

**INFORMING EXPECTATIONS THROUGH VISUAL CUES:
CREATING THE ASSURANCE OF JUSTICE IN
REGULATORY TAKINGS JURISPRUDENCE**

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“It is seeing which establishes our place in the world; we explain that world with words, but words can never undo the fact that we are surrounded by it.”

—JOHN BERGER, *WAYS OF SEEING* 1 (Penguin Books 1977) (1972).

INTRODUCTION

The Founders included the Fifth Amendment’s guarantee, “nor shall private property be taken for public use, without just compensation,”¹ as assurance that the newly formed democracy would be a “just” society.² Justice, however, is an elusive concept—a reflection of society’s changing perceptions.³ Although it may be comforting to believe in an *a priori* definition of justice, and even more comforting

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¹ U.S. CONST. amend. V. The Fifth Amendment guarantee against taking without compensation is commonly referred to as the Takings Clause and was incorporated against the states through the Fourteenth Amendment in 1897. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235–41 (1897). Most states have included a similar guarantee in their constitutions, with the few that have not, including it by either statute or judicial mandate. See Marc R. Poirier, *Regulatory Takings*, in ENVIRONMENTAL LAW PRACTICE GUIDE § 10A, §§ 10A.20–10A.22[2] (Michael B. Gerard, Esq., ed., 1999) (1992) [hereinafter, Poirier, *Regulatory Takings*] (table of state taking provisions).

² E.g., William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 712 (1985) [hereinafter Treanor, *The Origins*] (discussing James Madison’s liberalist approach on property, noting that for Madison, “[a] government that provided compensation when it took real or personal property demonstrated its commitment to personal freedom”).

³ See, e.g., T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1715 (1988) (observing that “since we do not possess infinite wisdom, we are unable to make reliable assertions about the content of this conception of justice”).

to believe that such an absolute has been successfully memorialized in the Constitution, history provides proof that the concept of justice evolves with experience.⁴ This reality, however, comes into direct conflict with the popular, albeit misconceived, belief that property rights are absolute.⁵

The impetus behind the inclusion of the Takings Clause in the Fifth Amendment was the public concern for the potential of majoritarian abuse⁶—and that assurance won would not have meant nearly

⁴ See, e.g., *id.* at 1720 (noting, for example, that “[o]nly 125 years ago, our laws incorporated the idea that it was possible for one human being to own another”). The accepted function of the Supreme Court as the interpreter of the Constitution, acknowledges that words can and do change to reflect the times. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget, that it is a constitution we are expounding.”); John Brigham, PROPERTY AND THE POLITICS OF ENTITLEMENT 21 (1990) (“The opinions of the Supreme Court . . . are a running commentary on fundamental concepts, and they disclose ideological shift or continuity in the polity.”). The necessity of change in a functioning government predates the founding of the United States. See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 19 (J.G.A. Pocock ed., Hackett Publ’g Co. 1987) (1790) (“A state without the means of some change is without the means of conservation. Without such means it might even risk the loss of that part of the constitution which it wished the most religiously to preserve.”). Furthermore, even in the realm of property principles, which have been described as “sluggish, inert, and timid,” *id.* at 44, the necessity for change has been accepted:

Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . In a changing world it is impossible that it should be otherwise.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

⁵ E.g., JOHN LOCKE, *The Second Treatise on Civil Government*, in TWO TREATISES OF GOVERNMENT 286, V § 27 (Cambridge Univ. Press 1988) (1691) (standing for the proposition that the right to property, derivative of the right to life, is an absolute and a nonnegotiable element of the social contract). Notwithstanding the grounding in Lockean philosophy, some commentators have argued that the notion of absolute property rights only became generally accepted after the Supreme Court recognized diminution to investment-backed expectations as a constitutionally impermissible taking. See Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings After Palazzolo*, 46 ST. LOUIS U. L.J. 713, 731 (2002).

Early Americans did not recognize these regulations as taking property because not all expectation interests were recognized as legal interests until the Supreme Court, in a series of late nineteenth-century rate regulation cases, constitutionalized the protection of what we now call investment-backed expectations. Put simply, the bag of early modern writs did not include one for suing government officials for reducing the development potential of land caused by the legislative pursuit of moral topography.

Id.

⁶ See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 479 (1970) [hereinafter Sax, *Public Trust Doctrine*] (“The rationale [for the Takings Clause] is that economic benefits are to be

as much if the public did not have faith in the permanence of the written word.⁷ Naturally, admitting that justice is a malleable term can result in instinctive unease; but this unease should be dispelled by the realization that admitting to the term's flexibility is not to say that the definition of justice can be changed on a whim, capable of upsetting the comforting notion of justice as absolute.⁸ While memorializing a principle in writing guards against dramatic and arbitrary change,⁹ it does not preclude gradual change; for the most part, changes in the definition of justice come about through a process analogous to evolution—falling beneath the radar of conscious perception.¹⁰ It is this fact—that change is so incremental as to be accepted before there is a general awareness of choice—that maintains the assurance of security and even fools some into believing in abso-

protected against certain kinds of public acquisitiveness lest the cost of public progress be unfairly thrust upon certain individuals or groups instead of upon the general community which benefits from public enterprises.”); Treanor, *The Origins*, *supra* note 2, at 712. In general, one can view all the rights set forth in the Bill of Rights as a direct response to the concern that the Constitution did not do enough to safeguard individual rights. This concern was evident even before the adoption of the Constitution. *See generally* THE FEDERALIST No. 84 (John Hamilton) (responding to New York citizens' concern that the proposed Constitution did not have a Bill of Rights).

⁷ *E.g.*, Kraig Odabashian, Comment, *Investment-Backed Expectations and the Politics of Judicial Articulation: The Reintegration of History and the Lockean Mind in Contemporary American Jurisprudence*, 50 UCLA L. REV. 641, 643 (2002) (concluding that “[f]or Madison, the technology of a written constitution overcomes the uncertainty of an evolving political life”).

⁸ *See* Tideman, *supra* note 3, at 1715 (giving an alternate explanation to quiet society's unease based on the difficulty of any one definition gaining acceptance).

⁹ *See* Odabashian, *supra* note 7, at 643.

¹⁰ *See* BURKE, *supra* note 4, at 53 (“The science of constructing a commonwealth . . . is . . . not to be taught *a priori*. Nor is it a short experience that can instruct us”); Hulsebosch, *supra* note 5, at 727. Hulsebosch describes the evolutionary theory of informal amendment to the Constitution as one where “not everyone agrees on how and when [changes] happen[. . .]. [They] involve[] some mixture of time, the assimilation of the regulation's means into our legal culture, and the regulation's popular acceptance.” *Id.* *See also* Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6–7 [hereinafter Rose, *Property and Expropriation*] (noting that some expropriations of property are so “taken for granted that we barely even notice them”). Although a definition is sometimes changed by governmental fiat—like the emancipation of slaves—those instances are few and far between. *Id.* at 7 (finding that “rights alterations that accompany revolutions and warfare or other upheavals that create massive overthrowings of existing property rights and resource uses” are “extraordinary”); Tideman, *supra* note 3, at 1722. Even in those limited circumstances, such a fiat is the culmination of heightened awareness that a previously held notion of justice is in danger of moving outside the boundaries of justice. *See* United States v. Caltex, Inc., 344 U.S. 149, 156 (1952). For example, when property is lost during a revolution or war, the losses are accepted because loss in general is expected. *Id.* (“This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war . . .”).

lute definitions.¹¹ Furthermore, in many areas of law that are not so resistant to change as property law, there is a consensus that rigidity in the face of progress does not comport with the illusion of justice.¹²

Property rights, a society's most evident reflection of justice,¹³ should also be considered flexible and able to evolve with changing expectations—without this flexibility destroying the public's faith in its society's commitment to justice.¹⁴ Indeed, the Supreme Court recognized the need for flexibility in the seminal property case, *Penn Central Transportation Co. v. City of New York*,¹⁵ by adopting a balancing test between public interests and private interests to determine whether a regulation was compensable.¹⁶ Unfortunately, the flexibility introduced into regulatory takings jurisprudence was diminished to some extent by *Lucas v. South Carolina Coastal Council*,¹⁷ which replaced the balancing test in cases of total economic wipeout with a

¹¹ CAROL M. ROSE, *Seeing Property*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 273 (1994) [hereinafter ROSE, *Seeing Property*] (“[P]roperty’s brave claims of control and permanence. . . . are often considerably more aspirational than real.”); Rose, *Property and Expropriations*, *supra* note 10, at 6.

¹² *C.f.* *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985); *Epstein v. Gluckin*, 135 N.E. 861, 862 (N.Y. 1922). For example, the Supreme Court of Delaware in *Unocal*, a seminal case in corporate law, recognized the need to create new law, in order to comply with the mandates of justice. *Unocal Corp.*, 493 A.2d at 957 (“[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs.”); *see also Epstein*, 135 N.E. at 862 (contractual remedy case) (“[Where a] formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice[,] [w]e may not suffer it to petrify at the cost of its animating principle.”); Hulsebosch, *supra* note 5, at 732 (calling for a flexible standard of property rights).

¹³ Rose, *Property and Expropriations*, *supra* note 10, at 4 (noting that David Hume and Adam Smith “identified the recognition of property as ‘justice’ itself”); *c.f.* Hulsebosch, *supra* note 5, at 716 (“From old limits on testamentary transfers to new forms of zoning and eminent domain, property law is where our society works out conflicts between private right and public will.”).

¹⁴ *See generally*, Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 93–94 (2002) [hereinafter, Poirier, *Virtue of Vagueness*] (arguing that “the vague regulatory takings doctrine . . . provide[s] stability, coherence, and legitimacy for the ongoing social process of managing resources”). For a student comment that vehemently opposes this view, see Odabashian, *supra* note 7, at 643–45 (criticizing the Court for replacing “constitutional text” with “a vague analysis of social interest that incorporated the notion of investment-backed expectations,” a standard that could change at the whim of the legislature).

