

Note

Much Ado about Nothing: The Effects of the Post-Enactment Acquisition Rule in *Palazzolo v. Rhode Island*

Jerry Brito*

Introduction

Traditionally, courts have not allowed parties who acquired title to property to bring regulatory takings claims after regulations that affect the property have been enacted.¹ Because a post-enactment acquirer of title had notice of the regulatory restrictions on the property at the time she acquired it, so the argument went, she had lost nothing.² But the Supreme Court's 2001 decision in *Palazzolo v. Rhode Island*³ changed this.

Writing for the Court, Justice Kennedy decried such a "single, sweeping, rule [where a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."⁴ Such a rule, he stated, would allow a state to "put an expiration date on the Takings Clause" and "absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."⁵ The Court thus dispensed with the rule as "capricious" and "blunt."⁶

But although the Court granted post-enactment acquirers standing to bring regulatory takings claims, that does not necessarily mean post-enactment acquirers will succeed. Parties must still show a regulatory taking has

* J.D. expected May 2005, George Mason University School of Law; B.A. in Political Science, August 1999, Florida International University. The author would like to thank Alberto and Elena Brito for their loving support, Robert Percival for his guidance and advice on this Note, and the student editors of the Federal Circuit Bar Journal for their meticulous editing and kind friendship.

¹ Mary Blatch, Note, *Palazzolo v. Rhode Island: A Decision Worth Noticing?*, 52 CATH. U. L. REV. 481, 483 & n.8 (2003).

² See generally Steven J. Eagle, *The Regulatory Takings "Notice Rule": Sources and Implications*, SF64 ALI-ABA 365 (2001), WL SF64 ALI-ABA 365 (analyzing the importance of the "notice rule").

³ 533 U.S. 606 (2001).

⁴ *Id.* at 626.

⁵ *Id.* at 627.

⁶ *Id.* at 628.

occurred.⁷ This begs the question: Should the very fact that the post-enactment acquirer had notice of the regulatory restriction factor into the analysis of whether a taking has occurred?

Justices O'Connor and Scalia, who joined the majority, offered sharply differing answers in their concurring opinions. Justice O'Connor wrote that the fact that there was notice should be considered in deciding whether the post-enactment acquirer had any reasonable investment-backed expectations.⁸ Justice Scalia, on the other hand, wrote that the fact that property had been acquired with notice of regulatory restrictions should play no role in such an analysis.⁹

This Note will show that, in practice, lower courts have adopted Justice O'Connor's position. Although they have begun to allow post-enactment acquirers of property to bring regulatory takings claims, courts have considered the fact that these acquirers had notice in their takings analyses.¹⁰ The result is that the claims are almost always defeated because courts tend to find that notice eliminates reasonable investment-backed expectations required for a successful claim.¹¹ As a consequence, there has been little or no real change in the law post-*Palazzolo*. Although claims by post-enactment acquirers are

⁷ *Id.* at 632.

⁸ *Id.* at 633 (O'Connor, J., concurring).

⁹ *Id.* at 637 (Scalia, J., concurring).

¹⁰ See, e.g., *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350–51 (Fed. Cir. 2001) (upholding the original decision and reasoning that the plaintiff post-enactment purchaser's reasonable investment-backed expectations are "an especially important consideration in the takings calculus"); *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 126 (2003) (following *Rith's* interpretation of *Palazzolo* that, in conducting its takings analysis, a court may still take into account a post-enactment purchaser's investment-backed expectations given a relevant regulatory regime); *Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 732–34 (2002) (relying on *Palazzolo* when considering the plaintiff post-enactment purchaser's investment-backed expectations, and concluding the plaintiff had none); *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 788–89 (Ill. App. Ct. 2003) (noting that, while *Palazzolo* prohibits barring post-enactment purchasers from bringing a takings claim, it still requires the purchaser's investment-backed expectations to be considered in the takings analysis); *Johnson v. Oakland County Dep't of Human Servs.*, No. 229410, 2002 WL 737796, at *4–*5 (Mich. Ct. App. Apr. 23, 2002) (unpublished opinion) (considering investment-backed expectations of the plaintiff post-enactment purchaser of an option on regulated land); *Sanderson v. Town of Candia*, 787 A.2d 167, 169 (N.H. 2001) (holding that the plaintiff who purchased property knowing it did not satisfy a frontage ordinance cannot claim a taking because the plaintiff could not have legitimate investment-backed expectations).

¹¹ The only case found that could be characterized as a successful takings claim by a post-enactment acquirer since *Palazzolo* is *Woodland Manor, III Associates, L.P. v. Reisma*, No. C.A. PC89-2447, 2003 WL 1224248 (R.I. Super. Ct. Feb. 24, 2003) (unpublished opinion). This case, however, can be distinguished from *Palazzolo*. See *infra* note 105.

no longer automatically barred by a “notice rule,” they are *effectively* barred because the existence of notice will preclude courts from finding that a regulatory taking has taken place.

Part I of this Note gives background about regulatory takings jurisprudence. Part II surveys regulatory takings claims post-enactment acquirers have brought since the Supreme Court decided *Palazzolo*. Part III analyzes these decisions to show that, because lower courts have adopted Justice O’Connor’s notice argument, it makes little difference that post-enactment acquirers now have standing. It also examines the presumably different outcome, which would have followed if the Scalia argument had been accepted, and suggests that reviving the tort of slander of title could reconcile the diverging views of notice.

I. Background

The Fifth Amendment of the United States Constitution prohibits the federal government from taking private property for public use without just compensation; the Fourteenth Amendment extends this rule to the states.¹² When government has taken physical possession of private property, this rule has been easy for courts to apply.¹³ Government action that does not amount to physical confiscation has also been found to be prohibited without just compensation.¹⁴ In *Pennsylvania Coal Co. v. Mahon*,¹⁵ Justice Holmes wrote

¹² *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 233 (1897); see also U.S. CONST. amends. V, XIV.

