Palazzolo v. Rhode Island: Regulatory Takings, Investment-Backed Expectations, and Slander of Title

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I. Introduction

When a public enactment goes "too far," a private property owner has a constitutional right to just compensation.1 If the private owner brings suit for "inverse condemnation" and establishes that the government is engaging in a regulatory taking, she can recover the fair market value of the property taken.2 But, if instead, the owner sells the property to one who is on notice of the excessive regulation, the post-enactment purchaser's entitlement to compensation is much in doubt.

Two basic principles of property law seem to dictate opposite results. On one hand, property is said to be a "bundle of rights," the most important of which is the owner's right to transfer her entitlement to another. The purchaser "stands . . . in the precise position of the vendor himself."3 In the words of Justice Antonin Scalia, an individual's property rights are:

... [not] altered because they acquired the land well after the [regulator] had begun to implement its policy. So long as the [regulator] could not have deprived the prior owners of the [property] without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.4

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2. See, e.g., Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2456 (2001), available at No. 99–2047, 2001 U.S. Lexis 4910 (U.S. Jun. 28, 2001). While in an ordinary condemnation proceeding the government seeks the assistance of a court to take title to private property in return for "just compensation," here the condemnation is "inverse" in the sense that the private property seeks the assistance of a court to recover the value of the property taken when the government has engaged in a regulatory taking. Id.
Thus, market-alienability provides the original owners a fair return when property changes hands.

On the other hand, "[a] purchaser of property, with notice that the title of the vendor [is] to be disputed for . . . [an] infirmity, is entitled to no consideration . . . if the . . . infirmity be established." She can make her own determination as to whether the property is diminished in value. And in the words of U.S. Circuit Judge Sheldon Plager:

If the purchaser paid more than the property with the restriction on it is worth, the loss is the result of an error in market judgment, not a result of the restriction as such. . . . [T]he purchaser does not have reasonable expectations that the property can be used for the prohibited purpose; to assess the government for such a loss is to give the purchaser a windfall to which she is not entitled.6

Hence, the knowledgeable post-enactment purchaser seems to have suffered no loss.

Justice Scalia's support of market alienability and Judge Plager's requirement of an investment-backed expectation stand at cross-purposes. And in the recent case of Palazzolo v. Rhode Island, the United States Supreme Court reconsidered which of these two principles to apply to a successor who acquired title after the effective date of confiscatory regulations.7

Justice Kennedy, who delivered the opinion of the Court, reiterated Scalia's rule that the "postenactment transfer of title [does not] absolve the State of its obligation to defend any action restricting land use."8 But five other Justices (O'Connor, Stevens, Ginsberg, Souter, and Breyer) expressed different thoughts.9 In a variety of opinions, they opined over how and when post-regulation acquisition might prove fatal to the purchaser's claim of a regulatory taking. As a consequence, the constitutional right of the post-enactment purchaser to just compensation for the taking of property remains in doubt.

This article proposes an analytic rethinking of the rules of regulatory takings as applied to post-enactment purchases. If successful, the proposed rules will accomplish two goals: first, governments should be forced to internalize the cost of confiscatory regulations; and, second, the parties who in fact suffer the economic losses when government regulations go "too far" should receive the compensation.

5. Bigelow, supra note 4, at 180.
7. See Palazzolo, 121 S. Ct. at 2462–64.
8. Id. at 2462.
9. See Id. at 2465, 2468, 2472, 2477.
II. Regulatory Takings

Sovereign states have the inherent power to govern. Governments in the exercise of this power have encouraged individuals and business firms to invest capital in resources by offering assurances that the investors will have the exclusive use, enjoyment, and income therefrom. The legally protected right to these investment backed-expectations forms the foundation of the institution of property.\textsuperscript{10}

From time-to-time, governments also put in place regulations. These regulations sometimes modify the expectations of property holders by affecting, for good or ill, their rights to use, enjoyment, and income. As Justice Oliver Wendell Holmes observed years ago: “Government hardly could go on if to some extent values incident to property could not be diminished . . . .”\textsuperscript{11}

