island.³⁰ And yet, anxiety about the takings dimension of the new guidelines emanates from all sides of the debate.³¹

²⁶ *Id.*

²⁷ See WHITAKER ET AL., *supra* note 11, at 1 (noting that “[t]here are approximately 3,467 coastal islands . . . [o]f these islands, 53.7% are less than once acre”).

²⁸ Richard Chinnis & Debra Hernandez, *South Carolina Coastal Marsh Island Management Strategy*, PROCEEDINGS OF THE 14TH BIENNIAL COASTAL ZONE CONFERENCE, NEW ORLEANS, LA, at 3 (July 17-21, 2005) available at http://www.csc.noaa.gov/cz/2005/CZ05_Proceedings_CD/pdf%20files/Chinnis.pdf (last visited Feb. 4, 2006) (in a study of 2,076 islands unprotected from development and presently without bridge access, finding that 44% (914) are greater than 1000 feet from shore, 10% (207) are less than 50 feet from shore, and 46% (955) are less than 1000 feet from shore and 10% (207) of all islands are less than 50 feet from the shore).

²⁹ Interview with Nancy Vinson, Dir. of Water Quality and State Legislative Programs, Coastal Conservation League, in Columbia, SC (Sept. 8, 2006).

³⁰ S.C. CODE ANN. REGS. 30-12(N)(1)(a) (2006).

³¹ Nancy Vinson, Dir. Water Quality and State Legislative Programs, Coastal Conservation League, Henry McMaster, S.C. Attorney General, Ellison Smith, Attorney, Smith Bundy Bybee & Barnett, Carolyn Risinger Boltin, Deputy Comm’r, Ocean and Coastal Res. Mgmt.

Anxiety on the part of DHEC, the state agency that authored the new guidelines, is made evident by the precisely crafted language in key portions of the guidelines themselves. For example, project standards regarding “eligibility to apply for a bridge permit” highlight the tension between the public and private interests at issue, and have clearly been designed in an effort to balance both:

The decision on whether to issue or deny a permit for a bridge to a coastal island must be made with due consideration of the impacts to the public trust lands, critical area, coastal tidelands and coastal waters, weighed against the *reasonable expectations of the owner* of the coastal island.³²

The emphasized text is no accident; balancing public interests against “the reasonable expectations” of private landowners reflects a critical element of the general inquiry into whether a regulatory taking has occurred.³³ An exquisite sensitivity to such inquiries (perhaps acquired during the lengthy *Lucas* litigation), may well have played a role in the agency’s decision to include that very language here.

Meanwhile, island owners seeking permits under the new guidelines have exhibited strong expectations that they are indeed entitled to build bridges – expectations that, if violated, might create an impetus to sue for compensation.³⁴ For example, one South Carolina newspaper reported on growing anxiety among island owners about the new guidelines in an article published a few months before they were promulgated.³⁵ Concerned that he would not be able to bridge his small island to the mainland, Ted Mamunes argued that his island would become virtually valueless to him without a

S.C. Dep’t of Health & Envtl. Control, Presentations at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interests in Coastal Marshes and Marsh Islands (Sept. 8, 2006) *available at* <http://www.law.sc.edu/elj/2006symposium/> (last visited Feb. 4, 2006) (all presentations noted concerns about takings).

³² S.C. CODE ANN. REGS. 30-12(N)(2)(a) (2006) (emphasis added).

³³ *Penn Cent. Transp. Co.*, 438 U.S. 104 (setting forth the Supreme Court’s principal test for determining whether a private owner may seek compensation under the Fifth Amendment for partial economic deprivations associated with a land-use regulation). In *Penn Central*, the Court held that the application of New York City’s historic landmarks law did not constitute a compensable taking because the restrictions were aimed at benefiting the public welfare and permitted beneficial use of the property. *Id.* at 124. *See also infra*, text accompanying note 116.

³⁴ Jordan, *supra* note 21, at F1.

³⁵ *Id.*

bridge, lamenting that “[i]t’s useless to me if I can’t get to it.”³⁶ Mamunes’ choice of words here is as significant as DHEC’s careful phrasing in the guidelines, since a government regulation that deprives an owner of all economic value is the very categorical taking established in *Lucas*.³⁷ This is the famous *Lucas* “total wipeout” rule,³⁸ and given the South Carolina roots of the case, it’s not surprising that it would be on the minds of both property owners and regulators in the State.

Nonetheless, it is difficult to imagine a claim relating to the marsh island bridge guidelines ever falling within the ambit of the *Lucas* “total wipeout” rule. Although Mr. Mamunes doubtlessly *feels* as though his island would be useless without a bridge, it is almost certainly not the case. The new guidelines create a very different kind of regulatory hardship for marsh island owners than did the portions of the Beachfront Management Act challenged in *Lucas*.³⁹ Even if a bridge permit is denied, the island can still be accessed by means other than automobile traffic. At minimum, islands are usually accessible by watercraft of some kind, and thus amenable to varying kinds of residential, retreat, and recreational purposes – foreclosing the requisite “total wipeout” of economically viable use that triggers automatic compensation under *Lucas*. But that is not necessarily the end of the issue.

C. A Potential Claim under the Penn Central Balancing Test

A disappointed and determined owner may nevertheless allege a taking under the “ad hoc” regulatory takings balancing test set forth in *Penn Central Transportation Co. v. City of New York*,⁴⁰ the standard means of evaluating “partial” regulatory takings that leave at least some economically viable use. In such cases, the plaintiff alleges that a state regulation so

³⁶ *Id.*

³⁷ *Lucas*, 505 U.S. 1003 (ruling that application of the South Carolina Beachfront Management Act to a developer’s coastal property that deprived him of all economic benefit constituted a taking requiring just compensation without regard to the public purposes served by the regulation).

³⁸ The court in *Lucas* set forth the “categorical rule that total regulatory takings must be compensated.” *Id.* at 1026. Although *Lucas* established the “total wipeout” rule, the court in *Palm Beach Isles Assocs. v. United States* was the first to use the phrase. 208 F.3d 1374, 1380 (Fed. Cir. 2000) *remanded to* 58 Fed. Cl. 657 (Fed. Cl. 2003) (finding that the denial of a permit to fill lake bottom constituted a categorical taking, but on remand, finding that denial by the Army Corps. of Engineers was for a valid navigational purpose).

³⁹ The Beachfront Management Act challenged in *Lucas* prohibited the developer from building any occupiable structure on any part of the beachfront parcel at issue. 505 U.S. at 1008-09.