¹³ See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (holding New York City law requiring landlords to allow cable television companies to lay cable lines on their premises is a physical invasion of property and, thus, constitutes a taking); *United States v. Causby*, 328 U.S. 256, 265 (1946) (holding frequent government flights immediately above a landowner’s property constituted a taking; the court equated such overflights to a physical invasion).

¹⁴ See, e.g., *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922) (holding that regulation that restricted mining, thereby making plaintiff’s property effectively valueless, constituted a taking); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that environmental regulation that not only prohibited plaintiffs’ development of their land, but left them with no other economically beneficial use of land, is a taking); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (holding regulatory agency that conditioned a homebuilding permit on acquiring a public easement across the land in question effected a taking because there was a weak nexus between the state’s purpose in requiring the easement and the permit); *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987) (holding a regulation prohibiting certain Native American lands from descending by intestacy or devise and, instead, providing they escheat to the tribe without compensation, was a taking).

¹⁵ 260 U.S. 393 (1922).

for the Court that “while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking.”¹⁶

A. Categorical v. Partial Regulatory Takings

There are two ways a regulation can go “too far”: categorically or partially.¹⁷ If a regulation deprives a landowner of “all economically beneficial or productive use of land,” it is considered a categorical taking and is per se compensable “without case-specific inquiry into the public interest advanced in support of the restraint” under the rule established in *Lucas v. South Carolina Coastal Council*.¹⁸ The only exception to this rule is the legitimate exercise of a state’s police power to enforce “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”¹⁹ Enforcement of such “background principles” would not require compensation, even when enforcement results in the denial of all economically beneficial use of land.²⁰

On the other hand, when a regulation effects only a partial taking, courts “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.’”²¹ Instead, the inquiry is case specific and courts will engage in ad hoc, factual analyses “comparing the public benefits obtained by the

¹⁶ *Id.* at 415 (emphasis added).

¹⁷ Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims after Property Transfers*, 36 CONN. L. REV. 7, 14, 17–18 (2003) (arguing “that a potential takings claim materializes at the moment government regulates property because the takings claim is a distinct and recognizable form of property that exists independent of the property owner”).

¹⁸ 505 U.S. 1003, 1015 (1992) (holding that enacting an environmental regulation preventing the plaintiff from developing his beachfront land was a categorical taking). Finding a categorical regulatory taking under *Lucas* is rare; it is the exception rather than the rule. See Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 545–546 (1995) (reporting that two-and-a-half years after *Lucas*, only 80 state court opinions had mentioned the case; of those only 57 considered it in any detail, and “only three can be said to have relied on *Lucas* in finding a regulatory taking.”); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 332 (2002) (“[T]he categorical rule in *Lucas* was carved out for the ‘extraordinary case’ in which a regulation permanently deprives property of all value.”).

¹⁹ *Lucas*, 505 U.S. at 1029.

²⁰ See *id.* at 1029–30.

²¹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)) (citation omitted).

regulatory restraint to the burden on the private property owner to determine whether the regulatory action is compensable.”²²

In *Penn Central Transportation Co. v. New York City*,²³ the court announced several factors that drive the factual inquiry into whether a partial regulatory taking has occurred.²⁴ These factors are: (1) the regulation’s effect on the landowner; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the government action.²⁵ In *Palazzolo*, the Court ratified the *Lucas* rule of per se compensability for categorical takings, as well as the *Penn Central* test for partial takings.²⁶

B. *Palazzolo* and the Post-Enactment Acquisition Rule

The plaintiff in *Palazzolo* was the sole shareholder of a corporation that purchased beachfront property prior to a Rhode Island environmental agency designation of the land as protected wetlands.²⁷ After the regulations came into effect, the corporation tried unsuccessfully to acquire a permit from the state to develop the land.²⁸ Subsequently, the state revoked the corporation’s charter for failure to pay taxes and, as a result, title to the land passed to the plaintiff by operation of law.²⁹ After the plaintiff again was denied permission to develop on the land—this time as an individual owner—he sued for inverse condemnation alleging a regulatory taking.³⁰ The Rhode Island Supreme Court upheld the trial court by ruling that the plaintiff’s claim was barred because he acquired the land (albeit by operation of law) after the enactment of the regulations in question and, therefore, he had notice of the restrictions the regulations imposed on his property.³¹

The United States Supreme Court reversed that decision and held that a landowner who acquires title after a regulation has been enacted has as much

²² Brown, *supra* note 17, at 18.

²³ 438 U.S. 104 (1978).

²⁴ *Id.* at 124. After analyzing these factors, the Court held that historical landmark restrictions do not amount to a compensable regulatory taking. *Id.* at 138.

²⁵ *Id.* at 124.

²⁶ *Palazzolo*, 533 U.S. at 617 (citations omitted).

²⁷ *Id.* at 613–14.

²⁸ *Id.* at 614.

²⁹ *Id.* Operation of law is “the means by which a right or a liability is created for a party regardless of the party’s actual intent.” BLACK’S LAW DICTIONARY 1119 (7th ed. 1999). In *Palazzolo*, title to the property passed to the plaintiff Palazzolo not because he purchased it or otherwise devised it to himself from his company, but simply because the State revoked his company’s corporate charter. *Palazzolo*, 533 U.S. at 614. Although he is a post-enactment acquirer of land, he is not a post-enactment purchaser.

³⁰ *Id.* at 615.