Although the government may regulate a property owner’s expectations, the Fifth Amendment to the United States Constitution bars the federal government from “taking” private property without just compensation and the Fourteenth Amendment applies the same prohibition against conduct by state and local governments.\textsuperscript{12} Historically, these compensation requirements were applied only when a government agency took physical occupation of privately owned land for public works, such as a highway or a public spring. Early in the twentieth century, however, the principle was extended to strike down overbearing government regulations. Speaking for the Court, Justice Holmes ruled “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”\textsuperscript{13}

All regulations must serve a public purpose if they are to be constitutionally valid. In the traditional language of the law, they must be intended to promote “public health, safety, morals and welfare.”\textsuperscript{14} Some regulations, however, even though serving a valid constitutional purpose, may be unconstitutional in effect if they require “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{15} Justice Holmes’ opinion left the Supreme Court with the daunting task of determining when a regulation serving a valid constitutional purpose must also be supported by com-

\textsuperscript{11} Pennsylvania Coal, 260 U.S. at 413.
\textsuperscript{12} Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 233 (1897).
\textsuperscript{13} Pennsylvania Coal, 260 U.S. at 415.
\textsuperscript{14} Berman v. Parker, 348 U.S. 26, 28 (1954).
\textsuperscript{15} Armstrong v. United States, 364 U.S. 40, 49 (1960).
pensatory payment in order to be constitutionally applied to a property holder’s interest.

That task is complicated by the dynamic nature of the property marketplace. Parcels are bought and sold. Ownership changes hands. Regulations come and go. Market values fluctuate (sometimes in response to regulatory change, and sometimes not). The legal issues of whether and when a “regulatory taking” results in an inverse condemnation intermix with questions of who suffered the loss in what amount.

The complication is confounded by the ambivalence underlying the constitutional principle itself. The prohibition against regulatory takings concerns valid exercises of sovereign power, invalidly applied. It is the uncompensated application of a regulation to a particular private property interest that results in an inverse condemnation, and thus, violates the Constitution. Even after the regulation is determined to be invalid in its application to a particular property interest, the regulator, by compensating the disappointed property holder, may keep the regulation in force and effect.16

III. Categorical Ratio Decidendi

For the past quarter century, the Supreme Court has attempted to respond to the question of whether and when valid regulations have been invalidly applied with categorical ratio decidendi. Regulations that result in the permanent physical occupation of private land are per se compensable.17 Likewise, total takings, regulations that deprive a landowner of “all economically beneficial or productive use of land,” have been treated as necessarily compensable without case-specific inquiry.18

In the case of partial takings, however, the Court has followed no “set formula” when determining whether regulations that leave the owner with some residual beneficial and productive use of land require compensation. Instead, it engages in “essentially ad hoc, factual inquiries”19 to determine whether the government is “forcing some people

16. See, e.g. Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 441 (1982) (stating “We do not . . . question the substantial authority upholding a State’s broad power to impose appropriate restrictions upon an owner’s use of his property. . . . The issue of the amount of compensation that is due is a matter for the . . . courts to consider. . . .”)
17. Id. at 434–35.
18. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). In a case that came down after the text of this article had been completed, the Supreme Court held that a “temporary prohibition on economic use” during a planning moratorium does not constitute a categorical taking “absent extraordinary delay.” Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, No. 00–1167, 2002 U.S. LEXIS 3028, at *51–4 (Apr. 23, 2002).
alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole."

The Court has created a special category of partial takings to deal with pecuniary charges, or in-kind dedications exacted as conditions for the grant of regulatory permissions. To be legitimate, such exactions must have an essential nexus with the impact of the proposed development on the community, while the burden of the exactions on the landowners must be roughly proportional to the negative impacts on the community.

When there is an adjudication that an inverse condemnation is occurring, the transgressing government has a choice. If the government ceases and desists, then the landowner’s monetary relief is limited to the lost income and enjoyment occasioned by the temporary taking. If the regulation is kept in force and effect, just compensation is measured in terms of the full fair market value of the property interest taken.