⁴⁰ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

compromises private property rights that it warrants compensation under the Fifth Amendment even though possession remains with the owner.⁴¹ Under the three factors of the *Penn Central* test, courts consider: (1) the character of the government action, (2) the economic impact of the regulation on the owner, and (3) – as the new regulations anticipate – the extent to which the challenged regulation interferes with the “reasonable, investment-backed expectations” of the landowner.⁴²

Even by this route, however, most takings claims would encounter high hurdles, especially under the first prong. Courts evaluate the character of the government action in considering its intrusiveness or unfairness with regard to the challenging landowner.⁴³ The more the regulation appears to single out individual owners to finance a collective benefit (or effectuates a permanent physical invasion by third party interlopers⁴⁴), the more likely it is to be held a taking. But the new bridge guidelines should easily survive scrutiny under this prong, as they neither single out individual landowners⁴⁵ nor imply a physical occupation⁴⁶ – nor, as aforementioned, do they even directly regulate the landowner.⁴⁷ Although the guidelines can fairly be considered land use regulations, they circumscribe not the owner’s use of privately owned land but the management decisions of the state on what is concededly *public* land.⁴⁸ This point might well prove dispositive of the entire claim, exposing a pivotal weakness that even extraordinary showings under the other prongs might not overcome. Nevertheless, it is worth probing the arguments under the remaining two prongs, both to exhaust the claim and to explore the significance of the analysis for related takings claims involving submerged lands.

We thus turn to the second consideration, which inquires into the economic impact of the regulation on the owner.⁴⁹ Most challengers are unlikely to fare much better under the economic impact prong of the test, by which the likelihood that the regulation will be held a taking tracks the degree of economic loss suffered by the private owner.⁵⁰ The more loss is suffered in comparison to what value remains, the more likely a court is to

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See, e.g.*, *United States v. Causby*, 328 U.S. 256 (1946).

⁴⁴ *See, e.g.*, *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁴⁵ *Penn Cent. Transp. Co.*, 438 U.S. at 132.

⁴⁶ *Id.* at 124.

⁴⁷ *See* discussion, *supra* Part II.B.; S.C. CODE ANN. REGS. 30-12(N)(1)(a) (2006).

⁴⁸ *Penn Cent. Transp. Co.*, 438 U.S. at 131. *See also* Ryan, *supra* note 24.

⁴⁹ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

⁵⁰ *Id.*

find a taking.⁵¹ However, though the economic impacts of a permit denial may prove considerable (in that a bridged island might prove more profitable overall than an island without a bridge), the regulations leave considerable economic value in coastal islands that can still be accessed by means other than cars, demonstrated by the high market value of even those islands that lack bridge access.⁵² As the Penn Central Transportation Company learned when it failed to win compensation for the opportunity loss of potential profits from a forbidden high rise office complex over Grand Central Station, takings law has never required that the government permit the *most* economically valuable use of land.⁵³ That's why the economic impact analysis is closely intertwined with the final prong of the test, which considers the owner's reasonable, investment-backed expectations.⁵⁴

The "reasonable expectations" prong of the test considers whether an owner deserves compensation for the loss of a right to use her land in a way that she had reasonably anticipated and substantially relied on.⁵⁵ Clearly, it is the "reasonable expectations" prong of the test that so motivated DHEC's careful phrasing of how the state should consider bridge permit applications.⁵⁶ And just as clearly, many coastal landowners are concerned about the extent to which the new guidelines might frustrate their expectations.⁵⁷ Everyone seems to expect that this part of the analysis could get tricky in application to the marsh island bridge controversy. But what, exactly, is a "reasonable" expectation?

The "reasonable expectations" prong is the most interesting and also the most unsettled in the analysis, leaving important questions unresolved. First,

⁵¹ *Id.*

⁵² For example, despite the lack of bridge access, the marsh island development Dewees Island advertises at substantial values for its remaining lots which range from \$260,000 to \$2,575,000. Dewees Island, <http://www.deweesisland.com> (last visited Feb. 4, 2006).

⁵³ *Penn Cent. Transp. Co.*, 438 U.S. at 125 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 592-93 (1962)) (using zoning laws as an example of a valid government action that prohibits the most economically beneficial use of the land); *see also* *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning law upheld in spite of 75% diminution in value of real property caused by the zoning law).

⁵⁴ *Penn Cent. Transp. Co.*, 438 U.S. at 124-25.

⁵⁵ *Id.*

⁵⁶ *See* S.C. CODE ANN. REGS. 30-12(N)(1)(a) (2006) ("The decision on whether to issue or deny a permit for a bridge to a coastal island must be made with due consideration of the impacts to the public trust lands, critical area, coastal tidelands and coastal waters, weighed against the *reasonable expectations of the owner* of the coastal island." (emphasis added)); *see also* Jordan, *supra* note 21.

⁵⁷ *See* Jordan, *supra* note 21, at F1; *see also* discussion, *supra* Part II B.

what is it that creates a reasonable expectation with which a challenged regulation might interfere? In later cases, the Court has suggested that an owner's expectations hinge on the "background principles" of a state's law of property and nuisance,⁵⁸ but what exactly does that mean? What does and doesn't count as part of the background principles of state law that inform reasonable expectations? It can't be that the background principles include all state laws, because if that were the case, no takings challenge could ever succeed on this prong of the analysis; the challenged law would simply be part of the set of principles that create an owner's legitimate expectations. But both statutory law and common law evolve over time, so how do we distinguish the subset legitimately informing an owner's reasonable expectations from the rest that don't?

Perhaps the more fruitful question to ask is: what can legitimately *destroy* expectations that might have been reasonable under a previous state of affairs? Can any new law render a previously reasonable expectation newly "unreasonable" without effecting a taking? To take a popular example in this age of increasing concern over nationwide wetlands loss, what about a modern wetlands-protective statutory scheme that withdraws much privately owned coastal land from further development? As critical a natural resource management strategy as this might be, we can at least appreciate the frustration of a long-time coastal land owner who hears about the new law just as she raises a hammer to break ground on a new foundation. But what about a would-be developer that takes title to the restricted land *after* passage of the new wetlands law? Can he claim that the law interferes with his reasonable expectations for development in such a circumstance? Indeed, these are the very facts that attracted the Supreme Court's attention in another of its recent landmark takings decisions, *Palazzolo v. Rhode Island*.⁵⁹

Given the unfavorable analyses we would expect under the first two prongs of the *Penn Central*⁶⁰ balancing test, a plaintiff challenging the new marsh island bridge guidelines could only hope to prevail on the force this third prong.⁶¹ But the recent aftermath of *Palazzolo* suggests that – to the

⁵⁸ *Lucas*, 505 U.S. at 1027-1030; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001).