³¹ *Id.* at 616.

standing to bring a regulatory takings claim as the landowner at the time the regulation was passed.³² The Court was divided, however, on whether the fact that the post-enactment acquirer of title had notice of the regulatory restrictions on his land should be a factor considered when applying the *Penn Central* test. Justice O'Connor wrote in her concurring opinion that notice should be considered in deciding whether the post-enactment acquirer had any reasonable investment-backed expectations.³³ "[I]f existing regulations do nothing to inform the analysis," Justice O'Connor wrote, "then some property owners may reap windfalls and an important indicium of fairness is lost."³⁴ Justice Scalia, on the other hand, wrote in his concurrence that notice should play no role in a *Penn Central* analysis.³⁵ He argued that the "windfall," if any, should go to the landowner rather than to the government, the party "which acted unlawfully—indeed *unconstitutionally*."³⁶

II. Survey of Takings Claims by Post-Enactment Acquirers Since *Palazzolo*

This Part presents the survey results of takings claims by post-enactment acquirers decided since *Palazzolo*. Each section below presents the different conclusions reached. First, the trend appears to be that courts will allow all post-enactment acquirers of land to claim a taking regardless of how or when title is acquired. Second, as the rarity of successful categorical takings claims would suggest, no post-enactment acquirer has succeeded under a *Lucas* analysis. Third, lower courts have adopted the O'Connor rule, which takes notice into consideration when applying a *Penn Central* analysis on a post-enactment acquirer's partial takings claim. Last, the lower courts have used the reasoning in *Palazzolo* to extend standing to post-enactment acquirers of options to buy land, as well as to those seeking direct condemnation actions and zoning variances.

A. Acquisition of Title

In *Palazzolo*, the plaintiff acquired title to the regulated land by operation of law, not by purchase.³⁷ He was also the first post-enactment acquirer of title to the land.³⁸ This raises the question of whether subsequent cases have

³² See *id.* at 628.

³³ *Id.* at 633 (O'Connor, J., concurring).

³⁴ *Id.* at 635 (O'Connor, J., concurring).

³⁵ *Id.* at 637 (Scalia, J., concurring).

³⁶ *Id.* (Scalia, J., concurring).

³⁷ *Id.* at 614.

³⁸ See *id.*

limited *Palazzolo* to its facts or whether they have taken it to stand for a broader rule. A review of takings claims after *Palazzolo* indicates that courts have allowed post-enactment acquirers of land to challenge regulatory takings even if they *purchased* the land.³⁹ Moreover, it does not seem to matter that a post-enactment acquirer is not the first acquirer of land subsequent to the regulation.⁴⁰

In *Sanderson v. Town of Candia*,⁴¹ *Johnson v. Oakland County Department of Human Services*,⁴² *Cane Tennessee, Inc. v. United States*,⁴³ *Callan v. City of Laguna Beach*,⁴⁴ and *LaSalle National Bank v. City of Highland Park*,⁴⁵ a post-enactment acquirer who had notice of the regulation purchased the land in question and the court still allowed a takings claim to be heard under *Palazzolo*. There is no case that specifically mentions allowing someone further along the chain of title than the first post-enactment acquirer to bring suit, but cases like *KCI Management, Inc. v. Board of Appeal*⁴⁶ include language suggesting no subsequent title holder may be barred from making a takings

³⁹ See *infra* notes 41–45.

⁴⁰ *Palazzolo*, 533 U.S. at 626. Justice Kennedy characterizes the “single, sweeping, [notice] rule” that the Court rejected in *Palazzolo* as “[a] purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.” *Id.* (emphasis added); see also *infra* note 47.

⁴¹ 787 A.2d 167 (N.H. 2001) (holding that plaintiff who purchased property with knowledge of existing frontage requirement ordinance does not suffer a compensable taking because she had few, if any, investment-backed expectations of development rights).

⁴² No. 229410, 2002 WL 737796, at *1 (Mich. Ct. App. Apr. 23, 2002) (unpublished opinion) (unpublished opinions of the Michigan Court of Appeals have no precedential effect) (ruling that plaintiff who purchased property with knowledge of existing sewage disposal regulation, where previous owner failed to acquire permit, does not suffer a compensable taking because he had no reasonable investment-backed expectations that he could build a dwelling on the parcel).

⁴³ 57 Fed. Cl. 115 (2003) (holding that plaintiff who purchased property with constructive knowledge of mining regulations does not suffer compensable taking because a reasonably prudent investor would not have believed that the investment was without regulatory risk).

⁴⁴ No. G029020, 2003 WL 204734, at *1 (Cal. Ct. App. Jan. 30, 2003) (unpublished opinion) (unpublished opinions of the California Court of Appeals have no precedential effect) (rejecting under *Palazzolo* the city’s argument that plaintiff is precluded from ever bringing an inverse condemnation action because he purchased the property subject to the lot size ordinance).

⁴⁵ 799 N.E.2d 781 (Ill. App. Ct. 2003) (holding that plaintiffs’ pre-purchase knowledge that regulations prohibited construction of home on lot does not bar a right to challenge the restriction; however, evidence of knowledge is properly considered in determining investment-backed expectations).

⁴⁶ 764 N.E.2d 377 (Mass. App. Ct. 2002) (citing *Palazzolo* for the proposition that owners may challenge zoning provisions affecting their land no matter how far along in the chain of title since the time of the enactment they happen to be).

claim.⁴⁷ In no case has a court tried to limit *Palazzolo* to its facts; neither as to how title was acquired, nor as to it whether it applied only to the first post-enactment acquirer.

B. No *Lucas* Categorical Takings from a Post-Enactment Acquirer

After *Palazzolo*, even a post-enactment acquirer of land, which a regulation has left devoid of any “economically beneficial use of property,” will be allowed to file a takings claim.⁴⁸ The Court affirmed and succinctly stated the “two-part test for regulatory takings established earlier in *Lucas* and *Penn Central*.”⁴⁹ While an ad hoc *Penn Central* analysis is appropriate for partial regulatory takings,⁵⁰ a regulation effecting a categorical taking is automatically compensable under *Lucas*.⁵¹ A search of takings cases after *Palazzolo*, however, reveals no case where a post-enactment acquirer of land has suffered a categorical taking. This comports with the notion that categorical regulatory takings, like the one in *Lucas*, are relatively rare.⁵²

One unsuccessful categorical takings case worthy of note is *Esplanade Properties, LLC v. City of Seattle*.⁵³ In this case, the plaintiff developer bought shoreline property “for only \$40,000 . . . ‘despite extensive federal, state, and local regulations restricting shoreline development.’”⁵⁴ The plaintiff then filed for permits to develop the land and Seattle’s Department of Construction

⁴⁷ *Id.* at 380-81. The court noted:

We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provisions first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property.