IV. Accrual of Regulatory Taking Claims

The Supreme Court has also posited special procedural rules as to when a cause of action for the regulatory taking becomes cognizable in a judicial proceeding. If a regulation results in the permanent physical occupation of private land, the cause of action accrues when the government first trespasses. When, however, the claim is that of a purely regulatory taking, the question is problematic. In several recent cases, "the Court has made clear ... a claim that the application of government regulations effect a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." In the recent Palazzolo case, the opinion of the

22. Nollan, 483 U.S. at 837.
25. See id.
Court restated ripeness as requiring a finding that there was “no genuine ambiguity . . . as to the extent of permitted development on . . . [the] property.”\(^{28}\) Only when “all the events have occurred which fix the alleged liability of the [Government] and entitle the plaintiff to an action” will the cause of action have accrued.\(^{29}\)

Justice Stevens, in the dissenting portion of his opinion in the Palazzolo case, makes the thoughtful argument that a regulatory taking may occur well before the claimant goes through prelitigation procedures required to make it subject to a constitutional challenge.\(^{30}\) The opinion of the Court rejects this possibility by opining that the inverse condemnation claim does not mature until the ripeness requirement has been satisfied.\(^{31}\)

The “catch-22” faced by the claimant is that under most regulatory procedures a landowner can always present an alternative plan or reapply for an exception or variance. In one sense then, regulatory disappointments are never “final.” This leaves any number of putative regulatory taking claims in procedural limbo. They may or may not be ripe for review, and they may or may not be found to amount to a regulatory taking, once reviewed. The owner faces a dilemma. If she brings suit, she runs the risk that her claim is not yet ripe. If she delays bringing suit, she runs the risk that a final determination already has been made and that the statute of limitations is running.

For example, in Creppel v. United States,\(^{32}\) a private landowner claimed that a 1976 regulatory order by the U.S. Army Corps of Engineers unconstitutionally abridged his expectation of land reclamation until 1984 when a federal district court ordered that the original project could proceed.\(^{33}\) The Court of Appeals for the Federal Circuit found that the landowner’s cause of action for a temporary taking accrued in 1976 after “all events [had] occurred that fix the alleged liability of the Government” and that a claim for a temporary taking filed by the landowner in 1991 was time-barred by the six-year statute of limitations governing claims against the United States.\(^{34}\)


\(^{30}\) Palazzolo, 121 S. Ct. at 2469 (Stevens, J., concurring in part and dissenting in part).

\(^{31}\) Id. at 2463.

\(^{32}\) 41 F.3d 627 (Fed. Cir. 1994).

\(^{33}\) Id. at 632.

\(^{34}\) Id. at 631–32.
V. Lack of Coherent Principles

In its use of categorical rules and procedural obfuscations, the Supreme Court has failed to provide a coherent set of principles to be used when determining the legitimacy of government regulation. Consider the just decided Supreme Court case of Palazzolo v. Rhode Island.35 In 1959, Palazzolo and his associates formed Shore Gardens, Inc. [SGI] and through it purchased a wetland parcel later characterized as "a title examiner's nightmare."36 During the 1960s, three attempts to develop the parcel were rebuffed by state natural resources agencies.37 SGI did not contest the denials. Beginning in 1971, Rhode Island subjected wetlands to increasingly onerous use restrictions.38 In 1978, SGI's corporate charter was revoked for nonpayment of taxes and title to the parcel passed to Palazzolo who had become the corporation's sole stockholder.39 In 1983, he renewed efforts to develop the property and finally, after the wetlands regulator rejected several projects, Palazzolo filed an inverse condemnation action in the state courts.40 The Rhode Island Supreme Court held first that Palazzolo's claim was not ripe, and second that he had no right to challenge regulations predating 1978 when he succeeded to SGI's legal ownership of the property.41

The opinion of the U.S. Supreme Court reversed, holding the regulatory taking claim both ripe for review and not barred because Palazzolo acquired title after the regulation's effective date.42 Accordingly, the Court remanded with a directive that the Rhode Island courts consider whether there had been a partial taking.43 But a fractured court found five Justices voicing separate opinions as to how the claims of a post-enactment purchaser should be reconsidered.44 Justice Kennedy argued that "it would be illogical and unfair, to bar a regulatory takings claim . . . where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."45 Justice O'Connor worried that "if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls."46

37. Palazzolo, 121 S. Ct. at 2455.
38. Id. at 2456.
39. Id.
40. Id.
41. Id. at 2457.
42. Palazzolo, 121 S. Ct. at 2465.
43. Id.
44. See Id. at 2465, 2468, 2472, 2477.
45. Id. at 2463.
46. Id. at 2467 (O'Connor, J., concurring).
Scalia answered that denial of recovery to purchasers would give a "windfall" to the government. Justice Stevens concluded that Palazzolo lacked standing to sue and that "[i]f the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted." Finally, Justice Breyer opined that change of ownership may have so "rapidly and dramatically" diminished "reasonable investment-backed expectations" as to disentitle the post-regularly acquirer to compensation. Rather than joining the issue, the disparate voices on the Court have taken it in different directions.

