

O'CONNOR, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 99–2047

ANTHONY PALAZZOLO, PETITIONER *v.*
RHODE ISLAND ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE
ISLAND

[June 28, 2001]

JUSTICE O'CONNOR, concurring.

I join the opinion of the Court but with my understanding of how the issues discussed in Part II–B of the opinion must be considered on remand.

Part II–B of the Court's opinion addresses the circumstance, present in this case, where a takings claimant has acquired title to the regulated property after the enactment of the regulation at issue. As the Court holds, the Rhode Island Supreme Court erred in effectively adopting the sweeping rule that the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction. Accordingly, the Court holds that petitioner's claim under *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978), "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Ante*, at 21.

The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis. Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in *Penn Central*

O'CONNOR, J., concurring

itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is “‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *Penn Central*, *supra*, at 123–124 (quoting *Armstrong v. United States*, 364 U. S. 40, 49 (1960)). The concepts of “fairness and justice” that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed “any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” *Penn Central*, *supra*, at 124 (quoting *Goldblatt v. Hempstead*, 369 U. S. 590, 594 (1962)). The outcome instead “depends largely ‘upon the particular circumstances [in that] case.’” *Penn Central*, *supra*, at 124 (quoting *United States v. Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958)).

We have “identified several factors that have particular significance” in these “essentially ad hoc, factual inquiries.” *Penn Central*, 438 U. S., at 124. Two such factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” *Ibid.* Another is “the character of the governmental action.” *Ibid.* The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis. *Id.*, at 127 (“[A] use restriction on real property

O'CONNOR, J., concurring

may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, [citations omitted], or perhaps if it has an unduly harsh impact upon the owner's use of the property"); see also *Yee v. Escondido*, 503 U. S. 519, 523 (1992) (Regulatory takings cases "necessarily entail[] complex factual assessments of the purposes and economic effects of government actions"). *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required.

The Rhode Island Supreme Court concluded that, because the wetlands regulations predated petitioner's acquisition of the property at issue, petitioner lacked reasonable investment-backed expectations and hence lacked a viable takings claim. 746 A. 2d 707, 717 (2000). The court erred in elevating what it believed to be "[petitioner's] lack of reasonable investment-backed expectations" to "dispositive" status. *Ibid.* Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922).

Further, the state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. For example, the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant may also shape legitimate expectations without vesting any kind of development right in the property owner. We also have never held that a takings claim is defeated simply on account of the lack of a personal financial investment by a postenactment acquirer of property,

O'CONNOR, J., concurring

such as a donee, heir, or devisee. Cf. *Hodel v. Irving*, 481 U. S. 704, 714–718 (1987). Courts instead must attend to those circumstances which are probative of what fairness requires in a given case.

If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost.* As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the sali-

*JUSTICE SCALIA's inapt "government-as-thief" simile is symptomatic of the larger failing of his opinion, which is that he appears to conflate two questions. The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power. The second question is whether the State must compensate a property owner for a diminution in value effected by the State's exercise of its police power. We have held that "[t]he 'public use' requirement [of the Takings Clause] is . . . coterminous with the scope of a sovereign's police powers." *Hawaii Housing Authority v. Midkiff*, 467 U. S. 229, 240 (1984). The relative timing of regulatory enactment and title acquisition, of course, does not affect the analysis of whether a State has acted within the scope of these powers in the first place. That issue appears to be the one on which JUSTICE SCALIA focuses, but it is not the matter at hand. The relevant question instead is the second question described above. It is to this inquiry that "investment-backed expectations" and the state of regulatory affairs upon acquisition of title are relevant under *Penn Central*. JUSTICE SCALIA's approach therefore would seem to require a revision of the *Penn Central* analysis that this Court has not undertaken.

O'CONNOR, J., concurring

ence of these facts cannot be reduced to any “set formula.” *Penn Central*, 438 U. S., at 124 (internal quotation marks omitted). The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under *Penn Central* before deciding whether any compensation is due.