Id. (citation omitted).

⁴⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–30 (2001).

⁴⁹ Mark W. Cordes, *The Effect of Palazzolo v. Rhode Island on Takings and Environmental Land Use Regulation*, 43 SANTA CLARA L. REV. 337, 353–54 (2003) (reviewing the state of regulatory takings law after *Palazzolo*, with particular attention to controls on environmentally sensitive land); see also *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 765 (Pa. 2002) (“In non-appropriation/non-physical invasion cases, the U.S. Supreme Court applies two tests to determine whether a taking has occurred.”).

⁵⁰ Cordes, *supra* note 49, at 353–54; see also *Machipongo Land & Coal*, 799 A.2d at 765.

⁵¹ Cordes, *supra* note 49, at 353.

⁵² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992); see also *supra* note 18.

⁵³ 307 F.3d 978 (9th Cir. 2002).

⁵⁴ *Id.* at 987 (emphasis added) (citation omitted).

and Land Use denied them.⁵⁵ The developer filed an inverse condemnation action alleging a categorical taking.⁵⁶ The district court granted partial summary judgment to the defendant city.⁵⁷

The Ninth Circuit, reviewing the district court's judgment de novo, affirmed summary judgment for the city.⁵⁸ It held that the regulations, including the Washington Shoreline Management Act (SMA), which prevented the plaintiff from developing the parcel, "reflected" the state's public trust doctrine.⁵⁹ The court, in turn, stated that the public trust doctrine is part of the background principles of law exempting a state from compensating landowners under *Lucas*.⁶⁰ The court thus concluded that "Washington's public trust doctrine ran with the title to the tideland properties and alone precluded the shoreline residential development proposed by Esplanade."⁶¹

Consequently, the Ninth Circuit avoided per se compensation of a post-enactment purchaser by invoking the background principles exception to the *Lucas* rule. Some commentators have also endorsed a "public trust" exemption to categorical takings.⁶² Justice Scalia, writing for the majority in *Lucas*, however, may not have meant to include environmental regulations, such as the SMA, in his definition of "background principles of law."

Land use regulations rendering property valueless are typically those that require land to be left in its natural state.⁶³ The environmental regulation in *Lucas*, as in *Esplanade*, was of this type.⁶⁴ Justice Scalia explained in *Lucas* that:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other

⁵⁵ *Id.* at 980.

⁵⁶ *Id.* at 981.

⁵⁷ *Id.*

⁵⁸ *Id.* at 987.

⁵⁹ *Id.* at 986.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 5 (1995) (arguing that the public trust doctrine "help[s] these lands to fulfill certain important societal and ecological functions thwarted by current understandings of regulatory takings doctrine"); see also Patrick A. Parenteau, *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow's Ear*, 30 B.C. ENVTL. AFF. L. REV. 101, 102 (2002).

⁶³ Cordes, *supra* note 49, at 360 & n.174.

⁶⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007 (1992).

uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise. . . . The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others.⁶⁵

This language suggests that Justice Scalia had these common law principles in mind, and Justice Kennedy appeared to confirm this in his concurrence:

The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. . . . Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.⁶⁶

If we acknowledge that only common law background principles serve as an exception to per se compensation for categorical takings, and if we accept the Court's admonition in *Palazzolo* that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title,"⁶⁷ then, after *Palazzolo*, a post-enactment purchaser of land will be entitled to per se compensation if a regulation effects a categorical taking, regardless of notice.⁶⁸ This seems like an anomalous result, and the Ninth Circuit avoided

⁶⁵ *Id.* at 1029 & n.16 (citations omitted).

⁶⁶ *Id.* at 1035 (Kennedy, J., concurring). Justice Blackmun echoed the same critique in his dissent, and also understood the majority opinion to limit exceptions to the per se compensation rule to common law background principles. *Id.* at 1054–55 (Blackmun, J., dissenting). He wrote:

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. . . . There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?

Id. (Blackmun, J., dissenting).

⁶⁷ *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–630 (2001).

⁶⁸ Cordes, *supra* note 49, at 353–354. Cordes explained:

The case firmly holds that in those rare instances in which a regulation eliminates all economic viability, notice of the regulation when the property is acquired does not preclude a takings claim. As a practical matter, if government regulations deprive the property of all economic viability, notice is irrelevant and apparently not a factor in the analysis.

Id. at 363 (citation omitted).

it in *Esplanade* by characterizing the regulations in question as encompassing the State's public trust doctrine.⁶⁹

Restrictions denying all economically beneficial use of land, by their nature, are likely to be environmental regulations that "reflect" the public trust doctrine. Allowing such regulations to qualify as background principles, and thereby defeat categorical takings claims, would seem to run counter to the common law root of background principles that Justice Scalia described in *Lucas*. Such a doctrine comes awfully close to contradicting the admonishment in *Palazzolo* that a background principle of property law is not simply any law or regulation in effect prior to an owner acquiring title.⁷⁰ Nevertheless, courts that employ the technique, as the Ninth Circuit did in *Esplanade*, might wish to avoid giving a windfall to plaintiffs who purchased inexpensive, practically valueless land with notice.