¹⁵ 438 U.S. 104 (1978).

¹⁶ *Id.* at 124. Use of a balancing test was not new—a predecessor to the *Penn Central* balancing test was promulgated in the Supreme Court that first recognized that regulations could constitute regulatory takings. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The history of the regulatory takings doctrine is discussed in more detail in Part I.B of this Comment.

¹⁷ 505 U.S. 1003 (1992).

bright line rule mandating compensation.¹⁸ This Comment proposes that flexibility can be reintroduced into the *Lucas* vein of regulatory takings jurisprudence, especially as concerning environmental regulations in coastal lands, by acknowledging and giving due weight to the role of visual cues in effectuating public subconscious acceptance to change.

Courtroom battles regarding coastal land regulations provide an exemplary stage to showcase changes in public expectations.¹⁹ When in the late 1960s and 1970s environmental concerns came to the forefront of public awareness,²⁰ there was a call to expand coastal land regulations—not only through the accepted means of a State’s general police power,²¹ but also by use of an ancient,²² and arguably stronger canon of property law—the public trust doctrine.²³ The

¹⁸ *Id.* at 1015.

¹⁹ See, e.g., *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972).

Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams.

Id.; see also, Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 331 (2004) (stating that “[l]awsuits placed the issue [of environmental protection] on the national agenda half a century ago, and lawsuits since have prodded it forward over stiff resistance”).

²⁰ *Lucas*, 505 U.S. at 1007 (“South Carolina’s expressed interest in intensively managing development activities in the so-called ‘coastal zone’ dates from 1977 when, in the aftermath of Congress’s passage of the federal Coastal Zone Management Act of 1972 . . . the legislature enacted a Coastal Zone Management Act of its own.”); see also Sax, *Public Trust Doctrine*, *supra* note 6, at 473 (“Public concern about environmental quality is beginning to be felt in the courtroom.”).

²¹ For an early review by the Supreme Court of decisions addressing the scope of a state’s police powers, see *Mugler v. Kansas*, 123 U.S. 623, 658–59 (1887) (including within the scope of state police powers regulation of a state’s “domestic commerce, contracts, the transmission of estates, real and personal, and acts upon internal matters which relate to its moral and political welfare” as well as “every law for the restraint of and punishment of crime, for the preservation of the public peace, health, and morals” (internal citations omitted)). Almost forty years later, the Supreme Court definitively held that land regulations were within a State’s police powers. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

²² DAVID SLADE, R. KERRY KEHOE & JANE K. STAHL, COASTAL STATES ORG., *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* 4 (1990) [hereinafter SLADE ET AL.] (“It is often stated that the Public Trust Doctrine dates back to the sixth century Institutes of Justinian and the accompanying Digest, which collectively formed Roman civil law, . . . [however these] were based, often verbatim, upon the second century Institutes and Journals of Gaius . . .”).

²³ See Sax, *Public Trust Doctrine*, *supra* note 6, at 474 (advocating an expansive approach to the public trust doctrine “as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems”).

public trust doctrine stands for the principle that land bordering navigable water belongs to the public and encumbers any future conveyance.²⁴ A government therefore has the affirmative duty to protect public trust lands;²⁵ if it fails to do so, a member of the public may have standing to sue the government for failing its fiduciary duty.²⁶ Ironically, many government regulations enacted as a direct response to public demand and increased environmental awareness came up

²⁴ *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). Although the definition for the public trust doctrine has varied through the years, the Supreme Court in *Phillips Petroleum Co. v. Mississippi*, recognized *Shively v. Bowlby*, as the “seminal case in American public trust jurisprudence.” *Phillips Petroleum Co.*, 484 U.S. 469, 473 (1988). *Shively* described the public trust doctrine as “title and dominion in lands flowed by the tide water . . . [held by] the King for the benefit of the nation . . . [which] [u]pon the American Revolution . . . vested in the original States . . .” 152 U.S. at 57; *see also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (“It is settled law of this country that the ownership of . . . lands covered by tide waters . . . belong to the respective States within which they are found, with the consequent right to use or dispose of . . . without substantial impairment of the interest of the public . . .”). *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984), is generally thought of as the seminal case reinstating the public trust doctrine into the lexicon of modern property law, and defines the public trust doctrine similarly to *Shively*, as “acknowledg[ing] that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people.” *Matthews*, 471 A.2d at 358; *see also* *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 51 (N.J. 1972) (“That broad doctrine derives from the ancient principle of English law that land covered by tidal waters belonged to the sovereign, but for the common use of all the people.”); SLADE ET AL., *supra* note 22, at 1 (“The Public Trust Doctrine provides that public trust lands, waters and living resources in a State are held by the state in trust for the benefit of all of the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses.”); *see generally* Sax, *Public Trust Doctrine*, *supra* note 6 (exploring the different definitions given to the public trust doctrine).

²⁵ *E.g.*, *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) (stating that the public trust is an “active . . . duty . . . [which] requires the state not only to promote navigation but also to protect and preserve those waters” for public benefit); CAROL M. ROSE, *The Comedy of the Commons*, in *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP* 110 (1994) (“[T]he ‘trust’ language of public property doctrine . . . suggested that governments had duties to preserve the property of what some cases called the ‘unorganized’ public.”).

²⁶ *Compare* *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971) (holding that a private citizen has standing), *Paepcke v. Pub. Bldg. Comm’n of Chicago*, 263 N.E.2d 11, 18 (Ill. 1970) (“If the ‘public trust’ doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it.”), *with* *Scott v. Chicago Part Dist.*, 360 N.E.2d 773, 775 (Ill. 1977) (noting that even though a citizen does not have standing to sue directly, dismissals of suits for lack of standing do not bar the State Attorney General from bringing suit); *Belford v. City of New Haven*, 364 A.2d 194, 198 (Conn. 1975) (holding that “a private individual cannot maintain a bill to enjoin a breach of public trust, in the absence of statutory authority”) (quoting *McCormick v. Chicago Yacht Club*, 163 N.E. 418, 420 (Ill. 1928)).

against the Fifth Amendment's Takings Clause.²⁷ The principle set forth by the Supreme Court in *Lucas*, that a prohibition on all land development triggered compensation,²⁸ was and continues to be particularly problematic in regards to environmental regulations that prohibit or severely limit development on coastal lands.²⁹

Courts have attempted to get around *Lucas* in many creative ways, such as noting that a bare minimal economic benefit is left to the landowner,³⁰ or fitting the regulation into the *Lucas* exceptions of "background principles of property law."³¹ Some recent cases have even hinted at another means to bypass the inflexible *Lucas* standard—the survival of the "investment-backed expectations" *Penn Central* factor,³² but have refused to directly address this possibility, hold-

²⁷ *E.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). *But see, e.g.*, *Just*, 201 N.W.2d at 765, 767–68 (upholding a regulation "to aid in the fulfillment of the state's role as trustee of its navigable waters" because the regulation did not take "a benefit not presently enjoyed by the public for its use" but merely maintained "the natural status quo of the environment"). *See generally* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 (1971) [hereinafter, Sax, *Public Rights*] (noting that the "interest in environmental quality . . . spawned various attempts at property regulation, many of which actually or potentially collide with the takings provision"); Houck, *supra* note 19, at 340 (emphasizing that the South Carolina regulation at issue in *Lucas* was in response to serious erosion concerns and noting that the legislation was in compliance with the Federal Coastal Zone Management Act).

²⁸ *Lucas*, 505 U.S. at 1015.

²⁹ *See generally* Joseph L. Sax, *Using Property Rights to Attack Environmental Protection*, 19 PACE ENVTL. L. REV. 715 (2002) [hereinafter Sax, *Using Property Rights*]; Houck, *supra* note 19, at 340. The critique of the focus on economic devaluation predates *Lucas*. Sax, *Public Rights*, *supra* note 27, at 172 ("[T]he current takings scheme introduces an irrationality by requiring compensation when the conflict resolution system imposes extreme economic harm on discrete users but not when analogous harm is placed on diffuse users.").

³⁰ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (emphasizing "that the categorical rule would not apply if the diminution in value were 95% instead of 100%") (citing *Lucas*, 505 U.S. at 1019 n.8); *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001) (remanding for consideration under the *Penn Central* balancing test rather than the *Lucas* categorical takings rule "because the value of upland portions [of the landowner's property] is substantial").

³¹ *See, e.g.*, *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 125 (N.J. 2005); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 (S.C. 2003), *cert. denied*, 540 U.S. 982 (2003). Nuisance law, the law of custom and the public trust doctrine are examples of "background principles." David L. Callies, *Nuisance and Background Principles: The Lucas Exceptions*, SJ052 A.L.I.-A.B.A. 473 (2004).

³² *McQueen*, 580 S.E.2d at 119 n.5 (noting that "Lucas left much confusion . . . about whether another *Penn Central* factor, 'investment-backed expectations,' survived in the context of a total deprivation case"); *see also Esplanade*, 307 F.3d at 984 (taking judicial notice of the fact that a developer purchased the land in question at a bargain price, even though broadly stating that "the multi-factor analysis established in *Penn Central*" is inapplicable).

ing instead that the public trust doctrine saved the regulations at issue from requiring compensation.³³

In *McQueen v. South Carolina Coastal Council*,³⁴ the South Carolina Supreme Court found that a compensable taking had not taken place even where it was “uncontested that McQueen’s lots retain[ed] no value.”³⁵ The South Carolina Supreme Court’s decision was based on the public trust doctrine.³⁶ The facts of *McQueen* were similar to the facts of *Lucas*; in both cases, private property owners protested regulations prohibiting all development on their property, where surrounding lots had already been developed and therefore practically unaffected by the regulations.³⁷ In another recent case, *Esplanade Properties, LLC v. City of Seattle*,³⁸ the petitioners attempted to develop land “on and over tidelands located . . . near both a large city park and a large marina.”³⁹ In *Esplanade*, the developers proposed to build residential housing “on platforms supported by pilings.”⁴⁰ Although the courts in both cases ultimately found that the public trust doctrine allowed regulation without compensation,⁴¹ the visual cues of the land proposed for development were different—one dealt with lots surrounded by developed land, the other surrounded by land mostly undeveloped.⁴²

This Comment will argue that instead of stretching the legal boundaries of the exceptions to the *Lucas* categorical rule, especially in regards to the expanding use of the public trust doctrine, *Lucas*

³³ *McQueen*, 580 S.E.2d at 120.