VI. Investment-Backed Expectations

Perhaps closer analytic attention to Breyer's formulation of "reasonable investment-backed expectations" may inform the debate as to whether and when a regulatory taking of property has occurred. The "investment-backed expectation" turn of phrase comes out of Professor Frank Michelman's seminal 1967 essay on the "Ethical Foundations of 'Just Compensation' Law." Over the past thirty years, the Supreme Court has rhetorically employed it in a number of its taking opinions without finding a way to consistently factor it into its decision calculus. The Court has sometimes, but not always, considered "reasonable investment-backed expectations" as a *sine qua non* for regulatory taking claims. But there is consensus that "the extent to which the regulation has interfered with 'distinct investment-backed expectations' is keenly relevant to takings analysis generally." As Justice O'Connor observed in her concurring opinion in *Palazzolo*, "... the degree of interference with investment-backed expectations... is one factor that points toward the answer to the question whether the application of a particular regulation to a particular property 'goes too far.'"
If the Court were to embrace the view of Jeremy Bentham that “property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess...” the factor will be relevant indeed. Absent an expectation, the claimant will have no property to be taken. And if there has been a regulatory taking of property, the value of the claimant’s reasonable expectations will constitute the measure of her just compensation.

But the devil is in the details. In the hard case, the post-regulatory purchaser receives a mixed message. The pre-existing regulations may be serving a legitimate constitutional purpose but their effect may be unconstitutional as applied by going “too far” in diminishing the value of the seller’s property. At the time of the sale any determination of whether the regulations constitute a regulatory taking may remain not yet ripe for review. When a purchaser buys under such circumstances, what are her reasonable expectations? Should she reasonably expect that she will take subject to the facially constitutional pre-existing law of which she was on notice? Or should she reasonably expect that she will be within the constitutional shelter of the unripened rights of her predecessor in title?

An answer to these questions may be found in a modeled example. Consider the hypothetical case of:

VII. Orval v. The City of Freemarket

At a cost of $500,000, Orval built an office building in downtown Freemarket in 1990. The building contained five office suites of equal size and with equivalent rental value. Freemarket’s ordinances required operators of commercial buildings to obtain an annual “certificate of public interest and convenience” from the city building inspector. In past years, Orval applied for and received certification.

In 1998, each of the five suites was rented out at an annual rental of $10,000, for a total in $50,000 in gross rental income. After paying taxes, operating, and maintenance expenses, and setting aside a reserve fund for depreciation, Orval realized $40,000 annually in net rental income. The state real estate tax assessor, using “the income approach” for appraisal, determined that fair market value of the property was $666,667. She arrived at this conclusion by capitalizing the $40,000 in net annual return at a rate of 6 percent.56

55. BENTHAM, supra note 11, at 68.
In 1998, the City of Freemarket passed an ordinance designed to "provide quality daycare facilities for the working mothers of Freemarket." A Commissioner of Daycare was empowered to designate daycare sites in twenty office buildings scattered throughout the central business district. Orval's building was one of the twenty selected.

When Orval applied for the 1999 certificate of public interest and convenience, the city building inspector told him it would only be granted if he made available one of the office suites to the Bo Peep Daycare Center, rent free. The daycare ordinance provided a "special hardship procedure" whereby a selected site might administratively appeal for "reasonable rent" upon a showing that they would otherwise not receive "a fair return on investment." Orval decided to forego the costly administrative appeal until he had better information on the likelihood of success.

Under protest, Orval permitted the Bo Peep Daycare Center to occupy one of his office suites rent free. As a result, the gross rental income from the building was reduced to $40,000, and the net rental income to $30,000. Pursuant to the "income approach" of appraisal, at a 6 percent interest rate the value of the building was reduced to $500,000.

At the end of 1999, Orval reevaluated his option. During the year the owners of four other designed daycare sites had applied for "reasonable rent" under the "special hardship" provision but they had all been turned down. If Orval ripens his constitutional claim by appealing and being denied reasonable rent, and then pursues a challenge, the result seems clear enough. The condition imposed upon Orval is almost certainly a regulatory taking. There appears to be no essential nexus between Orval's operation and the city's need for daycare centers, and the burden placed upon Orval is disproportionate to any daycare demands his operation places on the community.