C. Whither Notice: O'Connor or Scalia?

Clearly Justice O'Connor's interpretation of *Palazzolo*, which holds that notice of a regulation at the time of acquisition should inform a *Penn Central* analysis, has prevailed in the lower courts. While Justice Scalia's concurring opinion in *Palazzolo* has never been cited to support a holding, Justice O'Connor's consistently has.⁷¹ The barrage began with *Rith Energy, Inc. v. United States*,⁷² where the Federal Circuit granted a rehearing in light of the then recently decided *Palazzolo* case.⁷³ In *Rith*, the Federal Circuit recognized that *Palazzolo* rejected the idea that notice could bar a post-enactment acquirer of property from making a regulatory takings claim.⁷⁴ But it hastened to add that,

In rejecting such a "blanket rule," however, the Court did not suggest that the reasonable expectations of persons in a highly regulated industry are not relevant to determining whether particular regulatory action constitutes a taking. Justice O'Connor, a member of the five-Justice majority in *Palazzolo*, made that point explicitly in her concurrence. . . . As Justice O'Connor's opinion indicates, the role of investment-backed expectations in regulatory takings cases is well settled. . . . Justice O'Connor, writing for herself and three other Justices who were in the majority in *Palazzolo*, reiterated that among

⁶⁹ *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 986 (9th Cir. 2002).

⁷⁰ *Palazzolo*, 533 U.S. at 629–630.

⁷¹ See *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1350–51 (Fed. Cir. 2001); *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 126 (2003); *Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 727 n.17 (2002); *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 797 (Ill. App. Ct. 2003); *Sanderson v. Town of Candia*, 787 A.2d 167, 171 (N.H. 2001).

⁷² 270 F.3d 1347 (Fed. Cir. 2001).

⁷³ *Id.* at 1348.

⁷⁴ *Id.* at 1350.

the factors that are entitled to “particular significance” in regulatory takings analysis is the regulation’s “interference with reasonable investment backed expectations.” If the Court in *Palazzolo* had intended to discard this long-standing element of regulatory takings analysis it presumably would have been more explicit about doing so.⁷⁵

Rith and its endorsement of Justice O’Connor’s position have been followed by other lower courts.⁷⁶ In *Cane Tennessee*, a takings claim by a post-enactment purchaser of a regulated surface mine, the Court of Federal Claims (COFC) cited *Rith* and quoted Justice O’Connor’s concurring opinion in *Palazzolo* to support its finding that an owner’s knowledge of the risks involved in purchasing regulated land could be taken into account in determining investment-backed expectations.⁷⁷ The *Cane Tennessee* court also cited *Appollo Fuels, Inc. v. United States*,⁷⁸ another takings claim by a post-enactment purchaser that the COFC settled.⁷⁹ In that case, the court again quoted Justice O’Connor’s concurring opinion in *Palazzolo* to support the idea that a court must consider “‘the temporal relationship’ between regulatory enactment and title acquisition”⁸⁰ because “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness” of the plaintiff’s investment-backed expectations.⁸¹

Other cases taking a similar approach include *Sanderson*,⁸² *Johnson*,⁸³ *Machipongo Land & Coal Co. v. Commonwealth*,⁸⁴ *Woodland Manor, III Associates, L.P. v. Reisma*,⁸⁵ and *LaSalle National Bank*.⁸⁶ All of these cases considered

⁷⁵ *Id.* at 1350–51 (citations omitted).

⁷⁶ See *Cane Tenn.*, 57 Fed. Cl. at 126; *LaSalle Nat’l Bank*, 799 N.E.2d at 797.

⁷⁷ *Cane Tenn.*, 57 Fed. Cl. at 126.

⁷⁸ 54 Fed. Cl. 717 (2002).

⁷⁹ *Cane Tenn.*, 57 Fed. Cl. at 126.

⁸⁰ *Appollo Fuels*, 54 Fed. Cl. at 727 n.17 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001) (O’Connor, J., concurring)).

⁸¹ *Palazzolo*, 533 U.S. at 633.

⁸² 787 A.2d 167, 171 (N.H. 2001) (citing Justice O’Connor’s concurring opinion in *Palazzolo* to support the court’s consideration of “all relevant factors,” including pre-purchase knowledge of land regulation, in denying a takings claim).

⁸³ No. 229410, 2002 WL 737796, at *4 (Mich. Ct. App. Apr. 23, 2002) (unpublished opinion) (citing *Palazzolo* for the *Penn Central* test, including the reasonable investment-backed expectations prong, and finding that the plaintiff failed notice prong).

⁸⁴ 799 A.2d 751, 770 & n.11, 771 (Pa. 2002) (remanding takings case to trial court with instructions to conduct a *Penn Central* analysis and noting with approval Justice O’Connor’s concurring opinion in *Palazzolo* where she determined that notice should be considered in deciding investment-backed expectations).

⁸⁵ No. C.A. PC89-2447, 2003 WL 1224248, at *2–*3, *14 (R.I. Super. Ct. Feb. 24, 2003) (unpublished opinion) (holding that post-enactment purchaser had notice of regulations, but nevertheless had reasonable investment-backed expectations, because the previous owner assigned all interests to the plaintiff); see *infra* note 105.

⁸⁶ 799 N.E.2d 781, 789 (Ill. App. Ct. 2003) (citing Justice O’Connor’s concurrence in

and adopted Justice O'Connor's view that notice is relevant to a reasonable investment-backed expectations inquiry, which is part of the partial takings analysis under *Penn Central*. A search of regulatory takings cases after *Palazzolo* does not uncover any court accepting Justice Scalia's argument that notice should not be considered.