³⁴ 580 S.E.2d 116 (S.C. 2003).

³⁵ *Id.* at 119.

³⁶ *Id.* at 120 (holding that “[t]he tidelands included on McQueen’s lots are public trust property subject to control of the State”).

³⁷ Compare *id.* at 118 (“McQueen purchased two non-contiguous lots located on manmade saltwater canals in the Cherry Grove section of North Myrtle Beach. . . . The lots surrounding McQueen’s are improved . . .”), with *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992) (describing the two lots at issue as within “extensive residential development . . . located approximately 300 feet from the beach”).

³⁸ 307 F.3d 978 (9th Cir. 2002).

³⁹ *Id.* at 980.

⁴⁰ *Id.*

⁴¹ *McQueen*, 580 S.E.2d at 150; *Esplanade*, 307 F.3d at 987.

⁴² *McQueen*, 580 S.E.2d at 118; *Esplanade*, 307 F.3d at 980. Although not addressing the public trust doctrine, the case of *Bowles v. United States* also helps to highlight the importance of visual cues in property law. 31 Fed. Cl. 37 (1994). In *Bowles*, the court held the denial of a permit to fill land had accomplished a *Lucas* categorical taking, emphasizing that “[a]ll Mr. Bowles wanted to do was the same exact use as his surrounding neighbors; build a home in a residential subdivision.” *Id.* at 46.

should be interpreted (or reformulated)⁴³ to incorporate “investment-backed expectations” as informed by visual cues. Because expectations reflect common notions of justice, this solution will allow enough flexibility for governments to further the public interest without upsetting the public’s perception of secure and stable property rights. Furthermore, this Comment will argue that the state of prior development on land or the changing topography of land is an acceptable means to determine when compensation is necessary because such cues directly inform the public’s reasonable expectations. Regard to visual cues will also serve to anchor and limit the potential for extreme vagueness in a rule based on expectations.

Part I of this Comment will trace the history of takings jurisprudence, outlining the rationale behind the compensation requirement and the emergence of “investment-backed expectations.” Part II will trace the history of the public trust doctrine and its uneasy fit within regulatory takings jurisprudence. Part III will compare recent cases, including *McQueen* and *Esplanade*, that have skirted around *Lucas* by using the public trust doctrine. Part III will also argue that grounding the public trust doctrine with visual cues and general “investment-backed expectations” will make the doctrine more compatible with accepted notions of justice, thus leading to a regulatory takings jurisprudence that is more widely perceived as “fair.”

I. PROPERTY RIGHTS AND LIMITATIONS: THE PERPLEXING SIMPLICITY OF EMINENT DOMAIN & THE NOT-SO-SIMPLE REGULATORY TAKINGS JURISPRUDENCE

Implicit in the Fifth Amendment Takings Clause is the recognition that private property rights would sometimes need to give way to the public good.⁴⁴ The problem with this deceptively simple rule is that no society is ever completely of one mind, and any change, even

⁴³ Most commentators are adamant that Justice Scalia, in writing the *Lucas* opinion, meant to completely eradicate any vestiges of the *Penn Central* factors when dealing with economic wipeout cases. See, e.g., Odabashian, *supra* note 7, at 664 (“Scalia determines . . . that in at least those cases in which all economically viable use of the land is destroyed, the Court need not look at investment-backed expectations at all.”); see also Hulsebosch, *supra* note 5, at 721 (“Justice Scalia advocated a fixed conception [of background principles of property law] and disagreed with the evolutionary conception of Justices Sandra Day O’Connor and Stephen Breyer.”).

⁴⁴ Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Even the Supreme Court decision in *Lucas* acknowledged that landowners expected restrictions in the name of the State’s police powers. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (“[T]he property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”).

if in the interest of justice, no matter how incremental, will affront at least one member of any given society.⁴⁵ Therefore, questions of when it is appropriate that public interests prevail over private rights have plagued the doctrine since its inception.⁴⁶ The Supreme Court's jurisprudence on takings is an attempt to find a compromise between advancing the public good and vindicating private rights.⁴⁷ Compensation is a means to achieve this balance.⁴⁸ However, to say that compensation is the answer would be to state a mere tautology. The question remains the same: Under what circumstances does the concept of fairness require compensation when a landowner's property interests have been affected by government action? As a starting point, the answer depends on the characterization of the government action.⁴⁹ Has the government physically appropriated property or has it passed a law regulating property? Physical appropriation of property by the government falls under the relatively clear doctrine of eminent domain, while everything else falls under the unwieldy doctrine of regulatory takings.⁵⁰

⁴⁵ See Treanor, *The Origins*, *supra* note 2, at 705–06 (tracing the genesis of the Takings Clause, and noting a general rejection of the existence of “a readily discernible common good” and that the few states which included a just compensation clause before the adoption of the Bill of Rights did so on “the new insight that society was composed of groups whose interests irreconcilably diverged”).

⁴⁶ See, e.g., Poirier, *Virtue of Vagueness*, *supra* note 14, at 97 (“In judicial opinion and academic assessment alike, it seems almost *de rigueur* to include at least one or two choice sentences of complaint [about the regulatory takings doctrine] . . .”).

⁴⁷ Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1165 (1967) (referring to the Takings Jurisprudence as “essentially engaged in deciding when government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons”); see also Hulsebosch, *supra* note 5, at 716.

⁴⁸ Michelman, *supra* note 47, at 1180 (“[C]ompensation payments have something to do with maintaining at an acceptable level *the assurance* that benefits and burdens will be evenly distributed over the long run.”) (emphasis added).

⁴⁹ *Yee v. Escondido*, 503 U.S. 519, 523 (1992); see also Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62–63 (1964) [hereinafter Sax, *Police Power*] (classifying government action as either enterprise or mediation and requiring compensation only if the government acts as an enterprise). In a subsequent article, Sax shifted his focus away from the enterprise/mediation categorization to focus on property use, but the initial classification, though no longer central, remained in the background. Sax, *Public Rights*, *supra* note 27, at 151.

⁵⁰ *Yee*, 503 U.S. at 523 (“The first category of cases [physical appropriations] requires courts to apply a clear rule; the second [involving regulatory takings] necessarily entails complex factual assessments of the purposes and economic effects of government actions.”).

A. *Eminent Domain—Compensation Expected and Granted*

Eminent domain is the inherent power of the federal, state, or local governments, as “sovereign” entities, to condemn private property against the will of the individual for public use.⁵¹ This power of the government has generally been accepted as necessary, although the scope of the power is often the subject of dispute and varying judicial interpretations.⁵² While the definition of “public use”⁵³ or the value of “just” compensation⁵⁴ has been fiercely litigated, one aspect of eminent domain has remained consistent: A physical taking, no matter how *de minimus*, requires compensation.⁵⁵ The classic example

⁵¹ *E.g.*, *Johnston v. Ala. Pub. Serv. Comm’n*, 252 So. 2d 75, 76 (Ala. 1971); *Haig v. Wateree Power Co.*, 112 S.E. 55, 57 (S.C. 1922).

⁵² *E.g.*, *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005) (giving broad deference to local governments in determining whether eminent domain is justified); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (same), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (placing limitations on the government’s discretion based on state constitutional grounds). The controversy surrounding eminent domain proceedings is not a question of whether compensation should be paid—that compensation is due is never questioned when the government has physically appropriated private property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (“In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.”); *see also* Michelman, *supra* note 47, at 1184 (“[C]ourts . . . never deny compensation for a physical takeover.”). Instead, the controversy surrounding eminent domain proceedings regards the definition of “public use.” Initially, state courts had systematically ruled that local governments had broad deference in deciding the scope of the definition. *E.g.*, *Poletown*, 304 N.W.2d at 458, *overruled by* *Hathcock*, 684 N.W.2d at 784; *Kelo*, 843 A.2d 500, 525–26 (Conn. 2004), *aff’d by* 125 S. Ct. 2655, 2665 (2005). The Supreme Court approved this deferential standard in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). However, *Midkiff* did not calm the controversy, and more than twenty years later, the Supreme Court reinforced its decision in *Midkiff* by finding in *Kelo v. City of New London* that an economic rejuvenation plan, where private property was condemned and transferred to private parties, was within the permissible scope of “public use.” *Kelo*, 125 S. Ct. at 2665. However, that Supreme Court decision left room for the state supreme courts to limit government eminent domain powers under state constitutions. *See, e.g.*, *Hathcock*, 684 N.W.2d at 784.

⁵³ *See supra* note 52 and accompanying text.

⁵⁴ It is generally accepted that “just compensation” equals fair market value, *e.g.*, *United States v. John J. Felin & Co.*, 334 U.S. 624, 644 (1948) (Reed, J., concurring); however, the debate surrounds whether there is a discernable market price, what factors into the market price, and if there is no discernable market price, what other factors can determine the value of “just compensation.” *Id.* *See generally* Poirier, *Regulatory Takings*, *supra* note 1, at §§ 10A.18[1][b]–[g] (discussing what factors into the valuation of just compensation).