If, after Orval's successful challenge, Freemarket removes the condition, then Orval's monetary relief is limited to the lost income and enjoyment occasioned by the temporary taking. If the exaction had been in force and effect for the calendar year of 1999, Orval could recover $10,000 in interest. If the city decides to maintain the exaction in force and effect, however, Orval's just compensation would be measured in terms of the full, fair market value of the property interest taken—$166,667 ($666,667–$500,000).

If, however, Orval decides to sell the office building without ripening his claim to just compensation, then the answers to the "taking questions" become more puzzling. For example, assume that in 2000, after
the exaction had been in effect for one year, Orval sells the property to Wise for $500,000. Wise was an arms-length purchaser who was fully aware of the exaction and its consequences. If the city decides to keep the exaction in force and effect, who, if anyone, is entitled to recover the economic loss of $166,667?

It seems neither fair nor just to permit Wise to recover a claim against the city for $166,667. Using his knowledge, he took advantage of the situation and discounted the price he paid for the property. He had no "investment-backed expectation" that he would own the property free and clear of the exaction, which served a constitutionally valid purpose. An award of $166,667 to Wise would be a windfall; he has no good entitlement to just compensation.

On the other hand, the city is persisting in a course of regulatory conduct that is resulting in an unconstitutional economic loss of $166,667. And we now see that it is Orval who has proved to be the loser. But, under ordinary principles of condemnation law, only the owner of property at the time the taking occurs is entitled to just compensation. After Orval has sold the property, it seems too late for him to pursue a claim for inverse condemnation.57 Yet, if Orval is not permitted to recover his loss, the Town of Freemarket will be rewarded for its unconstitutional behavior in the amount of $166,667. How can Orval state a cause of action and force Freemarket to pay him his loss after he has transferred all right, title, and interest in the property?

Although it seems too late for Orval to pursue an inverse condemnation claim,58 a tort cause of action might still be timely presented. The tort of slander of title may be recycled from the trash bin of history and given a constitutional dimension.59 Freemarket, by promulgating

57. See Danforth v. United States, 308 U.S. 271 (1939); 2 Nichols on Eminent Domain § 5.01(5)(d)(i) (Julius L. Sackman ed., 3d ed. 1999) (stating "It is well settled that when there is a taking of property by eminent domain in compliance with law, it is the owner of the property at the time of the taking who is entitled to compensation.").

58. See United States v. Dow, 357 U.S. 17, 20–21 (1958) (stating "compensation is due at the time of the taking, the owner at that time, not the owner at an earlier or later date, receives the payment."). If Justice Stevens's dissenting views were adopted, then the taking would have occurred during Orval's tenure and he would have standing to bring the claim against Freemarket.

59. "Slander of Title is the publication of false statements that disparages the property rights of another. Damages are measured in terms of the resulting reduction in value of the land or chattel. The earliest case involved oral aspersions upon the marketability of the owner's title to land." Restatement (Second) of Torts, § 624 cmt. a. (1977); 2 Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, The Law of Torts § 6.1 at 262–75 (2d ed. 1986). The tort neatly applies to regulatory excesses when government unconstitutionally (and falsely) asserts the power to regulate without paying compensation. Since the constitutional doctrine treats imposition of such regulations as "takings," the disparagement is to "title" and the just compensation is the owner's loss of fair market value.
and publishing a regulation that had a constitutionally impermissible impact on Orval’s property, slandered Orval’s title and caused him a $166,667 loss. The slander occurred when Orval sold to Wise, which caused Orval to suffer an economic loss of what would have been part of the property’s fair market if it had not been overzealously regulated. By using slander of title, the government would be discouraged from engaging in unconstitutional behavior and Orval’s “distinct investment-backed expectation” would be protected. Wise would not receive a windfall. Fairness and justice would be served.