⁵⁹ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *aff'g in part and rev'g in part*, *Palazzolo v. State ex rel. Tarvares*, 746 A.2d 707 (R.I. 2000).

⁶⁰ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

⁶¹ As aforementioned, even the most powerful "expectations" argument might fail to overcome unfavorable analyses on the "character" and "economic impact" prongs. Nevertheless, probing the "expectations" argument enables us not only to exhaust the claim but to explore the significance of the *Palazzolo v. Rhode Island*, 533 U.S. 606, remand and

probable relief of the State and the likely disappointment of some landowners – the “reasonable expectations” prong will provide no haven.

III. PALAZZOLO AND THE PROBLEM OF REASONABLE EXPECTATIONS

Although Anthony Palazzolo originally brought suit in Rhode Island,⁶² the story of *Palazzolo* might be rightly described as beginning in South Carolina, with the *Lucas* decision.

As aforementioned,⁶³ *Lucas* set forth the “total wipeout” rule requiring compensation whenever a regulation causes a landowner to lose 100% of all economically viable use of her land, regardless of the important social benefits that the regulation might confer.⁶⁴ The *Lucas* “total wipeout” rule can be understood as clarifying the *Penn Central* analysis at the extreme end of the “economic impact” inquiry, directing that the court’s consideration of the “character” and “expectations” prongs approaches zero whenever the economic impact inquiry points to a 100% loss by the owner. Still, *Lucas* preserved a key exception, indicating that even in such cases of total deprivation, there is no taking if the desired use prevented by the regulation is one that the owner never had the right to engage in anyway – for example, one that would create a public or private nuisance.⁶⁵ Although this reservation became known as the *Lucas* “nuisance exception,”⁶⁶ it is really an inquiry into the “background principles” of state law that tell us whether the owner had the right to engage in the prohibited use to begin with⁶⁷ – i.e., whether that right was ever a stick in the proverbial bundle that he acquired when he took title.⁶⁸ As such, we might better understand the nuisance

McQueen v. S.C. Coastal Council, 580 S.E.2d 116, decision on related takings challenges that implicate the public trust doctrine in South Carolina and elsewhere.

⁶² *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000).

⁶³ See *supra* text accompanying notes 36-38.

⁶⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992).

⁶⁵ *Id.* at 1027-30.

⁶⁶ *Id.* at 1030. See Patrick Wiseman, *May the Market do what Taking Jurisprudence Does Not: Divide a Single Parcel into Discrete Segments?*, 19 Tul. Envtl. L.J. 269, 273-274 (2006) (discussing the new *Lucas* nuisance exception) and Gary Lawson, Katharine Ferguson & Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me be Misunderstood!*”: Rediscovering the *Mathews v. Eldridge* and *Penn Central* Frameworks, 81 Notre Dame L. Rev. 1, 42-43 (2005) (discussing the Rhode Island court’s use of the *Lucas* nuisance exception in *Palazzolo*).

⁶⁷ *Lucas*, 505 U.S. at 1027-1030; see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-630 (2001).

⁶⁸ In other words, “if the contested use was not one acquired by the owner at purchase, the takings claim must be rejected at the outset due to lack of a protected property interest.”

exception as the *Lucas* “No Stick Taken” affirmative defense. But why is any of this relevant to Anthony Palazzolo? Because he arrived at the Rhode Island Superior Court claiming (albeit in a novel way) that he was the victim of a *Lucas* “total wipeout.”

Mr. Palazzolo owned waterfront real property, of which approximately 80% were wetlands adjacent to a pond and the remaining 20% uplands overlooking the pond.⁶⁹ At the time that he took title to the parcel, a statewide regulatory program limited the filling and development of wetlands like those in the lowland portion of his parcel.⁷⁰ When he sought permission to develop both the upland and wetland parts of the property, he was granted permission to build two lots in the uplands portion but denied permission to fill the wetlands to make them suitable for residential development.⁷¹

Palazzolo claimed that the regulation preventing him from developing the wetland portion of his property constituted a “total wipeout” of the value of that lowland portion of the property,⁷² raising interesting interpretive questions about the appropriate denominator in performing the total-wipeout analysis.⁷³ Palazzolo’s attempt to cast his loss as a categorical taking under *Lucas* proved unsuccessful,⁷⁴ and his case would ultimately be decided as a partial taking claim under the *Penn Central* regulatory takings balancing test.⁷⁵ But the case that would bear his name may prove critical in fleshing out some of the more unsettled areas of both rules, such as the nature of “reasonable expectations” under *Penn Central* and the scope of the No Stick Taken defense under *Lucas* (at least regarding coastal development in states like Rhode Island and South Carolina).

Michael Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 327 (2005).

⁶⁹ *Palazzolo v. Rhode Island*, 533 U.S. at 612-14. The facts presented here are simplified to reflect only those relevant to the “reasonable expectations” inquiry that is the subject of this discussion. An additional description of the Palazzolo property can be found in *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 709, 710 (R.I. 2000), and Brief of Defendant-Appellees, *Palazzolo v. Rhode Island*, No. 98-333A (R.I. 1999), WL 34749043.

⁷⁰ *Palazzolo v. Rhode Island*, 533 U.S. at 614-615.

⁷¹ *Palazzolo v. State ex rel. Tavares*, 746 A.2d at 715.

⁷² See *Palazzolo v. Rhode Island*, 533 U.S. at 630.

⁷³ See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967).

⁷⁴ *Palazzolo v. Rhode Island*, 533 U.S. at 630-31.

⁷⁵ *Palazzolo v. State*, No. 88-0297, 2005 R.I. Super LEXIS 108 at *34 (R.I. Super. Ct. July 5, 2005) (not reported in A.2).