⁵⁵ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . .”) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)); *Lucas*, 505 U.S. at 1015; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

of this decree at work is the ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁵⁶ which found that even the placement of a cable box and wires on property required compensation, notwithstanding the fact that the encroachment was barely noticeable and that fair market value was either not affected at all or only negligibly affected.⁵⁷ Commentators have repeatedly puzzled over why this rule is so adamantly protected by the Supreme Court's interpretation of the Constitution.⁵⁸ Perhaps it is because the Fifth Amendment's language, "nor shall private property be taken for public use, without just compensation,"⁵⁹ seems deceptively clear.⁶⁰ Perhaps too, it is because historically, the Fifth Amendment was meant to protect just that—physical appropriations.⁶¹ Or maybe, the answer is simply that physical invasions are so tangible and visible that even though a particular appropriation may not result in monetary devaluation, allowing a physical invasion without demanding some kind of recompense would seriously undervalue closely held notions of security—both private and public expectations.⁶² Whatever rationale chosen, courts have consistently found that any time the government encroaches on property physically and permanently, it would be unjust to deny compensation.⁶³

434–35 (1982) ("In short, when the 'character of the governmental action,' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." (internal citations omitted)).

⁵⁶ 458 U.S. 419 (1982).

⁵⁷ *Id.* at 434–35.

⁵⁸ Michelman, *supra* note 47, at 1185 ("[T]he magic of physical invasion is rooted in wordplay . . . [that] begins to fail as soon as we press on to a modest level of lingual sophistication."). For an excellent discussion of the weaknesses of the Taking Clause's historical anchor, see William Michael Treanor, *The Original Understanding of the Takings Clause and The Political Process*, 95 COLUM. L. REV. 782 (1995). In this article, William Treanor notes that at the time the Fifth Amendment was adopted, "[e]ven with respect to physical seizures of property by the government, the compensation requirement was not generally recognized . . ." *Id.* at 785.

⁵⁹ U.S. CONST. amend. V.

⁶⁰ Michelman, *supra* note 47, at 1185.

⁶¹ Treanor, *The Origins*, *supra* note 2, at 708 ("Madison intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings.").

⁶² ROSE, *Seeing Property*, *supra* note 11, at 269 ("Physical characteristics are often visible. Perhaps this helps to explain why, for example, issues of governmental 'takings' are so notoriously sensitive when they concern what are called 'physical invasions' of property . . .").

⁶³ See Michelman, *supra* note 47, at 1184.

B. Regulatory Taking—The Propriety of Compensation Questioned

Regulatory takings jurisprudence is fraught with inconsistencies and inadequacies.⁶⁴ Unlike cases involving eminent domain, when it comes to regulatory takings law, the language of the Fifth Amendment does not provide much guidance.⁶⁵ In fact, it was not until 1922 that the Supreme Court, in *Pennsylvania Coal Co. v. Mahon*,⁶⁶ recognized that anything other than physical appropriations fell within the ambit of the Takings Clause, and held “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁶⁷ This basic rule promulgated by *Pennsylvania Coal* is hazy; the boundaries of what is “too far” are the subject of constant litigation.⁶⁸ Even in *Pennsylvania Coal*, the Court identified the potential problems of extending takings claims to regulations promulgated according to the states’ valid police power.⁶⁹ Specifically, the Court recognized that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”⁷⁰ Furthermore, the Court acknowledged that legal property rights are not and have never been interpreted as absolute, stating, “[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”⁷¹

Since *Pennsylvania Coal*, the Supreme Court has repeatedly attempted to formulate clear guidelines for determining when com-

⁶⁴ See Sax, *Police Power*, *supra* note 49, at 37.

⁶⁵ Treanor, *The Origins*, *supra* note 2, at 711.

⁶⁶ 260 U.S. 393 (1922).

⁶⁷ *Id.* at 415.

⁶⁸ For example, there is a long list of leading cases developing the regulatory takings jurisprudence after regulatory takings was originally acknowledged in *Pennsylvania Coal*. In chronological order, those cases are: *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (holding that zoning ordinances are not *per se* unconstitutional); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (establishing a balancing test between the public interest, “distinct investment-backed expectations,” and the extent of the “economic impact of the regulation”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (holding that a regulation working a total economic wipeout is a *per se* compensable taking); *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) (holding that preexistence of regulations at the time property is acquired does not bar a takings claim); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 341–42 (2002) (holding that temporary development moratoria are not *per se* unconstitutional).

⁶⁹ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁷⁰ *Id.* at 413. The Supreme Court proved its commitment to this principle in holding that zoning regulations, although severely limiting property use in some cases, were not *per se* takings. *Village of Euclid*, 272 U.S. at 397.

⁷¹ *Pa. Coal*, 260 U.S. at 413 (emphasis added).

pensation is required, not for physical appropriations, but for when a government legitimately uses its police power to regulate property in its jurisdiction.⁷² But the clarity seemingly established in any one Supreme Court case is inevitably criticized as illusory.⁷³ The Court itself has acknowledged the difficulty of formulating bright line rules and even its reluctance to do so.⁷⁴ It is not surprising, then, that the current test for determining how far is really “too far,” is one that incorporates the original balancing test of *Pennsylvania Coal*, which identified the following factors: (1) “the extent of the diminution,” in “values incident to property;” (2) “[t]he extent of the public interest,” and; (3) whether or not the particular regulation at issue conferred an “average reciprocity of advantage” on the burdened property owner.⁷⁵ The Court fine-tuned this test in *Penn Central Transportation Co. v. City of New York*.⁷⁶ The *Penn Central* test added a crucial element to these factors—it introduced “investment-backed expectations” into the equation.⁷⁷ The *Penn Central* balancing test, which courts currently apply, weighs the following factors: (1) “economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action,” including whether the regulation was “reasonably necessary to the effectuation of a substantial public purpose.”⁷⁸ Naturally, a balancing

⁷² See *supra* note 68 and accompanying text.

⁷³ E.g., Sax, *Police Power*, *supra* note 49, at 37 (“In some specific instances [whether compensation is implicated] has become clear [However,] the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results.”).

⁷⁴ See, e.g., *Bowles v. United States*, 31 Fed. Cl. 37, 39 (1994) (“Courts . . . cannot produce comprehensive solutions. They can only interpret the rather precise language of the fifth amendment . . . in very specific factual circumstances.”). In an attempt to formulate one such bright line rule, in 1992, the Supreme Court in *Lucas*, developed the economic wipeout test; however, in an opinion a decade later, the Court emphasized the narrow scope of the *Lucas* rule. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (“[W]e still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine ‘a number of factors’ rather than a simple ‘mathematically precise’ formula.”). See also Sax, *Police Power*, *supra* note 49, at 37 (“[T]he Supreme Court] has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that ‘no rigid rules’ or ‘set formula’ are available” (internal citations omitted)).

⁷⁵ *Pa. Coal*, 260 U.S. at 413–15.

⁷⁶ 438 U.S. 104, 124 (1978); see also *Pa. Coal*, 260 U.S. at 393.

⁷⁷ *Penn Cent.*, 438 U.S. at 124.

⁷⁸ *Id.* at 124–27.

test does not result in any bright line rules; instead the outcome of each claim is fact specific.⁷⁹

The balancing test reformulated in *Penn Central*, however, did not eliminate the public's desire or demand for bright line rules. In 1992, the Supreme Court carved out one arguably clear rule for when a "regulation goes too far."⁸⁰ In *Lucas v. South Carolina Coastal Council*,⁸¹ Justice Scalia, writing for the majority, announced the following categorical rule: "[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,"⁸² without regard to "the public interest advanced."⁸³ This categorical rule equates some limited types of regulations to a physical invasion.⁸⁴

While, at first blush, this rule appears innovative, the essence of the rule existed in the early *Penn Central* analysis.⁸⁵ The fact that a regulation works a complete economic wipeout on a landowner triggers the first and second *Penn Central* factors—economic impact and investment backed expectations.⁸⁶ Although *Lucas* explicitly directs that the third prong—the public interest—is not to be weighed against a landowner's interest, the impact of *Lucas* on the *Penn Central* test is dubious.⁸⁷ The circumstances under which the *Lucas* rule would apply, complete economic wipeout and annihilation of an owner's investment-backed expectations, heavily favor the landowner's interests. Therefore, even if the *Penn Central* test applied, the public interest would have to be great indeed in order to outweigh

⁷⁹ See Poirier, *Regulatory Takings*, *supra* note 1, at §§ 10A.04, 10A-17 ("[The] fact specific inquiry mandated by *Penn Central* and its progeny . . . [i]n most cases . . . is unavoidable."). The principle of "ad-hoc, factual inquiries" was criticized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), yet championed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002).

⁸⁰ *Pa. Coal*, 260 U.S. at 415.

⁸¹ 505 U.S. 1003 (1992).

⁸² *Lucas*, 505 U.S. at 1019.

⁸³ *Id.* at 1015–16.

⁸⁴ *Id.*

⁸⁵ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127–28 (1978) (reasoning that where a statute has "nearly the same effect as the complete destruction of [property] rights . . . the statute was invalid as effecting a 'taking' without just compensation"). The *Penn Central* Court even cites a 1908 case that expounded the same rule—specifically, that if a "restriction makes property wholly useless 'the rights of property . . . prevail over the other public interest' and compensation is required." *Id.* at 128 (quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908)).

⁸⁶ See *supra* note 85 and accompanying text.

⁸⁷ *Bowles v. United States*, 31 Fed. Cl. 37, 46 (1994).

the overwhelming detriment to the landowner and defeat the conclusion that a taking had occurred. Furthermore, although not obvious, the exception carved out in *Lucas* inherently considers the public interest, at least to a certain extent.⁸⁸ This exception is set forth in the rule that where the regulation merely reflects “background principles of the State’s law of property and nuisance,” the Takings Clause does not require compensation, no matter the extent of economic deprivation.⁸⁹ Considering that “background principles” of property law consist, for the most part, of regulations enacted pursuant to a State’s police power,⁹⁰ which in turn is the power to act in the public interest,⁹¹ the *Lucas* exception may in fact reintroduce the very factor it purports to do away with. The fact that courts are increasingly acknowledging the public trust doctrine as a background principle of property law reinforces the conclusion that *Lucas* is not such a bright line rule after all.