VIII. Slander of Title

A prima facie action for slander of title could be stated against a government regulator whenever the owner of property, which is subjected to a regulatory taking, sells it to a purchaser with notice in an arm's-length market transaction. The fact of the sale would resolve any doubt of the finality of the impact of the government’s action on the pre-enactments owner’s entitlement. A partial taking would allegedly result from a confiscatory regulation’s imposition of an incumbrance on the seller’s title. To prove her case, the seller would need to show: (1) that the publication of the regulation disparaged her title to the property; (2) that the suit was not time-barred by the statute of limitations; (3) that the regulation went “too far” so as to impose an incumbrance and constitute a regulatory taking; and (4) that as a result of the disparagement, she had suffered damages in the form of a reduction of what would have been the fair market value of her property.

Such a claim would not be barred on sovereign immunity grounds because “the self-executing” nature of the Fifth and Fourteenth Amendments to the U.S. Constitution would override any such claim federal or state governments would have. In addition, the knowledgeable purchaser would take the property subject to the existing regulation and, having applied his own discount to the price, would not be heard to later complain that the pre-existing regulatory regime was confiscatory. Nor should the purchaser be heard to argue that the sale included an


assignment of the seller’s cause of action because federal law expressly prohibits the assignment of any claim against the U.S. government.\textsuperscript{64} Likewise, under the common law of most states, the sale of property would not be viewed as implicitly assigning the seller’s tort claims related to the property.\textsuperscript{65}

IX. Reconceptualizing Regulatory Takings

Only the owner of property at the time a condemnation action is brought is entitled to just compensation.\textsuperscript{66} Once property subjected to a regulatory taking has been sold, it is too late for the seller to pursue an action for inverse condemnation. But when property being subjected to a regulatory taking is sold in an arm’s-length transaction to a purchaser with notice, market theory teaches that the fair market price will be discounted. The knowledgeable buyer of the property will have suffered no compensable loss. The seller, however, will have seen his title to the property slandered. Government, the tortfeasor, has publicly and obdurately made pronouncements disparaging the seller’s full entitlement to the property and the seller has suffered tort damages in the amount of the reduction of the fair market of the property.

Imposition of tort responsibility on the government satisfies concerns expressed by Justices Kennedy and Scalia in \textit{Palazzolo v. Rhode Island}. The state is not given a “windfall” and “absolve[d] of its obligation to defend any action restricting land use, no matter how extreme or unreasonable.”\textsuperscript{67} The damages to be paid by the government are merely redirected to the party actually suffering the loss.

Nor are Justice Kennedy’s broader criticisms regarding the right of a post-enactment purchaser to challenge unreasonable regulations on the mark. “Future generations” will continue to have “a right to challenge unreasonable limitations on the use and value of land.”\textsuperscript{68} The law of takings is not concerned with regulations serving unlawful purposes. Such regulations will be struck down when they deny equal protection, or deny due process, or violate other federal laws.\textsuperscript{69} The law of takings is concerned with regulations serving a lawful public purpose that go

\textsuperscript{65} Andrea G. Nadel, Annotation, \textit{Assignability of Proceeds of Claim for Personal Injury or Death}, 33 A.L.R. 4th 82 (2001).
\textsuperscript{66} Martin v. United States, 30 Fed. Cl. 542, 551 (1994).
\textsuperscript{68} \textit{Id.} at 2463.
“too far” in burdening a owner’s particular “property.” Since time immemorial, the extent of the owner’s particular property has been measured by her “expectation of deriving certain advantages.” Title to property is, by its very nature, personalized to the holder’s particular expectations, and thus, subjecting knowledgeable post-enactment purchasers to pre-enactment regulations reaffirms rather than alters the “nature of property.” Justice Kennedy’s concerns are simply unfounded if the takings question is separated from the unreasonable regulation question.

This rethinking of regulatory takings has other procedural and substantive advantages. Procedurally, it brings timely closure to past excesses. Substantively, it addresses the courts’ attention back to basic concerns for fairness and justice.

Under the present state of the law, the question of whether an unripened regulatory taking is occurring remains open and unresolved through successive generations of ownership. Unless and until the property owner calls the question by obtaining final denial of a plan for development, the claim of unconstitutionality remains inchoate. Treatment of confiscatory regulations as resulting in a slander of a seller’s title at the time of sale will bring many claims to more timely closure. Whenever over-regulated property is sold, a tort cause of action accrues and if the seller does not thereafter bring suit within the period of limitations, the suit is time-barred.

