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Escaping Logical Circularity: The Postenactment Purchaser Problem and Reasonable Investment-Backed Expectations

by Tal Dickstein

Imagine buying a piece of property that is subject to a governmental land use regulation[1] such as a zoning ordinance[2] that restricts development or some other use of the property.[3] Under these circumstances, can a claim be brought against the government for reimbursement of the market value of the land? In other words, should one who purchases a piece of property after the enactment of a governmental regulation which restricts development (a postenactment purchaser) be allowed to maintain a claim that a regulatory taking,[4] or inverse condemnation,[5] has occurred even though the property was taken with actual or constructive notice[6] of the existing regulation?[7]

The answer to this question is of great importance to anyone contemplating purchasing real estate for two related reasons. First, in many parts of the United States, public regulation of private-property use is pervasive.[8] These regula-

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1. These public land use controls are distinguished from private forms of land use controls such as covenants, conditions, easements, restrictions, and nuisance law. *See* Edward H. Rabin & Roberta Rosenthal Kwall, Fundamentals of Modern Property Law 569 (3d ed. 1992) ("In contrast, zoning, planning, subdivision control, building and housing codes, and environmental protection of all kinds involve the active and continuing participation of government.").

2. For a simple definition of a zoning, see Rabin & Kwall, *supra* note 1, at 582 ("Zoning, as its name implies, involves the division of a city (or other area) into districts or zones, with different [building] regulations for each district.").

3. These are the essential facts of Anello v. Zoning of Appeals of the Village of Dobbs Ferry, 656 N.Y.S.2d 184 (N.Y. 1997), Gazza v. New York State Dep't of Envtl. Conservation, 657 N.Y.S.2d 555, 28 ELR 20053 (N.Y. 1997), Kim v. City of New York, 659 N.Y.S.2d 145 (N.Y. 1997), Basile v. Town of Southampton, 655 N.Y.S.2d 877 (N.Y. 1997), and Palazzolo v. Rhode Island, 533 U.S. 606, 32 ELR 20516 (2001), the principle cases analyzed in this Article. *See infra* Part II.A.

4. A regulatory takings claim derives from the government's power of eminent domain, which allows the government to take private property for public use as long as the government compensates the property owner for the value of the taken property. *See* Jesse Dukeminier & James E. Krier, Property 1102 n.3 (4th ed. 1998) ("Eminent domain is the power of government to force transfers of property from owners to itself[,] . . . [o]r to other entities commonly invested with the power of eminent domain, such as public utilities and public schools, or, at times, to other private parties."). This right is embodied in the Fifth Amendment of the U.S. Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This provision is known as the Takings Clause because it gives the government the right to *take* private property for public use so long as it is accompanied by just compensation. However, when the government merely enacts a land use regulation which burdens a parcel of land, the U.S. Supreme Court has recognized that a taking may still have occurred, thereby giving rise to the requirement of just compensation. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *See infra* Part I.B. (explaining regulatory takings jurisprudence). Thus, a claim that a taking has occurred in such a case is known as a "regulatory takings claim."

5. A regulatory takings claim is also known as an action for inverse condemnation because the property owner seeks a judicial determination that a taking has occurred, as opposed to a direct condemnation action where the government exercises its eminent domain powers and merely seeks a judicial determination of just compensation. *See* United States v. Clarke, 445 U.S. 253, 257 (1980) (Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."). In other words:

> As its name suggests, inverse condemnation is simply the opposite of a government eminent domain proceeding: The claimant rather than the government institutes the suit, alleging that a taking has occurred and seeking recompense for it. [Put differently, a] forced purchase, rather than a forced sale is the claimant's objective.

Dukeminier & Krier, *supra* note 4, at 1168. Regulatory takings claims will be further divided into partial takings and total takings. *See infra* Part I.B.

6. Constructive notice, also known as legal notice, is a legal fiction whereby "notice [is] presumed by law to have been acquired by a person and thus imputed to that person." Black's Law Dictionary 1088 (7th ed. 1999). *See* James Burling, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 U. Haw. L. Rev. 497, 517 (2002) [hereinafter Burling, *Background Principles*] ("[I]t is [ ] common 'wisdom,' that one who buys property buys it with knowledge of preexisting regulatory constraints and cannot complain about those limitations."). (Notably, James Burling is the attorney for the Pacific Legal Foundation who argued on behalf of the petitioner in *Palazzolo*.) In the postenactment purchaser context, the constructive notice principle presumes that the postenactment purchaser has knowledge of the fact that a governmental land use regulation burdens the property at the time of purchase. *See* David S. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions," and the (Mis) Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 366 (2002) (noting that when a "claimant's property is restricted pursuant to regulations that predate the purchase of property[,]" . . . "constructive notice [is] implicit in the preexisting regulations . . ."); Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. Haw. L. Rev. 533, 533 (2002) [hereinafter Eagle, *Regulatory Takings Notice Rule*] ("In its most general form, the 'notice rule' is the doctrine limiting the regulatory takings claims of property owners who acquire their interest after governmental restrictions are promulgated or deemed foreseeable.").