The Supreme Court itself has also seemingly ratified Justice O'Connor's position, if only in dictum. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,⁸⁷ the Court held that a 32-month temporary moratorium on development while a permanent regulation was considered is not per se compensable under *Lucas*; rather, a *Penn Central* ad hoc factual analysis is required.⁸⁸ In that case, the Court quoted Justice O'Connor's concurring opinion in *Palazzolo* and noted that it was "persuaded [by her reasoning] that the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of *all* the relevant circumstances.'"⁸⁹ While acknowledging it had "no occasion to address [notice] in this case," the Court nevertheless noted that "Justice O'Connor specifically considered the role that the 'temporal relationship between a regulatory enactment and title acquisition' should play in the analysis of a takings claim."⁹⁰ The Supreme Court's apparent approval in *Tahoe-Sierra Preservation Council* of Justice O'Connor's *Palazzolo* position has subsequently been cited by many lower courts to support considering notice when determining the investment-backed expectations of post-enactment acquirers.⁹¹

D. Extension of the *Palazzolo* Post-Enactment Acquirer Rule

The decision in *Palazzolo* allowed a cause of action for inverse condemnation to stand although the claimant acquired the land with notice of regulatory restrictions.⁹² It is interesting to note, however, that lower courts have not been content to rely on *Palazzolo* merely to permit inverse condemnation actions by post-enactment acquirers; they have begun to extend the reasoning of that case to other areas as well.

Palazzolo to reject plaintiff's contention that *Palazzolo* had rendered irrelevant the fact that plaintiffs knew they could not build on the vacant property at time of purchase).

⁸⁷ 535 U.S. 302 (2002).

⁸⁸ See *id.* at 334–335.

⁸⁹ *Id.* at 335 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)) (emphasis added).

⁹⁰ *Id.* at 335 (quoting *Palazzolo*, 533 U.S. at 632 (O'Connor, J. concurring)).

⁹¹ See, e.g., *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003); *Appollo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 732–33 (2002); *Woodland Manor, III Assocs., L.P. v. Reisma*, No. C.A. PC89-2447, 2003 WL 1224248, at *14 (R.I. Super. Ct. Feb. 24, 2003) (unpublished opinion).

⁹² See *Palazzolo*, 533 U.S. at 632.

For example, in *Rukab v. City of Jacksonville Beach*,⁹³ the court held that the standing rule in *Palazzolo* also applies to post-enactment acquirers who seek *direct* condemnation.⁹⁴ In *Rucci v. City of Eureka*,⁹⁵ the plaintiff, who alleged a regulatory taking, did not own the land in question; rather he had merely an option to purchase it. Nevertheless, the court allowed the claim to stand even though he had notice of the zoning restriction on the property before he acquired the option.⁹⁶ Meanwhile, the court in *Richard Roeser Professional Builder, Inc. v. Anne Arundel County*⁹⁷ referred to *Palazzolo*'s post-enactment acquirer rule as persuasive authority in deciding that taking title to land with knowledge of a restriction on it is not a self-created hardship that would bar a zoning variance.⁹⁸

These novel uses of *Palazzolo* are mentioned here to note a possible trend. Apparently, courts have taken to heart Justice Kennedy's admonition that the "State may not put so potent a Hobbesian stick into the Lockean bundle" because "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land."⁹⁹

III. The Effects of *Palazzolo* on Takings Claims by Post-Enactment Acquirers

Before *Palazzolo*, the rule had been that if an acquirer of property had notice of regulatory restrictions affecting the property when she acquired it, then she could not claim that she had suffered a taking.¹⁰⁰ Notice of a regulation would negate any investment-backed expectations and the "lack of reasonable investment-backed expectations [was] dispositive."¹⁰¹ In *Palazzolo*, the Supreme

⁹³ 811 So. 2d 727 (Fla. Dist. Ct. App. 2002).

⁹⁴ *Id.* at 733 ("We see no reason to treat a direct condemnation action differently from an inverse condemnation claim in this context. In both [this case and *Palazzolo*], property owners are asserting their constitutional rights not to have the government take their property without just compensation.").

⁹⁵ 231 F. Supp. 2d 954 (E.D. Mo. 2002).

⁹⁶ *Id.* at 957 ("State law defines property rights for federal takings claims. . . . [T]he option to purchase property . . . is a valuable right of the lessee, which, if taken by eminent domain, is compensable under Missouri law.") (citations omitted).

⁹⁷ 793 A.2d 545 (Md. 2002).

⁹⁸ *Id.* at 555–57.

⁹⁹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

¹⁰⁰ *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 717 (R.I. 2000). This was also the rule in the Federal Circuit. See *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994) (Takings recoveries are limited "to owners who can demonstrate that they bought their property in reliance on the nonexistence of the challenged regulation. One who buys with knowledge of a restraint assumes the risk of economic loss.").

¹⁰¹ *Palazzolo v. State ex rel. Tavares*, 746 A.2d at 717.

Court overturned this rule. It held that notice was not dispositive and a court must address the merits of each case under a *Lucas* or *Penn Central* analysis even when title is acquired after the effective date of a state-imposed restriction.¹⁰² Given the outcomes of takings claims by post-enactment acquirers since *Palazzolo*, as discussed in Part II, has the law changed in effect?

A. Partial Takings Cases after *Palazzolo*

On first reading, *Palazzolo* appears to be a law-transforming case that “shook up the practice of takings jurisprudence by broadening the class of plaintiffs who can bring a takings claim.”¹⁰³ A more sober interpretation understands that the decision still allows courts to construe notice as a prevailing, albeit not dispositive, factor in a *Penn Central* analysis.¹⁰⁴ In fact, this is precisely what has occurred.

A look at takings claims since *Palazzolo* shows no post-enactment acquirer of land has been able to overcome a *Penn Central* takings claim.¹⁰⁵ The fact

¹⁰² *Palazzolo*, 533 U.S. at 630.

¹⁰³ Janet S. Kole, *What Hath Palazzolo Wrought?*, N.J. LAW., Aug. 2002, at 44.

¹⁰⁴ Blatch, *supra* note 1, at 512.