A. Palazzolo to the U.S. Supreme Court

Palazzolo lost all the way to the Rhode Island Supreme Court, which decided there had been no taking on the simple grounds that there had been no frustration of reasonable, investment-backed expectations.⁷⁶ In the Rhode Island high court's view, the wetlands regulations that had been in place when he took title prevented Palazzolo from forming any reasonable expectation that he would ever be able to develop his new lowland property in the way he had planned.⁷⁷

The U.S. Supreme Court reversed, holding that a regulatory takings claim is not necessarily barred for lack of reasonable expectations simply because the challenged regulation precedes the owner's title.⁷⁸ Otherwise, it reasoned, the state could immunize itself against future challenges simply by passing a broad set of new legal restrictions and waiting for title in the affected properties to pass over time.⁷⁹ Remanding back to the Rhode Island Supreme Court for final determination,⁸⁰ the Court advised that the appropriate inquiry concerns reasonable expectations as against the "background principles" of the State's law of property and nuisance.⁸¹

And yet this answer leaves us adrift amid the continuing uncertainty about what qualifies as the relevant "background principles" that inform reasonable expectations. Apparently, the modern Rhode Island wetlands regulation did not – but then how far back in time must we look to find them? As some commentators have asked, must we go all the way back to the common law in 1789?⁸² Unlikely, since even *Lucas* acknowledged that background principles might evolve over time,⁸³ suggesting that they are not simply frozen artifacts from the time of a state's entry to the union.⁸⁴ But if

⁷⁶ *Palazzolo v. Rhode Island*, 533 U.S. at 616-17.

⁷⁷ *Id.* at 616.

⁷⁸ *Id.* at 632. *Palazzolo* also addressed important takings questions regarding conceptual severance (on remand), *Palazzolo v. State*, 2005 RI Super. LEXIS 108 at *34-49, and ripeness, *Palazzolo v. Rhode Island*, 533 U.S. at 616-625, but these are not relevant for the purposes of this discussion.

⁷⁹ *Palazzolo v. Rhode Island*, 533 U.S. at 628-30.

⁸⁰ *Id.* at 630.

⁸¹ *Id.* at 626, 629; *see also Lucas*, 505 U.S. at 1029.

⁸² Many commentators have asked this question, and most have answered in the negative. *See, e.g.*, Blumm & Ritchie, *supra* note 68; J.B. Ruhl, *The Background Principles of Natural Capital and Ecosystem Services—Did Lucas Open Pandora's Box?* (Fla. State Univ. Pub. Law Research Paper No. 214) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928656 (last visited Feb. 4, 2006).

⁸³ *Lucas*, 505 U.S. at 1031 (observing that "changed circumstances may make what was previously permissible no longer so").

⁸⁴ *See, e.g.*, Blumm & Ritchie, *supra* note 68.

principles can change over time, but modern legislative enactments don't count – how do we define the operative set? *Palazzolo* thus raised new questions about the *Lucas* rule without answering the persisting old question: how do we know whether an owner's expectations are *reasonable*?

B. *Palazzolo on Remand to the R.I. Courts*

After receiving *Palazzolo* on remand from the U.S. Supreme Court, the Rhode Island Supreme Court remanded the case back to the Superior Court where the original bench trial had been held with instructions to examine *Palazzolo*'s claim under the principles established in *Penn Central*.⁸⁵ Although the Rhode Island Superior Court's unpublished final decision does not resolve the more general reasonable expectations quandary, it does provide meaningful guidance for land use controversies involving submerged lands by clarifying a critical state law "background principle." Without answering the ultimate "what counts?" question, the court resolved that at the very least, the background principles of state law *do* include the public trust doctrine, and that the public trust doctrine can legitimately foreclose reasonable expectations for development that would imperil trust values.⁸⁶ On remand, the Rhode Island courts applied the Supreme Court's *Penn Central* and *Palazzolo* analyses and affirmed the original conclusion that there had been no taking, explaining its conclusion on the basis of three separate grounds: public nuisance, a tentative "No Stick Taken" rationale, and a full *Penn Central* takings analysis.⁸⁷

First, the court held that filling these wetlands would have constituted a public nuisance,⁸⁸ enabling the state's affirmative defense under *Lucas* that a regulation preventing a use that would have constituted a common law nuisance is not a taking.⁸⁹ The public nuisance rationale is intriguing, but

⁸⁵ *Palazzolo v. State*, No. 88-0297, 2005 R.I. Super LEXIS 108 (R.I. Super. July 5, 2005) (not reported in A.2), *remanded*, *Palazzolo v. State*, 785 A.2d 561 (R.I. 2001), *remanded*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *aff'g in part and rev'g in part*, *Palazzolo v. State ex rel. Tarvaes*, 746 A.2d 707 (R.I. 2000).

⁸⁶ *Palazzolo v. State*, 785 A.2d 561.

⁸⁷ *Palazzolo v. State*, No. 88-0297, 2005 R.I. Super LEXIS 108 (not reported in A.2).

⁸⁸ *Id.* at *20-21 (finding the proposed development was expected to result in nitrogen levels elevated to a degree that would damage water quality and wildlife values associated with the pond, constituting an anticipatory public nuisance).

⁸⁹ *Id.* at *20 (citing *Lucas*, 505 U.S. at 1029) (reserving the question of whether the nuisance exception applies only in cases of "total wipeout," or whether it applies more generally to claims of partial regulatory takings such as this one).

relevant to the South Carolina inquiry only if a marsh island bridge could be held to constitute a public nuisance.

Second, it held that Palazzolo had suffered no taking because Rhode Island's longstanding public trust doctrine makes clear that he *never held the right to develop these wetlands in the first place*.⁹⁰ Recognizing that the public trust doctrine protects tidewaters for "commerce, navigation, and fishery,"⁹¹ U.S. Supreme Court precedent establishes that the precise contours of the doctrine are applied based on state law.⁹² The Rhode Island court determined that, both constitutionally⁹³ and at common law,⁹⁴ Rhode Island's public trust doctrine prohibits the kind of development that Palazzolo sought.⁹⁵ In Rhode Island, the doctrine empowers and obligates the state, as trustee, to manage submerged lands (including those on private holdings)⁹⁶ to protect the scenic, recreational, and ecological trust values that would be lost were the targeted wetlands filled for development.⁹⁷ The State had first argued that the public trust doctrine prevented it from granting the permission Palazzolo sought in its 1999 brief to the Rhode Island Supreme Court,⁹⁸ before certiorari was granted to the U.S. Supreme Court. The Rhode Island court was thus comfortable in applying the antecedent "background principles" analysis suggested in *Lucas* to find that the rights Palazzolo claimed were "not part of his title to begin with," and that as a result, nothing has been taken from him when the state denied his subsequent permit applications.⁹⁹

At this point in its analysis, the court thus flirted with the *Lucas* No Stick Taken defense, finding that, as part of the background principles of

⁹⁰ *Palazzolo v. State*, 2005 R.I. Super LEXIS 108 at *26.