7. This situation is hereinafter referred to as the "postenactment purchaser problem." The reverse problem of whether a zoning ordinance, which would require the discontinuance of a lawful preexisting nonconforming use, constitutes an unconstitutional taking without just compensation is beyond the scope of this Article. For a discussion of this issue, often analyzed under the rubric of whether the regulatory agency will grant a variance forgiving compliance with a newly enacted regulation, see Terry Rice, *Zoning and Land Use*, 47 Syracuse L. Rev. 883 (1997) and *Zoning Variances*, 74 Harv. L. Rev. 1396 (1961).

8. *See* Dukeminier & Krier, *supra* note 4, at 1089 ("Zoning will undoubtedly remain a standard part of the American land use picture

tions include, but are not limited to, "zoning classifications, historic districts, aesthetic standards and . . . environmental regulations."[9] As the prevalence of land use regulations has soared, it is not surprising that the volume of takings claims, seeking just compensation for the diminution of land value these regulations cause, have also increased.[10] Second, real property, the subject of so many government regulations, changes hands at a high rate in this country,[11] meaning that the postenactment purchaser problem is likely to arise in many future regulatory takings claims.[12]

Given the divisive debate between staunch advocates of private-property rights and those favoring land use controls,[13] it is not surprising that courts have reached differing conclusions in addressing the postenactment purchaser problem. Many courts adhere to a strict notice rule, which prohibits all regulatory takings claims brought by postenactment purchasers.[14] Some, including the U.S. Court of

into the foreseeable future."); Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. Rev. 971, 988 (2002) (noting the current prevalence of restrictive suburban land use controls); Calvert G. Chipchase, Lucas *Takings: Why Investment-Backed Expectations Are Irrelevant When Applying the Categorical Rule*, 24 U. Haw. L. Rev. 147, 153 (2001) ("The twentieth century . . . has witnessed a proliferation of state and federal regulations—well beyond anything seen in the previous century."); James S. Burling, *Protecting Property Rights in Ecologically Valuable Resources After* Palazzolo, 64 ALI-ABA 109, 112 (2001) ("[T]he trend toward increased government regulation of property shows no signs of abating."); Berhard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 Seton Hall Const. L.J. 577, 589 (1997) (noting the "persistence and prevalence of exclusionary zoning"). *See, e.g.*, *The Supreme Court Breaks the Zoning Silence:* Village of Belle Terre v. Boraas, 4 ELR 10057, 10057 (May 1974) ("An example of the prevalence of exclusionary zoning techniques is provided in four northern New Jersey counties where 99.5[%] of the residential land was found by one study to be zoned for single families."). Thus, it appears that Justice George Sutherland's prediction in Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365, 386 (1926), that "with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities[,]" has come to fruition.

According to many commentators, the reason for the pervasiveness of zoning ordinances is the historical failures of nuisance law and private land use measures, i.e., servitudes and covenants, to deal with land use conflicts. *See* Dukeminier & Krier, *supra* note 4, at 1101 ("Unsatisfied with private arrangements (servitudes) and nuisance law as means of land use control, the government might and often does embark on more activist courses—leaving property in the hands of its owners but regulating its use, or taking property from its owners and reallocating it to governmentally preferred uses."); *id*. at 942-43, 1090 (explaining how zoning laws arose to meet the shortfalls of nuisance law and private restrictive covenants aimed at producing separate, single-family low-rise homes and medium density of population by "correcting the market's failure to take account [of] external costs one development may have on another"); Margaret Rosso Grossman, *Biotechnology, Property Rights, and the Environment*, 50 Am. J. Comp. L. 215, 244 (2001):

> [The prevalence of zoning laws is] in some measure a reaction to the inability of nuisance law to provide fully for a resolution of the land use conflicts which arose in a developed economy. Zoning gives local governments the opportunity to avoid land use conflicts, thus preventing incompatible land uses from giving rise to nuisance situations.

But see James L. Winokur, *The Mixed Blessing of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 Wis. L. Rev. 1, 17 (arguing that the prevalence of zoning ordinances is merely evidence of the desirability of "permanency of development of land").

9. Chipchase, *supra* note 8, at 153.

10. *See* Martin A. Schwartz, *Supreme Court Section 1983 Decisions (October 2001 Term)*, 19 Touro L. Rev. 51, 52 (2002) (noting the increased number of takings claims asserted under §1983 over the last 20 or 25 years); Dana Clark & David Downs, *What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States*, 11 J. Envtl. L. & Litig. 9, 76 (1996) ("In recent years, there has been a sharp increase in the number of such 'regulatory takings' claims particularly with respect to environmental regulations impacting land use."); Julia Kreidler Hickey, Florida Rock Industries v. United States*: A Categorical Regulatory Taking*, 2 Geo. Mason L. Rev. 245, 246 (1995) ("Courts have seen a sharp increase in the number of regulatory takings claims under the Clean Water Act.").