Taking aside whether *Lucas* truly eradicated the “public interest” *Penn Central* factor, another question remained: *Lucas* was unclear as to whether, in order to claim compensation, an affected property owner had to have distinct “investment-backed expectations.”⁹² Recent cases suggest an affirmative answer.⁹³ The unanswered questions of *Lucas* had the ironic effect of making the doctrine closer to the

⁸⁸ *Lucas*, 505 U.S. at 1030 (“The ‘total taking’ inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources . . .”).

⁸⁹ *Id.* at 1029.

⁹⁰ See *supra* note 21 and accompanying text.

⁹¹ See *supra* note 21 and accompanying text.

⁹² *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 n.5 (S.C. 2003) (“*Lucas* left much confusion . . . about whether another *Penn Central* factor, ‘investment-backed expectations,’ survived in the context of a total deprivation case.”). This confusion can be traced back to the opinions in *Lucas*. For example, Justice Scalia, writing the opinion in *Lucas* highlighted the fact that *Lucas* had purchased the property with the intention to develop it. *Lucas*, 505 U.S. at 1008. Furthermore, Justice Kennedy in his concurrence noted that the initial determination of whether a regulation at issue deprived the property of all value depends upon the landowner’s reasonable expectations. *Id.* at 1034 (Kennedy, J., concurring) (“The finding of no value must be considered under the Takings Clause by reference to the owner’s reasonable, investment-backed expectations.”); see also *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 984 (9th Cir. 2002) (taking judicial notice of the fact that a developer purchased the land in question at a bargain price, even though broadly stating that “the multi-factor analysis established in *Penn Central*” is inapplicable).

⁹³ *McQueen*, 580 S.E.2d at 119 n.5; *Esplanade*, 307 F.3d at 984; *Westside Quick Shop, Inc. v. Stewart*, 534 S.E.2d 270, 275 (S.C. 2000). *But see* *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (“[W]hen a regulatory taking, properly determined to be ‘categorical,’ is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations.”).

Penn Central test in its practical application.⁹⁴ Notwithstanding these unanswered questions, regulatory takings jurisprudence before *Lucas* seemed to at least have had the appearance of manageability, if not quite predictability: If a case involved total taking, compensation would be required in all but narrow exceptions; if a partial taking occurred, the *Penn Central* test would continue to be applied.⁹⁵

This token clarity was upset yet again in a 2001 Supreme Court case, *Palazzolo v. Rhode Island*.⁹⁶ The *Palazzolo* case dealt with a partial taking, and was thus outside of the realm of *Lucas*,⁹⁷ yet its implications regarding the perseverance of “investment-backed expectations” are worth noting. The Court ruled that even though the petitioner, Anthony Palazzolo, acquired title to the land after a regulation had been in place, his takings claim was not automatically barred.⁹⁸ This rule, at first blush, seems contrary to the concept of “investment-backed expectations,” as it was commonly thought that prior notice of property restrictions made certain expectations unreasonable.⁹⁹ Justice Kennedy, however, justified the need for such a rule, because to hold otherwise would allow “[a] State . . . to put an expiration date on the Takings Clause.”¹⁰⁰

⁹⁴ See, for example, the United States Court of Federal Claims’ regulatory taking analysis in *Bowles v. United States*, 31 Fed. Cl. 37 (1994), which although held that the regulation had effectuated a total taking, nevertheless proceeded to analyze the facts under both the *Lucas* and *Penn Central* tests, concluding that “the facts of this case require just compensation under either analysis.” *Bowles*, 31 Fed. Cl. at 46.

⁹⁵ *McQueen*, 580 S.E.2d at 119.

⁹⁶ 533 U.S. 606 (2001).

⁹⁷ *Id.* at 631–632.

⁹⁸ *Id.* at 628.

⁹⁹ See, e.g., Michelman, *supra* note 47, at 1213 (arguing that compensation is only necessary to maintain societal morale, which will in turn lead to an efficient society). In his seminal article, *Property, Utility, and Fairness*, Frank I. Michelman explained that a society would suffer through demoralization when it saw one of its members as a targeted “victim[] of unprincipled exploitation,” resulting in the fear that at any moment any one of its members could become such a target by legislative design. *Id.* at 1230. Further, Michelman noted that all tests employed by courts in regulatory takings claims attempted to determine “whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.” *Id.* at 1233. Michelman rationalized the stress on a clear manifestation of an owner’s expectations by stating that the “land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified—which is what he had before.” *Id.* at 1234 (emphasis added). This leads to the conclusion that if a regulation restricted property use before the owner took title to undeveloped property, then he could not have had any expectations as to that use.

¹⁰⁰ *Palazzolo*, 533 U.S. at 627.

Justice O'Connor, in her concurrence, attempted to reconcile the expectations factor with the seemingly inapposite holding of *Palazzolo*.¹⁰¹ By stating that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations,” Justice O'Connor noted that prior notice was not irrelevant to the analysis.¹⁰² To imply otherwise would have been contrary to public perceptions of justice: “[I]f existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicia of fairness is lost.”¹⁰³ Although Justice O'Connor's analysis dealt with a partial taking, this statement, regarding the importance of the regulatory scheme in place at the time the owner takes title, can be applied with equal force to a total takings case, where a property owner who bought land subject to certain regulations probably did so at a bargain price.¹⁰⁴ In such a case, justice would not mandate that the government pay for a landowner's inability to develop, and in fact, would even militate against it.¹⁰⁵

The Supreme Court's repeated emphasis on the factual nature of the regulatory takings inquiry further weighs in favor of extending the expectations factor to total takings cases.¹⁰⁶ Although bright line rules may be desirable, such rules should only be employed in a small number of cases, where the taking seems so obvious that no controversy really exists—in other words, where the justice in granting compensation is generally accepted. Such is the nature of the bright line

¹⁰¹ *Id.* at 633 (O'Connor, J., concurring); see also Hulsebosch, *supra* note 5, at 727 (noting that Justice O'Connor's approach leaves open the possibility “that a regulation effecting a taking from present holders might someday be assimilated into the background principals of property law so that some or all post-enactment acquirers would not succeed with takings claims”).

¹⁰² *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring).

¹⁰³ *Id.* at 635. *But see id.* at 637 (Scalia, J., concurring) (“The ‘investment-backed expectations’ that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional.”). Justice Scalia would advocate that no windfall occurs because although prior regulations should not play a role in determining whether a “taking” has occurred, it does play a vital role in determining damages. See, e.g., *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1363 (Fed. Cir. 2000) (“Once a taking has been found, the use restrictions on the property are one of the factors that are taken into account in determining damages due the owner.”).

¹⁰⁴ See, e.g., *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 986 (9th Cir. 2002) (noting that the developer purchased the coastal land in 1991 for “only \$40,000”); *Good v. United States*, 189 F.3d 1355, 1362 (Fed. Cir. 1999) (“At the time he bought the subject parcel, Appellant acknowledged both the necessity and the difficulty of obtaining regulatory approval.”).

¹⁰⁵ *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

¹⁰⁶ See *supra* note 79.

rule regarding physical invasions.¹⁰⁷ The categorical rule in *Lucas* also came about in a case where the reasonable expectations of the landowner were not questioned. The regulation at issue was enacted after Lucas had purchased the property specifically for residential development.¹⁰⁸ Furthermore, the lots surrounding Lucas's particular lots had been developed and were not affected by the regulation at issue—thus visually, the public could literally see that Lucas was shouldering a disproportionate part of the common burden—the empty lot a reminder of the right “taken.”¹⁰⁹ Even though the reasonable expectations factor was not explicit in the *Lucas* test (and was in fact denied), the rule that resulted in compensation for Lucas complied with both public and private expectations. Further, Lucas's private expectation included not only his own personal expectations, but also included the individual expectations of other members of the public who empathized with Lucas.¹¹⁰

II. THE PUBLIC TRUST DOCTRINE—A DOCTRINE OF EXPECTATIONS?

The public trust doctrine has its origins in the ancient Roman ideal of *jus publicum*—the notion of the “public right.”¹¹¹ This principle was carried over into English law, where submerged and tidal lands were owned by the King and open to the public.¹¹² With the independence of the United States, the ownership of public trust lands vested in the public, to be administered by the elected State governments.¹¹³ Although the doctrine was recognized early in U.S. his-

¹⁰⁷ See *supra* note 55 and accompanying text.

¹⁰⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992). There is no indication that the property was bought at a bargain price, as was noted in other cases, but rather that Lucas paid a price reflective of the suitability for residential development. *Id.* at 1039 n.3 (Blackmun, J., dissenting).

¹⁰⁹ *Id.* Justice Kennedy, in his concurrence, highlighted the potential importance of the developed and non-regulated state of neighboring property lots, stating that where a regulation unevenly distributed the burden on remaining undeveloped land, the owner's reasonable expectations may be thwarted. *Id.* at 1035–36 (Kennedy, J., concurring) (“[T]he means, as well as the ends, of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots.”).

¹¹⁰ See Michelman, *supra* note 47, at 1230; see also *supra* note 99 and accompanying text (discussing demoralization costs in takings jurisprudence).

¹¹¹ See SLADE ET AL., *supra* note 22, at 6.