⁹¹ *Id.* at *26-27 (citing *Shively v. Bowlby*, 152 US 1 (1894)).

⁹² *Ill. Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Shively*, 152 U.S. at 15.

⁹³ *Palazzolo v. State*, 2005 R.I. Super LEXIS 108 at *28 (noting the public trust doctrine is incorporated in the R.I. CONST. art. 1, §17).

⁹⁴ *See, e.g., Champlin's Realty Assoc. L.P. v. Tillson*, 823 A.2d 1162 (R.I. 2003); *Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999).

⁹⁵ *Palazzolo v. State*, 2005 R.I. Super. LEXIS 108 at *29 (citing *Warren*, 740 A.2d at 1255, 1259-60).

⁹⁶ *See, e.g., Champlin's Realty Assocs. L.P.*, 823 A.2d at 1167 (holding that the State can cede trust resource ownership while retaining rights and powers under the public trust doctrine).

⁹⁷ *See* Michelle A. Ruberto & Kathleen A. Ryan, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 SUFFOLK U. L. REV. 353, 378-379 (1990).

⁹⁸ Brief of Defendant-Appellees at *34, *Palazzolo v. Rhode Island*, No. 98-333A (R.I. 1999), WL 34749043.

⁹⁹ *Palazzolo v. State*, 2005 R.I. Super LEXIS 108 at *24-25 (citing *Lucas*, 505 U.S. at 1027).

state law, the public trust doctrine so governed the acquisition of property rights in Rhode Island that Palazzolo's bundle had never included a stick that would empower him to fill those wetlands without sovereign permission.¹⁰⁰ Moreover, the doctrine makes clear that such permission would not be forthcoming if the proposal would compromise trust values.¹⁰¹ Thus, when permission was refused, Palazzolo should not have been surprised – and he certainly could not claim that the state had frustrated any “reasonable expectations.”¹⁰² However, the court conceded uncertainty regarding whether the No Stick Taken defense may be applied outside the scope of a *Lucas* total wipeout claim, leaving this part of its analysis vulnerable to challenge.¹⁰³ Other courts¹⁰⁴ and commentators¹⁰⁵ have reasoned that the underlying logic of what this piece calls the “No Stick Taken” defense must apply to any kind of takings challenge, because whether the property right claimed violated was actually owned by the claimant should not hinge on whether the claim is one for total or partial deprivation of economic use. Nevertheless, the Rhode Island court acknowledged this potential problem – but found it unnecessary to resolve in light of its third ground for decision.¹⁰⁶

C. Penn Central, *The Public Trust Doctrine, and the Property Owner's Reasonable Expectations*

Most significant for submerged lands disputes like the marsh island bridge controversy is the court's third analysis, by which it found no taking under the *Penn Central* balancing test notwithstanding the first two grounds for defeat of Palazzolo's claim.¹⁰⁷ The regulation survived scrutiny under the “character of the government action” inquiry, since the permit was denied based on the State's interpretation of a neutral rule of general applicability that did not unduly single out Palazzolo.¹⁰⁸ In addition, the court held that the “economic impact” inquiry undermined Palazzolo's claim, finding that the regulation's foreclosure of wetland development was actually more

¹⁰⁰ *Id.* at *57.

¹⁰¹ *Id.* at *27 (citing *Shively*, 152 U.S. at 57-58).

¹⁰² *Id.*

¹⁰³ *Id.* at *25-26.

¹⁰⁴ See, e.g., Blumm & Ritchie, *supra* note 68, at 327 n.28 (listing decisions from the Sixth and Federal Circuits so holding).

¹⁰⁵ See, e.g., *id.* at 327; DOUGLAS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 117 (2000) (recognizing that the background principles defense applies to all inverse condemnation claims).

¹⁰⁶ *Palazzolo v. State*, 2005 R.I. Super LEXIS 108 at *57-59.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *36.

likely to enhance the overall value of the property than reduce it.¹⁰⁹ Finally, the court found that the regulation did not interfere with reasonable, investment-backed expectations, because, once again, Palazzolo *had no* reasonable investment-backed expectations.¹¹⁰ But its reasoning here departed from its similar conclusion earlier, on three grounds.

First, the court concluded that ample evidence existed to put a reasonable investor on notice that this property was not likely to yield a profitable land venture, such that no investor should have developed reasonable expectations of the sort Palazzolo claimed.¹¹¹ After all, previous investors had clearly realized that the large acreage of wetlands on this parcel would subject any development proposal to the uncertainties of seeking dredge and fill permission, and had left this parcel on the market long after all neighboring parcels had been purchased from the original owner.¹¹² As the court noted, “Constitutional takings law does not compensate bad business decisions.”¹¹³ Second, the court cited evidence from early in the proceedings that Palazzolo himself knew the investment was unlikely to be very successful, having testified at trial that of all the lots for sale in the vicinity, he knew that he had purchased “the worst of them,” and the last of them to sell.¹¹⁴ The court reasoned that he could not have suffered interference with reasonable expectations if even he did not expect much from this particular investment.¹¹⁵

But most important for our purposes, the court held that the public trust doctrine, as part of the State of Rhode Island’s background law of property, precluded Palazzolo from ever forming reasonable expectations that he would be able to fill wetlands such as these.¹¹⁶ The court applied reasoning similar to that underlying its second alternative holding, but here in a robust context immune from any vulnerability associated with applying the *Lucas*

¹⁰⁹ The court made this determination based on evidence forecasting that Palazzolo could expect a lower return on investment if he undertook the expensive prospect of developing even the wetland lots than he could expect from developing only the upland parcels (and reaping the higher prices they would command overlooking an undeveloped marsh than they would overlooking a residential subdivision). *Id.* at *45-46.

¹¹⁰ *Id.* at *59.

¹¹¹ *Id.* at *51-56.

¹¹² *Palazzolo v. State*, 2005 R.I. Super LEXIS 108 at *51.

¹¹³ *Id.* at *52.

¹¹⁴ *Id.* at *49.

¹¹⁵ *Id.* at *50 (“The third prong of the *Penn Central* analysis . . . clearly requires a determination of realistically achievable economic goals.”).

¹¹⁶ *Id.* *25.