11. *See, e.g.*, U.S. Census Bureau Joint Release of the U.S. Department of Commerce and the U.S. Department of Housing & Urban Development, *New Residential Sales in January 2003*, Feb. 27, 2003, *at* http://www.census.gov/const/newressales.pdf ("Sales of new one family homes in January 2003 were at a seasonally adjusted annual rate of 914,000 . . . . This is 15.1[%] ([+ or –]11.5%) below the revised December rate of 1,077,000, but is 5.1[%] ([+ or –]13.3%) above the January 2002 estimate of 870,000."); *News Highlights: U.S. New Home Sales +0.4% to 1.021 Mln*, Dow Jones Int'l News, Oct. 25, 2002, at 11 (reporting that in September, new home sales were up 0.4% to 1.021 million and that U.S. existing home sales were up 1.9% to 5.40 million). This trend is not limited to single-family home sales. *See, e.g.*, Ray A. Smith, *Companies Use Proceeds to Shore Up Balance Sheets, Taking Advantage of Prices*, Wall St. J., Oct. 22, 2002, at A2 (reporting that "[c]orporations sold 95 properties with sale volume totaling $2.35 billion during the third quarter, up from 63 properties totaling $98 million in the year-ago quarter . . . . So far this year, corporations have sold 240 properties with sales volume totaling $4.78 billion, up from 208 properties and sales volume of $3.70 billion a year ago.").

12. *See* Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra, 69 Tenn. L. Rev. 891, 894 n.17 (2002) (noting that the postenactment purchaser problem "has arisen quite often . . .").

13. *See, e.g.*, Charles Lyons, *Abuses Are the Exception*, USA Today, Feb. 26, 2004, at A12 (debating whether "eminent domain is a valuable tool for improving communities").

14. *See* Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996); Pro-Eco, Inc. v. Board of Comm'rs of Jay County, 57 F.3d 505, 511, 26 ELR 20445 (7th Cir. 1995) (rejecting Pro-Eco's takings claim on standing grounds, because when the government acted, Pro-Eco did not own the property, but rather only had an option to buy the property); Creppel v. United States, 33 Fed. Cl. 590, 600 (Fed. Cl. 1995) ("[I]ndividuals who did not acquire their interests in the subject property until after the date of the taking may not obtain just compensation."); Hoeck v. City of Portland, 57 F.3d 781, 789 (9th Cir. 1995) ("Under the law at the time Hoeck took title, he had no right to use his property to maintain an abandoned structure."); M. & J. Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995) ("[I]n analyzing a governmental action that allegedly interferes with an owner's land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property."); Carson Harbor Village, Ltd. v. City of Carson, 37 F.3d 468, 476 (9th Cir. 1994) ("[F]or standing purposes [a regulatory takings claimant] must at the least demonstrate that he was a property owner subject to the statute at the time of its enactment."); Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994) ("The investment-based expectation criterion limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation."); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177, 24 ELR 21072 (Fed. Cir. 1994) ("[T]he owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss."); Superior-FCR Landfill, Inc. v. County of Wright, 59 F. Supp. 2d 929 (D. Minn. 1999); Vatalero v. Department of Envtl. Regulation, 601 So. 2d 1223, 1129 (Fla. Dist. Ct. App. 1992) ("[W]here the owner purchases land zoned in one classification with the intent or expectation of obtaining a change in zoning and is unsuccessful, nothing has been 'taken' from him."); Huntzinger v. State, 519 N.W.2d 367, 371 (Iowa 1994) ("Here, at the time the plaintiffs acquired title, the [s]tate, under existing state law, could have prevented disinterment. This limitation or restriction on the use of the land inhered in the plaintiffs' title."); Leonard v. Town of Brimfield, 666 N.E.2d 1300, 1303 (Mass. 1996) ("Because [claimant] purchased the property subject to the restrictions on

Federal Claims and the U.S. Court of Appeals for the Federal Circuit, have gone so far as to preclude takings claims where subsequent land use restrictions were not yet in existence but were foreseeable when the claimant acquired title.[15] Other courts have held merely that claimant's preacquisition notice of the applicable regulation is relevant to a partial takings inquiry.[16] On the other hand, a number of state courts have held that preacquisition notice of existing regulations can never, without more, bar a regulatory takings claim or preclude a zoning variance.[17]

To illustrate the various arguments made regarding the postenactment purchaser problem, this Article first examines a series of cases decided by the state of New York Court of Appeals.[18] Those cases are *Anello v. Zoning of Appeals of the Village of Dobbs Ferry*,[19] *Gazza v. New York State Department of Environmental Conservation*,[20] *Basile v. Town of Southampton*,[21] and *Kim v. City of New York*,[22] which were all decided the same day in 1997 and were later dubbed