¹¹² *Id.*

¹¹³ *Id.* Further, some states include versions of the public trust doctrine in their constitutions. *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002) (“The [public trust] doctrine is ‘partially encapsulated in the language of [Washington's] constitution which reserves state ownership in ‘the beds and shores of all navigable waters in the state.’” (internal citations omitted)); Pub. Access

tory,¹¹⁴ it had not been widely used,¹¹⁵ nor so expansively claimed,¹¹⁶ so that the public trust doctrine as it reemerged in the latter half of the twentieth century caught much of the general public by surprise.¹¹⁷ This aspect of surprise can be attributed, in part, to the vagueness of the public trust's scope,¹¹⁸ especially when compared to fixed notions

Shoreline Haw. v. Haw. County Planning Comm'n., 903 P.2d 1246 (Haw. 1995) (citing to HAW. CONST. art. XII, § 7, which protects "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes"). Other states refer to "law of custom" as opposed to the public trust doctrine. *E.g.*, *Thornton v. Hay*, 462 P.2d 671, 676 (Or. 1969). But the "law of custom" is strikingly similar to the public trust doctrine, as the rationale behind the law of custom is that rights and access to certain natural resources have always been enjoyed by the public, thus providing notice to landowners that they are taking the land subject to that custom, and therefore the right to exclude the public is not part of private property rights. *Id.* at 678. The difference between custom and public trust may lie in the theory that custom may be a more expansive doctrine. *See, e.g.*, *Pub. Access Shoreline Haw.*, 903 P.2d at 1272. The public trust doctrine is usually only used in reference to lands bordering bodies of water. *See, e.g.*, *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 118 (S.C. 2003). For example, in Hawaii, custom is used not only to allow access to water, but also to allow native Hawaiians access to land anywhere in the state to practice any traditional Hawaiian right. *Pub. Access Shoreline Haw.*, 903 P.2d at 1272. *But see Hawaii v. Hanapi*, 970 P.2d 485, 495 n.10 (Haw. 1998) (restricting rights to land that has not been fully developed and especially restricting rights over residential property).

¹¹⁴ *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

¹¹⁵ Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633 (1986) (arguing that the public trust doctrine is "resist[ing] a legal system that is otherwise being abandoned").

¹¹⁶ For a brief review of the public trust doctrine's evolution from public necessity to public leisure, see *Raleigh Avenue Beach Ass'n. v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 27–28 (N.J. Super. Ct. App. Div. 2004), *aff'd* 879 A.2d 112 (N.J. 2005). New Jersey is a state that has broadly defined the public trust doctrine. *Id.* The appellate decision in *Raleigh* details how the public trust as it was defined by Roman law allowed public access "to dry . . . [fish] nets there, and haul them from the sea," and how an early English case viewed the necessity of beach access as "essential to [the public's] welfare." *Id.* at 27–28 (quoting the Justinian Institutes and *Blundell v. Catterral*, (1821) 106 Eng. Rep. 1190, 1199 (K.B.)). The New Jersey Supreme Court affirmed the appellate decision in *Raleigh*, which extended the public trust not only for public recreational uses of the wet sand area, but also to the entire beach itself. *Raleigh*, 879 A.2d at 124–25.

¹¹⁷ *See SLADE ET AL.*, *supra* note 22, at 9 (noting how the requirement that private property owners of public trust land pay property taxes on the land, combined with the typical silence of deeds as to the public trust or to the exact water boundary, "lend[s] a certain credence to the private owner's perception that he or she has sole possession and control of the property, exclusive of the public").

¹¹⁸ *C.f. Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari) ("[T]he Supreme Court of Oregon's vacillations on the scope of the doctrine of custom make it difficult to say how much of the coast is covered."); *Thornton*, 462 P.2d at 679 (Denecke, J., specially concurring) ("The law regarding the public use of property held in part for the benefit of the public must change as the public need changes." (internal citations omitted)). *See also ROSE, su-*

of private property rights and, specifically, the right to exclude others.¹¹⁹ Further, its use to defeat takings claims, even after the supposedly bright line rule declared in *Lucas*, and its uneasy fit within regulatory takings jurisprudence,¹²⁰ adds to the dimension of unexpectedness.

The infusion of surprise in contemporary invocations of the public trust doctrine is ironic and illustrates the need to turn to visual cues for a more practical and obvious indicator to decide inverse condemnation claims. Public trust cases almost without exception highlight the long history of the doctrine.¹²¹ Indeed, courts after *Lucas* have had to cite to this long history in order to fit the public trust within its “background principal of property law” exception.¹²² The rationale being that such history is tantamount to prior notice that certain lands are impressed with the public trust even where they may have been conveyed in fee simple to private entities.¹²³ Thus, an owner cannot claim surprise when the right of exclusion is missing from his or her “bundle of rights.”¹²⁴ Yet surprise is at the basis of all regulatory takings claims—surprise (and indignation) that a society would restrict a fundamental right.

This underlying paradox is a theme running through the many legal commentaries that debate whether the public trust doctrine is

pra note 25, at 111 (“[T]he modern public trust doctrine, in spite of its popularity, is notoriously vague as to its own subject matter . . .”).

¹¹⁹ See, e.g., Callies, *supra* note 31, at 488 (emphasizing the importance of limiting the doctrine of custom because of “the potentially severe impact . . . on property rights in general, and the right to exclude others in particular”).

¹²⁰ For example, unlike typical takings claims, where the plaintiff is the private property owner, public trust cases are instituted by individuals or organizations on behalf of the public. See, e.g., *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 358 (N.J. 1984); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972). Therefore, a particular regulation is not scrutinized, but rather the focus of these cases shifted to the actions of landowners, turning a takings claim on its head. See, e.g., *Matthews*, 471 A.2d at 358; *Borough of Neptune City*, 294 A.2d at 55.

¹²¹ E.g., *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002) (“It is beyond cavil that ‘a public trust doctrine has always existed in Washington.’”); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 (S.C. 2003) (citing to a South Carolina Supreme Court decision from 1884); *Matthews*, 471 A.2d at 360 (citing to ancient Roman law); *Raleigh*, 851 A.2d at 27 (citing to ancient Roman law).

¹²² *McQueen*, 580 S.E.2d at 120 (holding that *Lucas* does not require a State to compensate a landowner “for the denial of permits to do what he cannot otherwise do”); *c.f.* *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (holding that the law of custom is but a “background principle of property” and thus survives a *Lucas* scrutiny).

¹²³ *Stevens*, 854 P.2d at 457.

¹²⁴ *Id.*

properly identified as a background principle of property law.¹²⁵ For Justice Scalia, the author of the *Lucas* opinion, this paradox is unacceptable.¹²⁶ The exception to *Lucas* was not meant to be expansively read or used as a sword to defeat public expectations.¹²⁷ Justice Scalia's view is made clear in his dissent from the denial of certiorari of *Stevens v. City of Cannon Beach*.¹²⁸ In *Stevens*, plaintiffs who owned oceanfront lots claimed an unconstitutional taking when they were denied applications to build a seawall that was necessary for the land's development.¹²⁹ At issue was whether the State law of custom, as announced in its 1969 case, *Thornton v. Hay*,¹³⁰ was viable in light of *Lucas*.¹³¹ In holding that it was, the Oregon State Supreme Court reasoned that Oregon's law of custom was not a newly legislated law, but rather a background principle of state property law.¹³² Therefore, even if the law of custom resulted in an economic wipeout, the Oregon State Supreme Court determined that no compensation was due because the landowners "never had the property interests that they claim were taken by defendant's decision and regulations."¹³³

In his dissent from denial of certiorari, Justice Scalia sharply criticized that holding as "invoking nonexistent rules of state substantive law."¹³⁴ He emphasized that the "opinion in *Lucas* . . . would be a nullity if anything that a State court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights."¹³⁵ Despite Justice Scalia's attempt to clarify the *Lucas* opinion, state courts continue to use the public trust doctrine to defeat takings claims.¹³⁶

¹²⁵ See generally Callies, *supra* note 31; Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939 (1999).

¹²⁶ See *Stevens*, 510 U.S. at 1207 (Scalia, J., dissenting from denial of certiorari).

¹²⁷ *Id.*

¹²⁸ 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

¹²⁹ *Stevens*, 510 U.S. at 1207 (Scalia, J., dissenting from denial of certiorari).

¹³⁰ 462 P.2d 671 (Or. 1967).

¹³¹ *Stevens*, 854 P.2d at 453.

¹³² *Id.* at 456.

¹³³ *Id.* at 457.

¹³⁴ *Stevens*, 510 U.S. at 1211 (Scalia, J., dissenting from denial of certiorari).

¹³⁵ *Id.*

¹³⁶ *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 986 (9th Cir. 2002) (stating that "*Lucas* . . . effectively recognized the public trust doctrine" by referring to State background principles of property law); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 32–33 (N.J. Super. Ct. App. Div. 2004), *aff'd* 879 A.2d 112 (N.J. 2005); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 (S.C. 2003).

III. VISUAL CUES, EXPECTATIONS & THE PUBLIC TRUST DOCTRINE:
THE MEANS TO INSPIRE SECURITY

As previously stated in this Comment, the vagueness of the public trust doctrine is a potential source of public unease.¹³⁷ To satisfy conceptions of justice, the doctrine needs to be perceived as more concrete. Tying the public trust doctrine with visual cues can help to inspire a more secure notion of absolute property rights. Two recent cases, *McQueen v. South Carolina Coastal Council* and *Esplanade Properties, LLC v. City of Seattle*, although relying on the public trust doctrine to defeat a taking, exemplify the importance of visual cues.

Relying on vision as a form of knowledge has been historically critiqued because of the notion that vision is inflexible and unable to capture the nuances of life necessary to form a complete understanding of the world.¹³⁸ However, it is precisely this perceived inflexibility that provides reassurance. Even though people are constantly warned that things are not always as they appear, because of the sheer emphasis in modern society on the visual,¹³⁹ a picture is always, and will continue to be, worth a thousand words. Vision, in reality is contrary to the ideal notion of vision which provides so much security; it is perhaps the most vulnerable of the senses because our surroundings are in constant flux. The vulnerability lies in the fact that because of the constant changes taking place, we do not *consciously* take notice of the vast majority of those changes.¹⁴⁰ A frightening—but

¹³⁷ See *supra* notes 8, 118–20 and accompanying text.