No Stick Taken defense in a *Penn Central* partial taking context.¹¹⁷ The State's background principles of law determine which sticks – which rights – Palazzolo acquired when he took title to the land, and accordingly, informed his reasonable expectations about the extent of those rights.¹¹⁸ The framing of Palazzolo's expectations around the background principle of the public trust doctrine fits squarely within the third factor of the *Penn Central* test,¹¹⁹ even if the No Stick Taken defense has not yet been approved by the U.S. Supreme Court to stand as an independent ground on which to deny a partial takings claim. The *Penn Central* analysis requires consideration of the owner's reasonable expectations,¹²⁰ and the Rhode Island Supreme Court easily concluded that the State's strong public trust doctrine foreclosed the very formation of reasonable expectations in this case.¹²¹

The *Palazzolo* remand does not suggest a unifying theory to define “background principles” generally, nor does it establish what properly informs an owner's “reasonable expectations” in all cases, but it does provide meaningful guidance to states, owners, and the courts that mediate their claims over the legal boundaries between public and private interests in coastal and wetland areas.¹²² The Supreme Court's takings jurisprudence has given us a tool with which to think about an important aspect of private rights that requires protection against public incursion, which are the investments that owners make in reasonable reliance on the background principle of state law. While it remains unclear exactly how deep legal rules must run before they earn a place among these principles, the public trust doctrine – long received as common law in most states and often adopted constitutionally as well¹²³ – is easily among them. The public trust doctrine establishes a set of sticks in submerged land that remain held by the public,¹²⁴ even when the others in the bundle are taken privately. And when

¹¹⁷ *Id.*

¹¹⁸ *Palazzolo v. State*, 2005 R.I. Super LEXIS 108 at *25.

¹¹⁹ *Id.* at *24-25.

¹²⁰ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹²¹ *Palazzolo v. State*, 2005 RI Super LEXIS 108 at *24-25.

¹²² *See Palazzolo v. Rhode Island*, 533 U.S. at 627.

¹²³ *See Ryan, supra* note 2, at 478-79.

¹²⁴ Some commentators have expressed anxiety that the public trust doctrine may be too amorphous – too dangerously vulnerable to expansion – to be entrusted among the background principles of state law. *See, e.g.*, Barton Thompson, Jr., Robert E. Paradise Professor of Natural Resources, Stanford Law School, Keynote Address at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interests in Coastal Marshes and Marsh Islands (Sept. 7, 2006) available at <http://www.law.sc.edu/elj/2006symposium/> (last visited Feb. 4, 2006). Nevertheless, as the common law trust remains almost universally rooted in

the public exercises the rights represented by these sticks, nothing has been taken.

IV. PALAZZOLO, MCQUEEN, AND THE MARSH ISLAND BRIDGE CONTROVERSY

The *Palazzolo* remand is highly suggestive of how the third prong of a partial regulatory taking claim under the marsh island bridge guidelines – or, indeed, under any wetland or tideland protective regulation – might be entertained in a state with a strong public trust doctrine, such as South Carolina.

As an unpublished Rhode Island case, the *Palazzolo* remand is not binding in South Carolina, but similarities between coastal management issues and the strong articulations of the public trust doctrine in both states make it persuasive precedent. Like Rhode Island, South Carolina has a rich tradition of the public trust doctrine, both at common law¹²⁵ and constitutionally.¹²⁶ Rhode Island's constitutional statement of the public trust doctrine¹²⁷ is more explicitly protective of ecological concerns than South Carolina's, which stresses protection for navigability values,¹²⁸ but the South Carolina Supreme Court has interpreted the doctrine to protect considerations also including "marine life, water quality, and public access" relating to trust resources.¹²⁹ Even this distinction may be of little practical consequence in this discussion, since tideland bridges could interfere with both ecological and navigational values.

application to submerged lands even after decades of attempts to expand its scope, see Ryan, *supra* note 2, at 490, such anxiety may be unwarranted.

¹²⁵ See, e.g., *State v. Pac. Guano Co.*, 22 S.C. 50 (S.C. 1883); *Cape Romaine Land & Improvement Co. v. Ga.-Car. Canning Co.*, 148 S.C. 428 (S.C. 1926); *State v. Hardee*, 193 S.E.2d 497 (S.C. 1972).

¹²⁶ S.C. CONST. art. XIV, §4; S.C. Code Ann. §49-1-20 (2005). The language from the South Carolina Constitution reads: "[a]ll navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, impost or wharfage shall be imposed . . . unless the same be authorized by the General Assembly." *Id.*

¹²⁷ R.I. CONST. art. 1, §17.

¹²⁸ S.C. CONST. art. XIV, §4 (stating "all navigable waters shall forever remain public highways . . .").

¹²⁹ *Sierra Club v. Kiawah Resort Associates*, 456 S.E. 2d 397 (S.C. 1995); See also *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 (S.C. 2003) (finding restricting development of artificial tidelands was not a compensable taking as a result of the limits of the public trust doctrine), *cert. denied*, *McQueen v. S.C. Dep't of Health & Envtl. Control*, 540 U.S. 982 (2003).

In addition, analogous No Stick Taken reasoning was recently employed by the South Carolina Supreme Court in *McQueen v. South Carolina Coastal Council*,¹³⁰ a case in which an owner brought and lost a true *Lucas* takings claim. The *McQueen* case, which followed *Palazzo* to the Supreme Court before its remand back to South Carolina, makes a jump by the No Stick Taken rationale from the *Lucas* to the *Penn Central* context perhaps inevitable.

A. *McQueen v. South Carolina Coastal Council*

In *McQueen*, an owner had purchased two contiguous lots on manmade saltwater canals in Myrtle Beach with the hopes of developing them for residential purposes.¹³¹ Continuous erosion of the property caused the majority to revert to tidelands and critical area saltwater wetlands.¹³² When *McQueen* filed applications with the State to backfill his lots to make them solid enough to support structures, there was already insufficient high ground to develop anything at all.¹³³ The State denied his request to backfill the lots because doing so would permanently destroy the critical areas that had been established by the natural process of erosion, even though the waterways were originally manmade.¹³⁴ *McQueen* claimed a categorical taking under *Lucas*, since the remaining high ground was insufficient in size to enable any economically viable development at all.¹³⁵

Although *McQueen* prevailed in a lower court, the South Carolina Supreme Court reversed, finding that no taking had occurred because the wetlands regulations that pre-dated *McQueen*'s title prevented him from forming reasonable expectations with which the subsequent permit denials could have interfered.¹³⁶ The U.S. Supreme Court granted certiorari and then remanded to South Carolina for further consideration in light of its holding in *Palazzo* that pre-existing regulations were not dispositive of the question whether an owner could have formed reasonable expectations with which the state had unduly interfered.¹³⁷

¹³⁰ 580 S.E.2d 119.