building in a flood plain, she may not complain about the loss of a right she never acquired."); Steinbergh v. City of Cambridge, 604 N.E.2d 1269, 1274 (Mass. 1992) ("The challenged regulation did not interfere with the plaintiffs' investment-based expectations. They acquired the property when the regulation was already in effect.") (citation omitted); Adams Outdoor Adver. v. City of E. Lansing, 614 N.W.2d 634, 644, 31 ELR 20010 (Mich. 2000) (deciding compensation was not due because plaintiff had never included in its "bundle of rights" the right to display the billboards); Myron v. City of Plymouth, 562 N.W.2d 21, 23 (Minn. Ct. App. 1997), *aff'd*, 581 N.W.2d 815 (Minn. 1998) ("The fact that appellant knew at the time of purchase that the property was subject to a zoning restriction is [ ] a sufficient basis to reject his claim of an unconstitutional taking."); Minnesota v. Modern Box Makers, Inc., 13 N.W.2d 731, 735 (Minn. 1944) (rejecting plaintiff's challenge to a zoning ordinance because the ordinance was in effect prior to plaintiff's purchase of the property); Brotherton v. New York Dep't of Envtl. Conservation, 675 N.Y.S.2d 121, 122 (N.Y. App. Div. 1998) (denying a takings claim because "[w]hile the corporation may have purchased the property in 1958, the parcel was not conveyed to the petitioner until 1979, at which time the petitioner concedes it already had become subject to regulation under the Tidal Wetlands Act"); Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 716, 30 ELR 20420 (R.I. 2000), *aff'd in part and rev'd in part*, 533 U.S. 606, 32 ELR 20516 (2001) ("[W]hen Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired."); Wooten v. South Carolina Coastal Council, 510 S.E.2d 716, 717 (S.C. 1999) ("[T]here is no compensable regulatory taking when the property was subject to the restriction on use when the property was acquired."); Grant v. South Carolina Coastal Council, 461 S.E.2d 388, 354 (S.C. 1995) ("Grant has *never* had the right to fill critical area tidelands on his Folly Beach property. In 1987, when Grant purchased the Folly Beach property, South Carolina law forbade his filling critical areas without a permit from the Coastal Council."); City of Va. Beach v. Bell, 498 S.E.2d 414 (Va. 1998) (holding denial of permit was not a compensable taking because the zoning ordinance predated landowner's acquisition of property).

15. *See* Brace v. United States, 48 Fed. Cl. 272, 284, 31 ELR 20300 (Fed. Cl. 2000) ("[P]laintiff, knowing the wetland character of the land, by failing to promptly apply for a [development] permit, knowingly took a risk that environmental regulations would become more stringent."); Good v. United States, 189 F.3d 1355, 1362, 30 ELR 20102 (Fed. Cir. 1999) ("[I]n view of the regulatory climate that existed when [the claimant] acquired the subject property, [claimant] could not have had a reasonable expectation that he would obtain approval to fill 10 acres of wetlands in order to develop the land."); Avenal v. United States, 100 F.3d 933, 938 (Fed. Cir. 1996) (holding that claimants who acquired certain oyster harvesting licenses in the 1970s lacked reasonable expectations under *Penn Central* because they should have anticipated subsequent freshwater diversion projects which the court characterized as "inevitable"); State Department of Health v. The Mill, 887 P.2d 993, 1000 (Colo. 1995) (en banc) ("In short, expectations of unregulated use are unreasonable when an extensive regulatory scheme is in place at the time of investment."). *See also* Glen P. Sugameli, Lucas v. South Carolina Coastal Council: *The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 Envtl. L. 939, 980 n.295 (1999) (collecting cases).

16. *See* Palm Beach Isles Assocs. v. United States, 208 F.3d 1354, 30 ELR 20481 (Fed. Cir. 2000); Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154, 156, 30 ELR 20165 (Fed. Cl. 1999) ("Where a regulatory scheme is in place at the time of purchase, as was the Clean Water Act here, the reasonableness of the buyer's expectations must be discounted."); Forest Properties, Inc. v. United States, 177 F.3d 1360, 1366, 29 ELR 21174 (Fed. Cir. 1999) (claimant had no reasonable investment-backed expectations where he took title with notice of certain guidelines which "made it clear that filling wetlands to construct housing on the [ ] reclaimed land was disfavored and that it was most unlikely that such a project would be approved"); Ciampitti v. United States, 22 Cl. Ct. 310, 321, 21 ELR 20866 (Cl. Ct. 1991) ("[T]he degree to which the claimant has advance notice of the government action is relevant to claimant's reasonable expectations."); Cottonwood Farms v. Board of County Comm'rs of the County of Jefferson, 763 P.2d 551, 558 (Colo. 1988) (en banc) (preacquisition notice is relevant to whether there was a denial of all economically beneficial use, but not to constitutionality of zoning ordinance); Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984) ("A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights."); McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 634 (S.C. 2000), *cert. granted and judgment vacated*, 533 U.S. 943 (2001) ("This pre-existing permit requirement is relevant to respondent's investment-backed expectations.").