¹⁰⁵ The only case found that could be characterized as a successful takings claim by a post-enactment acquirer is *Woodland Manor*. No. C.A. PC89-2447, 2003 WL 1224248, at *1 (R.I. Super. Ct. Feb. 24, 2003) (unpublished opinion). In that case, several partners bought land that they intended to develop in different phases. *Id.* at *1. Project financing was to be guaranteed by HUD and because HUD requires each of its projects to be owned by a single purpose entity, the partners created entities for each phase of the project that were owned in equal shares. *Id.* The various business entities, however, “comprised the same individual persons and operated as coadunate components of the larger business enterprise.” *Id.* (citation omitted). Government action subsequently prompted a takings claim by the partners and, *during litigation*, they consolidated their interest through sale into one entity: *Woodland Manor, III Associates, L.P.* *Id.* at *3. This entity was then properly substituted as the plaintiff pursuant to the court’s rules. *Id.* An Assignment Agreement was also executed whereby the partners assigned all their interests to the plaintiff consolidated entity. *Id.* The superior court ruled for the plaintiff on an action of inverse condemnation, but was overturned by the Rhode Island Supreme Court, which remanded the case. *Id.* “[The superior court] then ruled in favor of the defendant on the ground that the plaintiff lacked standing. On appeal, the Rhode Island Supreme Court vacated the judgment and remanded the case to the superior court for consideration under . . . *Palazzolo v. Rhode Island*.” *Id.* Plaintiff was then found to have standing because the Assignment Agreement “acts as both the conduit through which the takings cause of action survived the transfer of interest and the basis for the plaintiff’s standing to bring this claim.” *Id.* at *6. The situation in this case is unlike a post-enactment purchaser of land who has clear notice of a regulation when he buys the property because the sale here occurred during litigation for the purpose of consolidation, and the Assignment Agreement was found to be the instrument that allowed the plaintiff to show standing. Unlike the prototypical post-enactment purchase, no seller exists here who

that acquirers had notice has weighed heavily against their investment-backed expectations.¹⁰⁶ Thus, the results of the takings cases analyzed above are the same as if the plaintiffs had been barred from bringing their claims under the old rule. Other than perhaps creating more litigation, *Palazzolo* has seemingly had no effect on the outcome of partial takings claims by post-enactment acquirers of regulated property.

This has been the case because lower courts, beginning with *Rith*, have applied Justice O'Connor's interpretation of *Palazzolo*, which allows notice to inform a *Penn Central* inquiry.¹⁰⁷ As a post-enactment acquirer will have actual or constructive notice of state-imposed restrictions on the property—presumably echoed in the purchase price—the “investment-backed expectations” prong of the *Penn Central* test becomes *virtually*, if not technically, dispositive. But if Justice Scalia's interpretation of *Palazzolo* had been preferred, and notice did not inform a *Penn Central* inquiry, then courts could not rely on the virtually dispositive issue of investment-backed expectations. Seemingly, this would result in courts finding more takings because takings claims by post-enactment acquirers, which notice would have otherwise defeated, would be compensable.

Unlike the O'Connor rule, the Scalia rule would have effected a real change in the outcome of partial takings claims by post-enactment acquirers. Under the Scalia rule, however, the person from whom the government took would not be compensated, while a post-enactment acquirer who never suffered a loss is given a windfall.¹⁰⁸ This can hardly be said to be fair, and Fifth Amendment jurisprudence is predicated on principles of fairness.¹⁰⁹ The O'Connor rule, therefore, tries to “restore[] balance to that inquiry” and maintain an “important indicium of fairness” by retaining notice as a relevant factor in judging investment-backed expectations.¹¹⁰

But this is not completely fair either. As we have seen, although it does not technically bar claims by post-enactment acquirers, the O'Connor rule effectively precludes any acquirer with notice from ever succeeding in a partial

accepted a depressed price for his land and who must now stand by while the purchaser reaps a windfall as Justice O'Connor feared in *Palazzolo*.

¹⁰⁶ See *infra* Part III.C.

¹⁰⁷ See *supra* notes 71–85 and accompanying text.

¹⁰⁸ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 636–37 (2001) (Scalia, J., concurring).

¹⁰⁹ Eric D. Albert, Note, *If the Shoe Fits, [Don't] Wear It: Preacquisition Notice and Stepping into the Shoes of Prior Owners in Takings Cases after Palazzolo v. Rhode Island*, 11 N.Y.U. ENVTL. L.J. 758, 771–74 (2003); see also *Palazzolo*, 533 U.S. at 618 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Court in *Armstrong* recognized that the “Fifth Amendment's 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.” *Armstrong*, 364 U.S. at 50.

¹¹⁰ *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

takings claim. As Justice Scalia points out, this leaves the original owner uncompensated and allows the government to take private property for public use without just compensation.¹¹¹

In the tug-o-war between Justices Scalia and O'Connor, each is pulling one end of the same fairness rope. Both attempt to protect legitimate fairness interests, yet they are at odds with each other. Perhaps Justice O'Connor's approach ultimately triumphs in the lower courts because it does not technically bar compensation even if it does so in practice. Whatever the case, under both the Scalia and O'Connor rules, the original owner—the only person who truly suffered a loss at the hands of the government—is left uncompensated.

B. Categorical Takings Cases after *Palazzolo*

Palazzolo rejected the notion that a regulation becomes a background principle of state law when title to land is transferred.¹¹² Therefore, if a taking is categorical then it is per se compensable under *Lucas* and the investment-backed expectations of a post-enactment acquirer do not play a role.¹¹³ It follows logically then that even a speculator who knowingly buys land, which regulation has dispossessed of all economically beneficial or productive use, and who does so for the sole purpose of bringing a categorical takings claim, will be entitled to compensation. This is a perverse outcome. Although post-enactment acquirers of property that have suffered only a partial regulatory taking are denied any compensation, acquirers of land devoid of any use, who pay a deeply discounted price for it, and who not only have notice of this fact, but may even be counting on it, are given the biggest potential windfall of all. The outcome in *Esplanade* might give a hint as to how courts will address this issue.¹¹⁴

This inconsistency is a necessary part of the O'Connor rule, as Justice Scalia notes in his concurring opinion.¹¹⁵ The Scalia rule, on the other hand, is internally consistent because it eschews consideration of notice altogether. But as noted in Part III.A, although the government might justly be held accountable, the Scalia rule is not entirely fair as it leaves the original owner at a loss.