¹³⁸ ROSE, *Seeing Property*, *supra* note 11, at 268. Rose notes with disapproval that “[a]ccording to some, vision is not the appropriate sense to support persuasive interactions at all. . . . [S]ome scholars have mounted a rather startling attack on vision as . . . [a] static model for knowledge . . .” *Id.*

¹³⁹ For example, the renowned German social critic and philosopher, Theodor Adorno, described the origins of modern culture’s reliance on vision to the subordination of all other senses as “the adaptation [of the public] to . . . the age of advanced industry, which was made by the eye when it accustomed itself to perceiving reality as a reality of objects . . .” THEODOR ADORNO, *IN SEARCH OF WAGNER* 99 (Rodney Livingston, trans. 1984) (1952).

¹⁴⁰ Nietzsche described this phenomenon as a “crisis of assimilation” where “[s]ensibility [became] immensely more irritable” due to the physical and rapid changes created by the Industrial Revolution. FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 47 (Walter Kaufmann & R.J. Hollingdale, trans., Random House 1967) (1901). Nietzsche’s eloquent description of this phenomenon evokes his desperation in the failings of vision:

The tempo of this influx [of images] *prestissimo*; the impressions erase each other; one instinctively resists taking in anything, taking anything deeply, to ‘digest’ anything; a weakening of the power to digest results

true—realization is that most people exist in a state of oblivion.¹⁴¹ While it has never been the ideal to be considered oblivious, that lack of perception can ironically help property law become more flexible. Changes are noted, even if subconsciously, and when a particular change is pointed out, or noted, whether it be by personal epiphany or through public outcry, that change is no longer shocking because it has already been consumed.

Visual cues are even more appropriate to the stabilization of regulatory takings jurisprudence precisely because so many areas of property law are already dependant on visual cues.¹⁴² This is an elemental concept learned at an early age by children—at least those who have watched Marvin the Martian race to claim various planets with colorful flags.¹⁴³ Whether it is obtaining rights over wild animals or obtaining rights to land—the surest way to claim possession is through leaving a visual mark. In *McQueen*, nature left its visible mark by flooding previously dry land—that is how the South Carolina Supreme Court was able to proclaim that it was nature and not the state that took the land. And just like a person can take another's land through adverse possession,¹⁴⁴ the South Carolina Supreme Court, with the help of the public trust doctrine, created an analogous doctrine for nature.

from this. A kind of adaptation to the flood of impressions takes place: men unlearn spontaneous action, they merely react to stimuli from the outside.

Id.

¹⁴¹ *Id.* See also JONATHAN CRARY, *Modernity and the Problem of the Observer*, in *TECHNIQUES OF THE OBSERVER: ON VISION AND MODERNITY IN THE NINETEENTH CENTURY* 24 (1990) Although modernity “demolish[ed] the field of classical vision, [it] generated techniques for imposing visual attentiveness, rationalizing sensation, and managing perception . . . [Such] disciplinary techniques . . . never allowed a real world to acquire solidity or permanence.” *Id.*

¹⁴² ROSE, *Seeing Property*, *supra* note 11, at 269 (“[G]enerally visibility runs through property law as perhaps no other legal area.”).

¹⁴³ See JOHN BERGER, *WAYS OF SEEING* 7 (Penguin Books 1977) (1972) (“Seeing comes before words. The child looks and recognizes before it can speak.”).

¹⁴⁴ Adverse possession is the property law doctrine by which a trespasser can be vested with legal claim of title to another's land by the passage of time, as long as the possession is continuous, open and notorious, actual, and hostile. *Marengo Cave Co. v. Ross*, 10 N.E.2d 917 (Ind. 1937). For a more detailed account of adverse possession, see generally Henry W. Ballantine, *Title By Adverse Possession*, 32 HARV. L. REV. 135 (1918).

A. *The Public Trust Doctrine v. Visual Cues: What Will the Neighbors Say?*

Lucas did not discuss the public trust doctrine; it was not necessary before *Lucas*'s pronouncement of its infamous categorical rule. However, the South Carolina Supreme Court in *McQueen v. South Carolina Coastal Council*, one of the more recent state supreme court cases to address public expectations and coastal regulations, relied on the public trust doctrine to save a similar regulation from violating the Fifth Amendment.¹⁴⁵ This begs the question of whether the public trust doctrine, had it been raised, could have saved the regulation at issue in *Lucas*. While some visual factors in *Lucas* and *McQueen* overlap, other facts of the two cases created divergent visual effects, which in turn could have allowed for the same opposite outcomes, even had *Lucas* included the public trust doctrine in its analysis. Although in both cases, the land at issue bordered the beach, the neighboring properties had been fully developed, and a coastal management regulation had rendered the property valueless, analyzing the differences in the visual cues in the two cases can lead to a better understanding of their polar holdings.¹⁴⁶

In *Lucas*, the lots regulated “were located approximately 300 feet from the beach.”¹⁴⁷ In *McQueen*, the lots at issue “had reverted to tidelands or critical area saltwater wetlands,” with both of Mr. McQueen’s lots subject to tidal flow.¹⁴⁸ Further, the time between purchase and development was significantly greater in *McQueen* than in *Lucas*.¹⁴⁹ *Lucas* purchased his lots within an ongoing development project and commissioned architectural drawings for the lots soon after their purchase; both these actions were tangible evidence of *Lucas*’s expectations to “do like his neighbors” and develop his land.¹⁵⁰ When the regulation prohibiting development passed, the South Carolina Supreme Court characterized *Lucas* as having “promptly filed [a takings] suit.”¹⁵¹ The landowners in *McQueen*, on the other hand, bought their lots in the early 1960s and did not attempt to develop until

¹⁴⁵ 580 S.E.2d 116, 120 (S.C. 2003).

¹⁴⁶ The public trust doctrine was not raised in *Lucas*; however, this Comment argues that reliance on visual cues would eliminate the need to rely on the public trust doctrine.

¹⁴⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

¹⁴⁸ *McQueen*, 580 S.E.2d at 118.

¹⁴⁹ *Lucas*, 505 U.S. at 1006–08; *McQueen*, 580 S.E.2d at 118.

¹⁵⁰ *Lucas*, 505 U.S. at 1008.

¹⁵¹ *Id.* at 1009.

1991, when McQueen filed a series of applications requesting permission to build bulkheads and backfill the lots.¹⁵²

The visual stories created in *Lucas* and *McQueen*, both by the treatment of the landowners themselves and nature, were vastly different. In regards to Lucas's land, the public saw an ongoing construction sight, relatively far from the beach, on dry land, amidst a fully developed residential neighborhood. The expectations not only of Lucas, but also of the public in regards to that land were thwarted when a regulation barred all construction. What would have remained had the regulation not been struck down would have been a gaping hole of dry land amidst the beachfront property. In the case of McQueen's lots, the public not only became accustomed to the lots remaining undeveloped, but also nature had taken its course and reclaimed the land.¹⁵³ While there is a public expectation that land will be developed, there is no such correlating expectation that the ocean will be developed. It is in fact the opposite expectation—that bodies of water will be free from private domain—that is at the core of the public trust doctrine and the related doctrine of custom. Thus, while the holding in *McQueen* was solely based on the public trust doctrine, it can also be seen as the culmination of public expectations, aided in part by objective visual cues. It is also significant to note that while the lots in *Lucas* had been purchased for close to one million dollars,¹⁵⁴ the two lots in *McQueen* had been purchased in the 1960s for less than five thousand dollars, which, even taking into consideration inflation, would still have been a minimal sum.¹⁵⁵

A brief description of *Esplanade*, another recent case invoking the public trust doctrine, also paints a compelling portrait of how public expectations can be reflected in the denial of compensation claims. The Ninth Circuit described the lots at issue in *Esplanade* as "first class tideland . . . submerged completely for roughly half of the day, during which time it resembles a large sand bar."¹⁵⁶ The landowner in *Esplanade* proposed to construct platforms, supported by pilings, on top of which he would build nine luxury residences.¹⁵⁷ The land at issue in *Esplanade*, like in *McQueen*, was bought at a bargain

¹⁵² *McQueen*, 580 S.E.2d at 118.

¹⁵³ *Id.* at 120. In fact, the South Carolina Supreme Court made a point of stating that "[a]ny taking McQueen suffered [was] not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property." *Id.*

¹⁵⁴ *Lucas*, 505 U.S. at 1006.

¹⁵⁵ *McQueen*, 580 S.E.2d at 118.

¹⁵⁶ *Esplanade Prop., LLC v. City of Seattle*, 307 F.3d 978, 980 (9th Cir. 2002).

¹⁵⁷ *Id.*

price—forty thousand dollars, with a development plan that was likely to produce a substantial return.¹⁵⁸ Unlike *McQueen*, in *Esplanade*, there was not even the contrary visual effect of neighboring residences to weigh in favor of the plaintiff—only undeveloped land, surrounded by a marina and a city park.¹⁵⁹

Thus, even though neither the South Carolina Supreme Court in *McQueen*, nor the Ninth Circuit reached the issue of whether the *Penn Central* reasonable investment-backed expectations factor survived *Lucas*,¹⁶⁰ both cases exemplified the need for such an inquiry. In essence, *McQueen* is the *Lucas* case, but with all the presumptions of the owner's reasonable expectations stripped away. The *Esplanade* case presented an even more dramatic case in which the invocation of the public trust doctrine vindicated public expectations shaped by the visual aspect of the land.

B. Public & Private Expectations: What Are My Neighbors Doing?

Neighbors' actions are social indicators of what is acceptable and what is intolerable.¹⁶¹ In the realm of takings law, it is therefore not surprising that neighbors' visible treatment of their properties have affected the outcome of takings claims.¹⁶² This was a theme running through *Lucas* itself, where in setting up the factual context of the case, Justice Scalia noted that Mr. Lucas's "intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done"¹⁶³ Another regulatory takings case shortly

¹⁵⁸ *Id.* at 987.