17. *See* Johnny Cake, Inc. v. Zoning Bd. of Appeals of the Town of Burlington, 429 A.2d 883, 885 (Conn. 1980) ("[I]f the hardship is created by the enactment of a zoning ordinance and the owner of the parcel could have sought a variance, then the purchaser has the same right to seek a variance and, if his request is supported in law, to obtain the variance."); Reinking v. Metropolitan Bd. of Zoning Appeals of Marion County, 671 N.E.2d 137, 141-42 (Ind. Ct. App. 1996) ("[T]he purchase of property with knowledge of use restrictions does not prohibit a purchaser from claiming a special or unnecessary hardship, regardless of who owned the property at the time it was burdened."); Lopes v. City of Peabody, 629 N.E.2d 1312, 1315 (Mass. 1994) ("We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provision first affected it."); Rocheleau v. Town of Greene, 708 A.2d 660 (Me. 1998); Twigg v. Town of Kennebunk, 662 A.2d 914, 916 (Me. 1995) ("The modern rule provides that a purchase with knowledge does not preclude the granting of a variance and, at most, is considered a nondeterminative factor in consideration of a variance."); Filister v. City of Minneapolis, 133 N.W.2d 500, 504 (Minn. 1965) ("We tend to the view that knowledge of the restriction does not in itself create an estoppel if the ordinance has at the time of its adoption deprived the property of all practical use."); Karam v. New Jersey Dep't of Envtl. Protection, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) ("[T]he right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development."); East Cape May Assocs. v. New Jersey Dep't of Envtl. Protection, 693 A.2d 114, 120 (N.J. Super. Ct. App. Div. 1997) ("East Cape May is entitled to assert whatever development rights its predecessors would have had."); In re Gregor, 627 A.2d 308, 312 (Pa. 1993) ("The right to develop a nonconforming lot is not personal to the owner of property at the time of enactment of the zoning ordinance but runs with the land, and a purchaser's knowledge of zoning restrictions alone is insufficient to preclude the grant of a variance . . . ."); State ex rel. Huebner v. Waukesha County Zoning Bd. of Adjustment, 514 N.W.2d 54 (Wis. Ct. App. 1993) ("A purchaser of property acquires no greater right to a variance than his predecessor and he should not be held to acquire less."). In light of these cases, one cannot help being puzzled at the Rhode Island Supreme Court's mention of the fact that "Palazzolo was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property *after* the regulation became effective." *State ex rel. Tavares*, 746 A.2d at 716.

18. *See infra* Part II.

19. 656 N.Y.S.2d 184 (N.Y. 1997).

20. 657 N.Y.S.2d 555, 28 ELR 20053 (N.Y. 1997).

21. 655 N.Y.S.2d 877 (N.Y. 1997).

22. 659 N.Y.S.2d 145 (N.Y. 1997).

New York's regulatory takings quartet.[23] In all four cases, the New York Court of Appeals denied regulatory takings claims brought by postenactment purchasers.[24] The court, relying in part on language from the landmark U.S. Supreme Court case of *Lucas v. South Carolina Coastal Council*,[25] reasoned that a postenactment purchaser could not claim that the government had "taken" anything because the purchaser never acquired the rights which were proscribed by the land use regulation existing at the time of purchase.[26] Hence, the New York Court of Appeals held that postenactment purchasers are categorically barred from bringing regulatory takings claims,[27] thereby establishing a postenactment purchaser bar. This rule of law is also known as the regulatory takings notice rule because it provides that purchasers with notice of existing land use regulations will not be heard to complain that such proscribed rights have been taken.[28]

Four years later, in *Palazzolo v. Rhode Island*,[29] the Court reached a contrary conclusion, rejecting any "blanket rule that purchasers with notice have no compensation right when a [regulatory takings] claim becomes ripe."[30] Interestingly, the *Palazzolo* Court also interpreted language in *Lucas*,[31] yet reached the opposite result of New York's highest court.[32] *Palazzolo* prevents the New York Court of Appeals, and other courts that have reached similar holdings,[33] from denying a takings claim based solely on the fact that the challenged regulation predates the claimant's title, effectively rejecting any postenactment purchaser bar.[34]

However, the Court's holding in *Palazzolo* presents an analytical problem recognized by the New York takings quartet[35] which courts and commentators have not sufficiently addressed.[36] If postenactment purchasers are allowed to bring a *Penn Central Transportation Co. v. New York City*[37] partial takings claim which asserts, in part, that the regulation has frustrated their investment-backed expectations,[38] a logical dilemma arises: it is impossible to unambiguously analyze a postenactment purchaser's investment-backed expectations because she very well may have purchased the property with the expectation of mounting a successful *Penn Central* takings claim and winning just compensation. Stated another way, the merits of a postenactment purchaser's *Penn Central* regulatory takings claim partially depends on the merits of the claim. It is now possible to see why Judge Carmen Beauchamp Ciparick of the New York Court of Appeals worried that allowing postenactment purchasers to bring regulatory takings claims would render *Penn Central*'s reasonable investment-backed expectations inquiry "hopelessly circular."[39]

This Article argues that evaluating the *pre*enactment owner's investment-backed expectations as opposed to those of the *post*enactment purchaser is a viable solution to this logical circularity problem because it takes into account the New York Court of Appeals' concerns without disturbing the essential holding of *Palazzolo*.[40] Part I provides a background of U.S. traditional and regulatory takings jurisprudence to help illustrate the framework within which the postenactment purchaser problem arises.[41] Part II analyzes the emergence of New York's postenactment purchaser bar in the regulatory takings quartet and explains the logical circularity problem the court sought to avoid.[42] Part III examines the Court's rejection of the postenactment purchaser bar in *Palazzolo* and explains why the circularity problem remains unanswered by the Court's opinion. Finally, Part IV identifies some attempted answers to the logical circularity problem and argues that analyzing the preenactment purchaser's investment-backed expectations is a workable solution.[43] The importance of such a prediction is of heightened importance in light of the fact that the New York Court of Appeals has apparently not yet revisited the issue of the postenactment purchaser since the Court's holding in *Palazzolo* nearly three years ago.

23. Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345 (1998) [hereinafter Eagle, *Regulatory Takings Quartet*].
24. In all four of these cases, the New York Court of Appeals construed both the U.S. Constitution's Takings Clause as well as Article I, §7 of the New York State Constitution which provides in part that "private property shall not be taken for public use without just compensation." N.Y. Const. art. I, §7. Hence, the New York Court of Appeals did not draw a distinction between the federal and New York State Takings Clauses in resolving these cases. *See Gazza*, 657 N.Y.S.2d at 557 n.2 (quoting both the Fifth Amendment to the Constitution and Article I, §7 of the New York State Constitution); *Anello*, 656 N.Y.S.2d at 184 (same); *Basile*, 655 N.Y.S.2d at 878 (same).
25. 505 U.S. 1003, 22 ELR 21104 (1992) (holding that a per se regulatory taking occurs when a regulation permanently destroys all economic value in the property).
26. *See Gazza*, 657 N.Y.S.2d at 560 ("[P]etitioner's claim that the denial of his variance was a 'taking' must fail because he never owned an absolute right to build on his land without a variance."). *See infra* Part II.B.
27. *See* John M. Armentano, *Challenging "Takings" Supreme Court Lifts "Notice" Bar to Suits Against Government*, N.Y. L.J., July 25, 2001, at 5 ("[The New York Court of Appeals cases] essentially prohibited [property] owners from recovering damages from a municipality on 'takings' grounds if the regulations were in effect when they acquired the property.").
28. *See* Robert Meltz, *What Role Does the Law Existing When a Property Is Acquired Have in Analyzing a Later Taking Claim?: The "Notice Rule,"* 64 ALI-ABA 381, 383 (2001) ("This government defense has been called the 'notice rule,' because the land buyer is seen as being 'on notice' as to the possibility of [the proposed land use] being thwarted, and hence not deserving of compensation."). *See supra* note 6 (explaining constructive notice). Hence, the postenactment purchaser bar and the regulatory takings notice rule are used interchangeably in this Article.
29. 533 U.S. 606, 32 ELR 20516 (2001).
30. *Id*. at 628.
31. *Id*. at 629 (analyzing *Lucas*' proposition that a takings claim must be premised on the taking of a right that "inhere[s] in the title itself"—a title which is subject to "restrictions that background principles of the [s]tate's law of property and nuisance already place upon land ownership") (quoting *Lucas*, 505 U.S. at 1029). *See infra* Part III.B.1. (describing *Palazzolo*'s interpretation of background principles).
32. *See infra* Part III.B.
33. *See supra* note 14 (collecting cases).
34. *See* Armentano, *supra* note 27 ("In *Palazzolo v. Rhode Island*, the Court held that a takings claim for damages is not barred by the mere fact that the claimant acquired title to the property after the effective date of the state-imposed restriction.").
35. *See infra* Part II.C.
36. *See id*.
37. 438 U.S. 104, 8 ELR 20528 (1978).
38. *See infra* notes 92-97.
39. Anello v. Zoning of Appeals of the Village of Dobbs Ferry, 656 N.Y.S.2d 184, 186 (N.Y. 1997).
40. *See infra* Part IV.C.
41. *See infra* notes 44-128 and accompanying text.
42. *See infra* notes 129-221 and accompanying text.
43. *See infra* notes 293-344.

I. Do We Have a Takings Claim?

Although takings jurisprudence is somewhat complicated and remains partially unsettled, this part briefly illustrates the contours of traditional and regulatory takings law. It then offers a snapshot of current regulatory takings jurisprudence to the extent necessary to understand the issues in the regulatory takings quartet and *Palazzolo*, and the ensuing logical circularity problem.

A. Nonregulatory Takings

Before analyzing whether a postenactment purchaser should be able to bring a cognizable regulatory takings claim, it is important to analyze when *any* owner can bring a successful takings claim. Initially, the states' power to take private land by eminent domain, or regulate the use of private land, derives from its police power[44] which was reserved to the states by the Ninth and Tenth Amendments to the U.S. Constitution,[45] and is often made explicit in state constitutions, legislation, or local enabling acts.[46] The economic rationale for the power of eminent domain is to eliminate transaction costs associated with far-reaching public improvements.[47]

However, the Fifth Amendment to the Constitution, which has been incorporated into the Due Process Clause of the Fourteenth Amendment and made applicable against the states,[48] provides that, "private property [shall not] be taken for public use, without just compensation"[49] and is therefore known as the Takings Clause. Thus, the Takings Clause limits the state government's police power to regulate land use by requiring that the government take private land only for public use, and that it provide just compensation if chooses to do so.[50]