The illogical effect of the O'Connor rule, when applied to categorical takings, is not likely to raise alarm because categorical takings are very rare¹¹⁶ and, as stated earlier, a search of takings cases after *Palazzolo* reveals no cases where a post-enactment acquirer of land has suffered a categorical taking.

¹¹¹ *Id.* at 636–37 & n.* (Scalia, J., concurring).

¹¹² *Id.* at 629–30.

¹¹³ *See id.* at 630–31.

¹¹⁴ *See supra* Part II.B.

¹¹⁵ *See Palazzolo*, 533 U.S. at 636 (Scalia, J., concurring).

¹¹⁶ *See supra* note 18.

Nevertheless, this inconsistency underscores the tension between the fairness poles the Scalia and O'Connor rules represented and suggests that neither rule is a perfect solution.

C. Reconciling the Fairness Tension in *Palazzolo*

One suggestion to reconcile the fairness interests seemingly at odds in Justices Scalia's and O'Connor's concurring opinions in *Palazzolo* is to revive the tort action of slander of title.¹¹⁷ Such a rule would bar takings claims by post-enactment acquirers but would not let government off the hook.¹¹⁸

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 arms-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 [sic] 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.¹¹⁹

State sovereign immunity could not be invoked to defeat this tort claim 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."¹²⁰ Also, because the pre-enactment owner would have to state a claim within a statutorily prescribed period, potential takings claims would be finalized one way or another by a certain date. Under *Palazzolo*, in contrast, a post-enactment acquirer far down the chain of title from the original owner presumably would still have standing and could technically be able to succeed in a takings claim.

¹¹⁷ See generally Garrett Power, *Palazzolo v. Rhode Island: Regulatory Takings, Investment-Backed Expectations, and Slander of Title*, 34 URB. LAW. 313 (2002) (proposing 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); Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89 (2000) (arguing for the recognition of a new type of regulatory takings claim whereby a landowner ripens her claim by selling her property at a reduced price rather than by applying unsuccessfully to government for permission to build).

¹¹⁸ Power, *supra* note 117, at 324.

¹¹⁹ *Id.* (footnote omitted).

¹²⁰ *Id.* (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

Hence, the slander of title solution addresses Justice O'Connor's concern that post-enactment acquirers might unfairly reap windfalls,¹²¹ while also addressing Justice Scalia's concern that the government as "the thief" would instead get the windfall.¹²² Furthermore, it takes into account the majority's main concern: to deny a rule that would have "the postenactment transfer of title . . . absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."¹²³ Finally, post-enactment acquirers are not left in the cold because, as Justice Stevens notes in his separate opinion in *Palazzolo*, future owners of regulated land will always have "standing to challenge the restriction's validity whether [they] acquired title to the property before or after the regulation was adopted."¹²⁴

Conclusion

After granting the plaintiff in *Palazzolo* standing to bring his partial takings claim, the Supreme Court remanded the case to the Rhode Island Supreme Court to conduct a *Penn Central* analysis consistent with its decision.¹²⁵ In turn, the Rhode Island court remanded the case to the trial court, where it is still pending.¹²⁶ If the evidence in this Note is any indication, the plaintiff in *Palazzolo*, who the Rhode Island Supreme Court already judged to have had notice, may also be found to have had no investment-backed expectations.¹²⁷ He would then find himself effectively in the same position as if the law had never been changed.

After *Palazzolo*, post-enactment acquirers of property have a right to bring takings claims. But under Justice O'Connor's interpretation, adopted overwhelmingly by lower courts, notice of the regulatory restriction at the time of purchase is factored into a court's consideration of the claimant's investment-backed expectations. As a result, post-enactment acquirers cannot be said to have any such expectations and, therefore, will very likely fail a *Penn Central* partial takings analysis. In fact, no post-enactment acquirer has successfully brought a partial takings claim since *Palazzolo*. Looking solely at

¹²¹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O'Connor, J., concurring).

¹²² *Id.* at 636–37 (Scalia, J., concurring). This concern is also shared by the majority, which wrote, "[t]he State may not by this means secure a windfall for itself." *Id.* at 627.

¹²³ *Id.*

¹²⁴ *Id.* at 638 (Stevens, J., concurring-in-part and dissenting-in-part).

¹²⁵ *Id.* at 632.

¹²⁶ *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561 (R.I. 2001).

¹²⁷ One ray of hope for *Palazzolo*, the plaintiff, is the Rhode Island case of *Woodland Manor*, where a post-enactment acquirer subsequent to *Palazzolo* successfully brought a partial takings claim. Like *Palazzolo*, the post-enactment acquirer in *Woodland Manor* was also effectively the original owner and so could only *technically* be said to have had notice. In *Woodland Manor*, however, the original owner had assigned all his interests to the plaintiff.

outcomes, it is as if the law had never changed and post-enactment acquirers still lack standing.

Although Justice O'Connor seeks to avoid windfalls to post-enactment purchasers who never truly suffered a loss, her rule technically leaves open the possibility that speculators would reap the biggest windfalls because investment-backed expectations are not considered in *Lucas* categorical takings analyses. This logical inconsistency, however, may not be troublesome given the rarity of categorical takings. In fact, no post-enactment acquirer has successfully brought a categorical takings claim since *Palazzolo*.

Justice Scalia's interpretation, on the other hand, eschews the problem of windfalls to speculators in favor of keeping government accountable. But, like the O'Connor rule, the Scalia rule does nothing to compensate the original owner who suffered the loss as a consequence of regulation. A new conception of takings jurisprudence that bars post-enactment acquirers from bringing takings claims, but which does allow original owners to do so even after sale, might be able to reconcile the two views.