¹⁵⁹ *Id.* at 980.

¹⁶⁰ *McQueen*, 580 S.E.2d at 119.

¹⁶¹ See, e.g., *Bowles v. United States*, 31 Fed. Cl. 37, 43 n.8 (1994) (reprinting, in part, a letter sent to the plaintiff by the Architectural Commission in regards to the plaintiff's development proposal, which explained that filling and sodding would be necessary and giving as its reasoning their desire to prevent "a precedent which would allow other potential homeowners to cut corners"). Society's concern with placing restrictions on an individual's property is embodied in zoning laws, and in the popularity and growth of common interest communities. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 6.2 (2000) (defining "common interest community" as a development or neighborhood where individual lots are burdened with reciprocal servitudes). For an article discussing common interest communities' misplaced preoccupation with neighbors' actions, see Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 559 (2002).

¹⁶² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

¹⁶³ *Id.*

following *Lucas, Bowles v. United States*, is even more explicit in acknowledging the role of visual cues.¹⁶⁴

In *Bowles*, the plaintiff bought an undeveloped lot within a residential subdivision upwards of the waterline.¹⁶⁵ In order to begin development, the lot needed to be filled to accommodate a septic system.¹⁶⁶ Although the plaintiff was aware of the need to receive approval from local regulatory agencies to proceed in developing his lot,¹⁶⁷ he had not been aware that a fill permit from the Army Corps of Engineers was also necessary.¹⁶⁸ At trial, it was established that he was the only lot owner who had ever been required to apply for such a permit.¹⁶⁹ The Corps denied Mr. Bowles' application, basing its decision on its jurisdiction to protect wetlands.¹⁷⁰ In appealing the Corps' decision, Mr. Bowles' argument was essentially, "all my neighbors are doing it, so why can't I?"¹⁷¹

The reasonableness of Mr. Bowles' expectations, as informed by the visual cues created by the neighboring property, permeated the Court of Federal Claims' opinion,¹⁷² which ultimately held in favor of Mr. Bowles based on both a *Penn Central* and a *Lucas* takings analysis.¹⁷³ Finding that the taking was categorical, the court noted that the trial court's focus on "reasonable investment-backed expectations . . . may have been unnecessary."¹⁷⁴ Nevertheless, the court proceeded to analyze the case under both, finding that under either doctrine, compensation was due.¹⁷⁵ In discussing the *Lucas* "background prin-

¹⁶⁴ *Bowles*, 31 Fed. Cl. at 46 ("All Mr. Bowles wanted to do was the same exact use as his surrounding neighbors; build a home in a residential subdivision.").

¹⁶⁵ *Id.* at 40. Whether the lot was actually part of the residential subdivision was a disputed fact at the trial court level; however, the court held that, "a reasonable investor would have considered it part of the subdivision." *Id.* at 42.

¹⁶⁶ *Id.* at 40.

¹⁶⁷ *Id.* at 42.

¹⁶⁸ *Id.* at 43.

¹⁶⁹ *Bowles*, 31 Fed. Cl. at 43.

¹⁷⁰ *Id.* at 40.

¹⁷¹ *Id.* This is a paraphrase of the courts language, which states: "Plaintiff argued that all his neighbors in the subdivision were allowed to place fill on their property for the purpose of installing septic systems." *Id.*

¹⁷² *See id.* at 41, 42, 43 n.9, 46, 51 (alluding to or explicitly addressing Bowles' reasonable expectations: "Bowles took what he believed to be an opportunity;" "a reasonable investor would have considered [the lot to be within the subdivision];" "[the evidence] tends to support . . . Bowles [sic] contention that a reasonable purchaser would have assumed;" "[a]ll Mr. Bowles wanted to do was the same exact use as his surrounding neighbors;" "the court visited the property and saw nothing that could reasonably constitute a 'red flag'").

¹⁷³ *Id.* at 46.

¹⁷⁴ *Bowles*, 31 Fed. Cl. at 46 (internal quotation marks omitted).

¹⁷⁵ *Id.*

ciple of property law” exception, the court summarily stated that it was inapplicable, reasoning that “[a]ll Mr. Bowles wanted to do was the same exact use as his surrounding neighbors; build a home in a residential subdivision”¹⁷⁶—language remarkably similar to that used in *Lucas*. The influence of the surrounding development was clear:

[T]he court visited the property and saw nothing that could reasonably constitute a “red flag” that would justify imputing Bowles with “notice” of the Corps jurisdiction over Lot 29. If anything, the opposite was apparent. There are several constructed homes on the north side of China Clipper Drive on lots virtually identical to Lot 29. . . . [E]ven after the time of Bowles’ permit denial other lots within the subdivision were filled in the exact manner Bowles wanted to fill his.¹⁷⁷

At first blush, the potency of this analysis is diminished after *Palazzolo*, which held that notice alone would be insufficient grounds for barring a takings claim;¹⁷⁸ however, *Palazzolo* did nothing to dispute the impact such “red flags” actually have on both private and public expectations.¹⁷⁹ The Court reasoned that “[p]rospective enactment . . . can limit the value of land without effecting a taking because it can be *understood as reasonable by all concerned*.”¹⁸⁰ Because the “all concerned” in a takings claim encompasses both the landowner and the public, the means by which both can most readily judge reasonableness is the physical aspect of the land at issue.

CONCLUSION

Compensation is a means to achieve justice.¹⁸¹ The legislature acts on the public’s behalf when it gives compensation;¹⁸² therefore,

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 51.

¹⁷⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001).

¹⁷⁹ *See id.* at 633 (O’Connor, J., concurring) (“Our polestar . . . remains the principles set forth in *Penn Central* itself [I]nterference with investment-backed expectations is one of a number of factors that a court must examine.”).

¹⁸⁰ *Id.* at 627 (majority opinion) (emphasis added).

¹⁸¹ Michelman, *supra* note 47, at 1171–72 (“[T]he only ‘test’ for compensability which is ‘correct’ in the sense of being directly responsive to society’s purpose in engaging in a compensation practice is the test of fairness: is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted?”).

¹⁸² *See, e.g., Bowles*, 31 Fed. Cl. at 53 (“A determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.”).

the act of giving must be perceived as fair by the public.¹⁸³ Fairness, in turn, is determined by evaluating the exchange accomplished.¹⁸⁴ The underlying question humming beneath the public inquiry is simple: “What are we getting in return for our money?” Because government is meant to serve the practical purpose of civil ordering, the answer should be readily available and obvious.¹⁸⁵ A citizen should not need to reference abstract rights.¹⁸⁶ Linking rationales for dispensing or withholding compensation with actual sensory perception can maintain the steady assurance of justice in society.

In the case of eminent domain, the public has physical and prominent proof of the exchange. The answer to the question, “what are we getting,” is the property condemned, available for all to inspect. Further, not only is the physical exchange evidenced, but in many cases, the rationale for the purchase is physically manifested through construction that benefits the public. Even in instances of controversial conveyances to private entities, the argument and rationale is played out in the press for public consumption.¹⁸⁷ Thus, even though a citizen may not agree to the answer given, one is nonetheless provided.

The exchange in regulatory takings cases is more problematic. In cases not involving complete economic wipeout, just compensation is not accompanied by a reciprocal property interest. The public trust doctrine is an unsatisfactory doctrine in this regard—a private landowner does not see fairness in not obtaining compensation for his inability to exclude others. But neither can the public be forced

¹⁸³ Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 764 (1979) (“Outcomes [of property rights disputes] must be rationalized to winners and losers alike in terms of a universal property doctrine that society as a whole accepts as just.”).

¹⁸⁴ This is reflected in the use of a balancing test in less than categorical takings. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

¹⁸⁵ BURKE, *supra* note 4, at 53 (“The science of government . . . [is] so practical in itself and intended for such practical purposes . . .”).

¹⁸⁶ *Id.* Edmund Burke aptly notes this point:

What is the use of discussing a man’s abstract right to food or medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician rather than the professor of metaphysics.

Id.

¹⁸⁷ See, e.g., Steve Chambers, *Public Use or Abuse?*, STAR-LEDGER (Newark), Feb. 21, 2005, at 1 (“In New Jersey, 40 towns have [exercised their power of eminent domain] since July 2003 alone, part of a nationwide phenomenon that has angered property rights groups.”).

to compensate for what nature has taken away (or back).¹⁸⁸ Visual cues, not only as to nature, but also as to a landowner's actions, help to inform the decision to compensate. Is the landowner seen as "impos[ing] a restriction on the use of the oceans to promote his activities on his own land . . . ?"¹⁸⁹ Or is the landowner simply trying to do what everyone else is doing?¹⁹⁰

The answer is not simple, but in the scholarly pursuit of the complicated analysis courts should not overlook the most practical of starting points—observation. This quite literal "first glance" could immediately lead to the answer. If an individual is attempting to build where no one else thought to build, or where nature, due to the owner's lack of vigilance, has repossessed, there is a strong visual cue of something awry—that perhaps what the landowner claims does not "inhere in the title itself."¹⁹¹ Compensation could then ironically become the means of *injustice*. By putting forth this proposition, this Comment in no way attempts to end the inquiry at visual cues, but simply means to emphasize that often the answers to the most complicated questions are those that are easily overlooked, and that in some property cases, justice should not be blind.

¹⁸⁸ Both State and the Federal governments often have social programs that compensate for natural disasters. For example, the National Flood Insurance Program paid out over \$3 billion dollars in disaster relief following Hurricane Hugo in 1989. Houck, *supra* note 19, at 339. The very existence of these programs has been another rationale for not compensating economic wipeouts resulting from coastal regulations. *Id.* (referring to coastal development as "real estate on welfare").

¹⁸⁹ Sax, *Public Rights*, *supra* note 27, at 160.

¹⁹⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992) (noting that Lucas's "intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done").

¹⁹¹ *Id.* at 1029.