The tort reconceptualization also provides a changing baseline as to what constitutes the seller’s reasonable invested-backed expectations. Since a buyer purchases on notice of the existing regulatory regime, he would hold his property subject to those pre-existing regulations that serve valid public purposes. His property’s alleged loss in fair market value will be measured not against the hypothetical value of property in its “pure and original” condition, but rather against the value of the property as legitimately regulated at the time of his acquisition. After compensating the excessively burdened property owners, the government is free to put in place new regulations to deal with new problems.

Substantively, this rethinking of the rules of regulatory takings provides objective answers to several of the questions that have puzzled the courts. The parties, by their market transaction, have denominated the “segment” of property in which each owner has an investment-backed expectation. It is with respect to that segment of property

acquired by the owner in the last previous market transaction that regulatory taking analysis should be done. For example, a segment might consist of a fee simple estate in three acres, or mineral rights under a broad form deed, or a railroad “right of way.” Likewise, the real estate market provides the answer to whether the regulatory taking is “total.” To make a case for a “total taking,” the owner would be required to plead and prove that an offer of the property for sale would produce no takers. The government might answer with testimony from market experts that a given price would yield willing buyers.

Even if the regulatory regime pre-existing the sale is ambiguous, post-enactment purchasers should have no cognizable complaint. To return to the words of Judge Plager, “[i]f the purchaser paid more than the property with the restriction on it is worth, the loss is the result of an error in market judgment, not a result of the restriction as such.”72 And in this respect, Justice Scalia seems in agreement: he has observed that a basic function of the real estate market is to allow the players, some “venturesome” and “risk averse” to rate the risk of uncertainty.73

Courts will continue to have details to work out. For example, a transfer to a successor in title for less than full and adequate consideration (e.g., heirs, devisees, donees, and friendly purchasers) would not be treated as resulting in a slander of title. These post-enactment successors would stand in the shoes of the transferor. If the cause of action for the regulatory taking had already accrued, the statute of limitations would continue to run. If the cause of action for the regulatory taking remained unripe at the time of the transfer, the post-enactment successor would not be barred from later claiming that the earlier-enacted restriction effected a taking if and when it ripened.

Judicial oversight also would be required to police efforts by property owners to strategically transfer property so as to manufacture tort claims. This policing may prove a difficult task, but courts can draw upon their long experience in distinguishing between bona fide sales and those that lack in good faith or are fraudulent.

X. Conclusions

This essay reconsiders the judicial efforts to differentiate “regulation” from “taking.” It concludes that the Supreme Court’s attempt to deal with this question with a categorical jurisprudence of “physical inva-

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73. Palazzolo, 121 S. Ct. at 2468. (Scalia, J., concurring).
sions,” “total takings,” and “partial takings” has lost sight of the concerns for “fairness and justice” that gave rise to the constitutional prescription of regulatory takings in the first place. The categories have proved particularly ill-suited to deal with the question of whether a buyer who acquired property with notice of the onerous regulations is disqualified from constitutionally challenging them.

The article proposes the reconceptualization of regulatory takings as occasioning a tort accruing in the seller if and when the over-regulated property is sold to a buyer who is on notice of the existing regulatory regime. There are major advantages to this way of thinking. Market transactions, rather than the courts, determine the parcel of property to be considered when undertaking the taking analysis. The owner of an over-regulated parcel will be able to sell the parcel for its discounted value without relinquishing his claim for just compensation. When the over-regulated parcel of property is sold, a cause of action will accrue in the seller and the statute of limitations will begin to run. The slander of title action will compensate the buyer for his losses, but it must be brought in a timely fashion or it will be time-barred. Whenever an over-regulated parcel changes hands, the buyers will receive a newly defined set of “investment backed expectations” based upon the regulatory regime as it existed at the time of sale. It is against this baseline of expectations that post-sale claims of inverse condemnation will be measured.

Neither categorical jurisprudence, nor slander of title can answer the “haunting jurisprudential problem”\textsuperscript{74} of “where regulation ends and taking begins.”\textsuperscript{75} That answer calls not for “an application of logic” but for “an exercise of judgment”\textsuperscript{76} by judicial philosophers in cases yet to come.

\textsuperscript{74.} CHARLES HAAR, LAND-USE PLANNING 776 (3d ed. 1976).
\textsuperscript{75.} Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).
From Blueprints to Bricks: A Survey of Current Baseball Stadium Financing Projects

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