The Court's traditional rationale for this constitutional guarantee against uncompensated takings of private property is 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."[51] This accords with the view of the author and proponent of the Fifth Amendment Takings Clause, James Madison, that compensation is intended to "remedy 'those particular cases in which majoritarian decisionmaking process would not fairly consider the claims of the owner.'"[52] Although the Court offers fairness as its principal justification for the requirement that the government pay just compensation when it takes private property, a powerful economic argument for this requirement is to dissuade the government from exercising its power of eminent domain unless the benefits to society outweigh the costs which must be paid by society in the form of just compensation which comes out of tax dollars.[53]

Any challenge to a governmental action asserting a violation of the Takings Clause involves a two-pronged test.[54] First, courts ask whether the governmental taking of private property is for public use and therefore a permissible exer-

44. *See* Rabin & Kwall, *supra* note 1, at 569 ("The state government possess this power [to regulate land use] by virtue of the police power, which enables the government to enact measures for the general health and welfare of the public.").

45. *See* U.S. Const. amends. IX, X.

46. *See* Rabin & Kwall, *supra* note 1, at 570 (noting that "the degree to which local governments are allowed to exercise this authority varies from state to state").

47. This rationale allows the government to avoid transaction costs associated with purchasing several pieces of property necessary to construct a public utility, such as a highway or airport. Forcing the government to purchase these parcels piecemeal on the open market would allow individual landowners to essentially hold the government initiative hostage by demanding an exorbitant sale price. This would result in inefficient use of land when measuring the overall benefit of the public utility against the value attached to the individual properties by landowners. *See generally* Richard A. Posner, Economic Analysis of Law 62-63 (5th ed. 1998). Using the example of a government-sponsored railroad project, Judge Richard A. Posner points out that if the government were forced to purchase individual tracts of land on the open market, landowners would be able to demand prices much higher than market value (absent the railroad project) because of the high cost to the government of abandoning that project for an alternate location. As a result, fewer right-of-way projects will be undertaken, thereby preventing the most efficient use of land. *Id*. Judge Posner goes on to argue that the just compensation requirement ensures that government will not condemn properties whose value for private use value is higher than their value for the public use that the government has in mind. *Id*. at 64.

48. In Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897), the Court stated:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Id. at 241. In any event, every state constitution contains a comparable Takings Clause. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 116 n.24 (1986) (implicitly recognizing that every state has its own Takings Clause and noting that "[s]tates have widely copied the [federal] Takings Clause's language").

49. U.S. Const. amend. V.

50. *See* Rabin & Kwall, *supra* note 1, at 572 ("[T]he police power is an implied limitation on property rights, but the police power itself must be limited if the property protections afforded by the Constitution are to have any meaning.").

51. Armstrong v. United States, 364 U.S. 40, 48-49 (1960) (holding that the forced transfer of ship hulls and materials to the United States resulted in a taking of the claimant's mechanic's lien on this equipment for which just compensation was due under the Fifth Amendment). *See* Agins v. City of Tiburon, 447 U.S. 255, 260, 10 ELR 20361 (1980) ("The determination that governmental action constitutes a taking is, in essence a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.").

52. *See* Eric D. Albert, *If 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 (2003) (quoting William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 836 (1995)).

53. *See id.* at 765-66 ("[Commentators] assert that compensation is necessary to prevent fiscal illusion, which is the argument that the government will overregulate if it operates under an illusion as to the real costs inflicted on private parties by regulation."); (citing Aaron N. Gruen, *Takings, Just Compensation, and the Efficient Use of Land, Urban, and Environmental Resources*, 33 Urb. Law. 517, 540 (2001) and Barton H. Thompson Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1489-92 (1990)). For a thorough discussion of the economic goals of takings law, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

54. Actually, there are at least three if one includes the procedural ripeness requirements for bringing a takings claim. *See infra* notes 271-78 and accompanying text (discussing the extensive ripeness requirements for bringing a regulatory takings claim).

cise of police power.[55] This requirement derives from the language of the Fifth Amendment which requires that the taking of private property be for public use.[56] In *Hawaii Housing Authority v. Midkiff*,[57] the Court set out the test for whether a government action constitutes public use.[58] The *Midkiff* Court stated that a challenged governmental action, which exerts some form of control over property, satisfies the constitutional requirement of public use if it is "rationally related to a conceivable public purpose,"[59] or, in other words, if the "[l]egislature rationally could have believed that the [act] would promote its objective."[60] This broad grant of power[61] led the Court to conclude that "the public use requirement is thus coterminous with the scope of a sovereign's police power."[62] If, however, the government fails to adequately defend its action as rationally related to public use, which it rarely does,[63] a court will strike down the governmental initiative as an unconstitutional exercise of state police power, without reaching the issue of whether just compensation is required.[64] To be sure, even if the property owner succeeds in striking down the governmental land control initiative as unconstitutional, he may also have a claim for just compensation for the value taken while the governmental action was in effect.[65]

If the governmental land control initiative passes this initial public purpose test, the next, and often more complicated inquiry,[66] is whether the governmental action consti-

55. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 636 n.1, 32 ELR 20516 (2001) (O'Connor, J., concurring) ("The first question is whether the enactment or application of a regulation constitutes a valid exercise of the police power.").