¹³¹ *Id.* at 117.

¹³² *Id.* at 118.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *McQueen*, 580 S.E.2d at 119.

¹³⁶ *Id.* at 118.

¹³⁷ *Id.* at 118-119.

On remand, the South Carolina Supreme Court again found no taking, and like the *Palazzolo* remand, in light of the public trust doctrine.¹³⁸ Under South Carolina's public trust doctrine, it reasoned, the state holds presumptive title to tidelands and land below the mean high water mark as trustee for the public benefit.¹³⁹ Under South Carolina law, wetlands created by the encroachment of navigable waters belongs to the State and proof that this encroachment of water occurred after the time of grant does not defeat the title.¹⁴⁰ As a result, the reversion to tidelands effected a restriction on McQueen's property rights inherent in the ownership of all property bordering tidal water in the State of South Carolina.¹⁴¹ The court thus applied the No Stick Taken defense in an unassailable *Lucas* context: no stick had been taken from McQueen, reasoned the court, because the lost right to fill was one that had never been part of his bundle under the background principles of South Carolina property law.¹⁴²

Reference to the public trust doctrine, which first appeared in *Palazzolo* in the State's brief to the Rhode Island Supreme Court in 1999¹⁴³, appeared in the *McQueen* litigation relatively later, in the State's brief to the South Carolina Supreme Court in 2002.¹⁴⁴ Whether or not it was the highly visible nature of the *Palazzolo* litigation that suggested the possibility of relying on the public trust doctrine in *McQueen*, the use of the No Stick Taken rationale in the *McQueen* remand,¹⁴⁵ taken together with the analogous reasonable expectations reasoning in the *Palazzolo* remand,¹⁴⁶ suggests another formidable defense against any takings claims raised by disgruntled marsh island bridge applicants.

¹³⁸ *Id.* at 120.

¹³⁹ *Id.* (citing *State v. Yelsen Land Co.*, 216 S.E. 2d 876 (S.C. 1975) (extending public trust doctrine presumptive title by state from lands below the high water mark to include tidelands)).

¹⁴⁰ *Id.* (citing *Coburg Dairy Inc. v. Lesser*, 458 S.E. 2d 547 (S.C. 1995); *State v. Fain*, 259 S.E. 2d 606 (S.C. 1979)).

¹⁴¹ *McQueen*, 580 S.E.2d at 119-120.

¹⁴² *Id.*

¹⁴³ Brief of Defendant-Appellees, *Palazzolo v. Rhode Island*, No. 98-333A at *11 (R.I. 1999), WL 34749043.

¹⁴⁴ Brief of Petitioner, *McQueen v. S.C. Coastal Council*, No. 94-CP-26-3154 at 17 (S.C. 2003) (No. 256642).

¹⁴⁵ *McQueen*, 580 S.E.2d at 119-120.

¹⁴⁶ *Palazzolo v. State*, No. 88-0297, 2005 R.I. Super LEXIS 108 at *25 (R.I. Super. July 5, 2005) (not reported in A.2).

B. Implications for the Marsh Island Bridge Controversy

South Carolina's public trust doctrine easily falls within the background principles of state property law.¹⁴⁷ Perhaps most notorious is the long line of public trust cases extending as far back as the 1880s establishing that ownership of tidelands and marsh islands rests presumptively with the state, and can only be shown to have transferred to private owners by their presentation of an express grant.¹⁴⁸ This, then, is a doctrine that requires South Carolinians to prove a chain of title extending all the way back to the King of England to avoid potential divestment to the state of ownership interests claimed in a marsh island.¹⁴⁹ Thus, perhaps even more than in most states, the reasonable expectations of South Carolina marsh island owners must be tempered by knowledge of the doctrine as among the background principles of state law.

In this way, the South Carolina public trust doctrine forecloses any reasonable expectations by an island owner of a protected legal right to lay a bridge over public tidelands. Permission to build a bridge through public tidelands can only take place at the discretion of the State, which owns and manages public tidelands for the public benefit.¹⁵⁰ Allowing too many bridges to be built in the tidelands could seriously undermine the state's obligations as trustee, and so a successful application for a bridge permit can never be presumed; there is always a reasonable chance that a permit might be denied. Accordingly, in the *Penn Central* analysis we began above in Part II, the third prong of the test would be equally unkind to a disappointed bridge permit applicant seeking compensation for economic loss associated with a permit denial. Even if the "character of the government action" and "economic impact" inquiries were not dispositive of such a claim (despite strong arguments that they should be),¹⁵¹ the State would almost certainly prevail on the "expectations" inquiry by showing that the South Carolina public trust doctrine has always foreclosed any possible reasonable expectations by property owners that their bundles included a "bridge stick," or right of automotive access.

This analysis may disappoint some owners, but the result should not be surprising, especially when analogized to like circumstances. Although homebuilder Ted Mamunes lamented that his island "is useless if [he] can't

¹⁴⁷ See generally *Pac. Guano Co.*, 22 S.C. at 84 (1883); see also *Hardee*, 193 S.E.2d 497; *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 59 S.E.2d 132 (S.C. 1950).

¹⁴⁸ See cases cited *supra* note 147.

¹⁴⁹ See generally *Pac. Guano Co.*, 22 S.C. at 50.

¹⁵⁰ See *McQueen*, 580 S.E.2d at 118-119.

¹⁵¹ See discussion *supra* Part II.C.

get to it,”¹⁵² we’ve already established that this is unlikely, and that we can better understand his complaint as one that his island, sans bridge, is difficult to get to, and thus less valuable than it might become if it were more conveniently accessible by cars. But indeed, the same is true of all inconveniently located property, which might command higher property values if only access were somehow made easier. For owners like Mr. Mamunes, the relevant question becomes: to what extent should the State subsidize individual owners of inconveniently located property? For example:

- Could a shop owner whose property exists on the far side of an interstate assert a right to build a bridge across the interstate to a bustling economic area, just because it will make her store more profitable? (Not likely.)
- Would a landowner with property on the far side of a public park preserved for scenic views, habitat, and public recreation be allowed to pave a driveway through the park, so as to procure more convenient access to the rest of town? (Probably not.)
- Accordingly, should an owner of a small island reasonably expect that the state owes her permission to build a bridge through tidelands preserved in a natural state for public trust benefits associated with navigation, marine life, water quality, and public access and recreation?

The best basis for any such expectation in this last example might simply be that similarly situated owners on other islands have been able to build the bridges they wanted, implying that later-applying owners should be able to count on similar bridges as well. But this is a classic problem in land use management, frequently arising in the case of new zoning regulations, where early acting owners’ land uses do not ensure similar permission for later acting owners.¹⁵³ By analogy, if a bridge that would not receive approval under the new guidelines is already in place, it is a prior non-conforming use that may continue, even though later permits for similar bridges may be denied.¹⁵⁴ If a bridge that would not receive approval under

¹⁵² Jordan, *supra* note 21, at F1.

¹⁵³ See generally 83 AM. JUR. 2D *Zoning and Planning* §§ 555-627 (2006) (discussing the general rules of zoning and exceptions for prior non-conforming uses, variances, and vested rights); see also Bradford W. Wyche, *An Overview of Land Use Regulation in South Carolina*, 11 SOUTHEASTERN ENVTL. L.J. 183 (2003).

¹⁵⁴ See *Zoning and Planning*, *supra* note 153, at § 555 (“A nonconforming use is a structure or other use prohibited by the zoning regulations, but permitted because it existed when the

the new guidelines was substantially on the way to being built before they went into effect, then that owner probably has the truly “reasonable, investment-backed expectation” that warrants an exception along the lines of a vested right.¹⁵⁵ But the simple fact that an owner always thought she’d be able to do it later because others had done so earlier holds little weight in the zoning context, and should similarly hold little weight in the permitting of marsh island bridges.

Still, none of this means that South Carolina should be completely unconcerned with owners’ reasonable, investment-backed expectations when setting coastal land use regulations. There remain good policy-based reasons to consider such expectations – the same policy-based reasons that underlie their inclusion in the *Penn Central* balancing test in the first place. In some cases, such as those involving claims for bridge infrastructure by owners systematically denied infrastructure for invidiously discriminatory reasons at a time when other groups were so rewarded,¹⁵⁶ perhaps the State should affirmatively exercise its discretion to build a bridge in spite of competing considerations. These questions remain due for consideration in the ad hoc, case-by-case fashion that regulations affecting land – the least fungible of all resources – have always required.¹⁵⁷

V. CONCLUSION

In conclusion, the state may choose to consider the investment-backed expectations of landowners in making decisions about who should get a permit to build a bridge in public tidelands, and perhaps it should weigh that consideration more heavily in some cases than others. However, takings law does not *require* it in Rhode Island and South Carolina, where the public trust doctrine precludes owners from ever forming such “reasonable expectations” as a legal matter. Taken together, the *Palazzolo* and *McQueen* remands suggest that takings liability relating to regulations like the Rhode Island wetlands program and the South Carolina marsh island bridge

regulations were adopted.”); *Gurganios v. City of Beaufort*, 454 S.E.2d 912, 918 (S.C. App. 1995) (noting that “a property owner has a constitutionally protected right to continue the use following enactment of a zoning ordinance” as a nonconforming use)

¹⁵⁵ See *Vulcan Materials Co. v. Greenville*, 536 S.E. 2d 892, 901-902 (S.C. App. 2000) (finding that Vulcan, by spending nearly \$2 million and removing overburden in preparation for building before the property was rezoned, established a vested right to the development plan); see also *Wyche*, *supra* note 153.

¹⁵⁶ See Faith R. Rivers, *Preserving Heirs’ Property Along the Gullah Coast*, 15 SOUTHEASTERN ENVTL. L.J. 147 (2006).

¹⁵⁷ See Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOTIATION L. REV. 337, 338 (2002).

guidelines will be limited. Any such claims will fail under the *Penn Central* regulatory takings balancing test – if not under the “character” or “impact” inquiries, then at least for lack of “reasonable expectations,” crafted in light of the background principle of the public trust doctrine.

But the significance of these decisions extends far beyond the state lines of Rhode Island and South Carolina. The public trust doctrine has been received at common law in nearly all of the States, and many have elevated its principles to their constitutions in recognition of the importance of preserving the critical public commons protected by the trust.¹⁵⁸ Whenever these states regulate land uses to protect public trust values associated with the wetlands, tidelands, lakes, and rivers that are the subject of the doctrine, they are regulating uses long withdrawn from the realm of purely private interest by the very “background principles” of state law that govern the takings inquiry. Claims for compensable takings under environmental regulations designed to protect tidelands and wetlands – like the lawsuits brought by David Lucas and Anthony Palazzolo – will likely wane in number as they become harder to win, delighting environmental advocates at the chagrin of property rights advocates. The implications of recognizing the public trust doctrine in these terms are just beginning to be felt in Rhode Island and South Carolina, but they will surely reverberate across the nation in the ongoing legal contemplation of the enduring tension between public and private interests in submerged lands.

¹⁵⁸ See, e.g., CAL. DEP’T OF WATER RES., BULL. NO. 160-98, CALIFORNIA WATER PLAN UPDATE app. at 2A-2 (1998), available at <http://rubicon.water.ca.gov/pdfs/v1/v1ap2a.pdf> (last visited Feb. 4, 2007). “In a majority of states, the public trust doctrine requires the state to hold navigable waters, the submerged lands underneath, and adjacent lands below the ordinary high water mark in trust for the public.” Stephanie Showalter, *No Right to Walk between High Water Mark and Water’s Edge*, The National Sea Grant Law Center (Oct. 31, 2006), <http://www.olemiss.edu/orgs/SGLC/National/SandBar/3.2beach.htm> (last visited Feb. 4, 2007). Most western states have now codified the doctrine. See Michael Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 4 ISSUES IN LEGAL SCHOLARSHIP, 12, 37 (2003), available at <http://www.bepress.com/ils/iss4/> (last visited Feb. 4, 2007) (“The public trust in water now extends to at least a half dozen Western states - California, North Dakota, Idaho, Washington, Montana, and Alaska - and probably to Oregon as well. New Mexico and Wyoming have longstanding public access rights to both navigable and nonnavigable waters which could ripen into recognition of the public trust in water.”). Most state constitutions also declare that water and other resources are held in trust for the public. *Id.* at 13, n. 97. For a list of state constitution sections that mention the public trust doctrine, see Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L. J. 1169, 1176 n.19 (1997).