56. *See supra* note 49.

57. 467 U.S. 229, 233, 14 ELR 20549 (1984) (upholding the Hawaii Land Reform Act of 1967, which "created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees").

58. *Id.* at 231-32 (addressing the question of "whether the Public Use Clause of [the Fifth] Amendment . . . prohibits the [s]tate of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the [s]tate").

59. *Id*. at 241 (collecting cases). *See also id.* at 421 ("In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation.") (internal quotation omitted).

60. *Id.* at 242 (quoting Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-72 (1981)).

The Court based this judicial deference to the legislature on the rationale of "institutional incompetence" explaining that, "in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power." *Id*. at 244. Furthermore, the Court decided that this judicial deference is due state legislatures as well, proclaiming, "[s]tate legislatures are as capable as Congress of making such determinations within their respective spheres of authority." *Id*.

61. The public use test set out in *Midkiff* is considered "broad" because it requires only that the governmental initiative provide an "*advantage or benefit* to the public (the so-called broad view)," and not that it result in "*actual use or right to use* of the condemned property by the public (the so-called narrow view)." Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 205 (1978) (emphasis added). *See* Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 Am. Bus. L.J. 527, 562 n.6 (2000) (noting that, [t]he Court has read the public use restriction so narrowly in recent years . . . that it is generally viewed as having little, if any restraining effect upon the exercise of the eminent domain power"). For further discussion on scope of the public use requirement, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 160, 166-69 (1985) (eschewing both the broad and narrow views, and instead arguing that a public use must provide "public goods"). *See, e.g.*, City of Oakland v. Oakland Raiders, 646 P.2d 835 (Cal. 1982) (holding that the proposed appropriation of the Raiders football franchise through use of the city's eminent domain power, to keep the team from moving to Los Angeles, passed the public use test, and noting, "[g]enerally speaking, anything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes"). In constitutional law parlance, this is known as the rational basis test.

62. *Midkiff*, 467 U.S. at 240-41. *But see* Dolan v. City of Tigard, 512 U.S. 374, 391, 24 ELR 21083 (1994) (declining to adopt the "reasonable" or "rational relationship standard" embraced by a majority of state courts, and opting instead for a "rough proportionality" test); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837, 17 ELR 20918 (requiring an "essential nexus" between a legitimate public purpose and the challenged governmental action).

63. In fact, Prof. Thomas Merrill, in his article *The Economics of Public Use*, surveyed all state and federal public use cases decided since 1954 and found that all the federal cases found a public use. *See* Merrill, *supra* note 48, at 95-109. Interestingly though, he also found that fully one in six of the state cases to take up the issue found no public use. *Id*. This divergence may be attributable to the fact that "the federal government is probably less subject to capture by small fractions than are state governments." Dukeminier & Krier, *supra* note 4, at 1116 (citing Merrill, *supra* note 48, at 115). *But see* Broad v. Sealaska Corp., 85 F.3d 422, 431 n.5 (9th Cir. 1996) (stating, "takings for a private use, as opposed to a public use, are presumptively unconstitutional," and holding, "the district court erred when it held that because this alleged taking was for a *private use* it did not violate the plaintiffs' Fifth Amendment rights"); In re City of Seattle, 638 P.2d 549, 557 (Wash. 1981) (concluding that "the proposed project [to condemn land for the development of a retail shopping center, public square, park museum, and parking in order to stem inner-city decay] contemplated a predominantly private, rather than public, use").

64. *Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."). *See also* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1229 (Cal. 2002) ("The 'public use' requirement is an explicit limit on the power of government to take private property for, as the Court has long recognized, a taking—even if justly compensated—must serve a legitimate public purpose."). *See also* Dukeminier & Krier, *supra* note 4, at 1105-06 ("The Fifth Amendment's mention of 'public use' is read to mean that property may be taken *only* for such uses; the government may not condemn for 'private' purposes, however willing it might be to pay compensation for the forced transfer.") (emphasis in original).

65. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 17 ELR 20787 (1987) (holding that the Takings Clause requires just compensation for a regulatory taking from the date the taking occurs, i.e., when the regulation is enacted, until the date the regulation is rescinded). *See also* Carson Harbor Village, Ltd. v. City of Carson, 37 F.3d 468, 473 n.4 (9th Cir. 1994):

> When the effects of a regulation do not "substantially advance a legitimate state interest," compensation is not automatically due. Rather, the proper remedy for an invalid exercise of the police power is amendment or withdrawal of the regulation and, if authorized and appropriate, damages. . . . However, if the landowner was deprived of all *use* of the property while the invalid law was in effect, mere withdrawal of the regulation is an insufficient remedy and compensation for the use of the property during the period in which the law was in effect must be paid.

66. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123, 8 ELR 20528 (1978) ("The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."). The Court has described this as a line-drawing problem saying:

> It is true that not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. This case [involving the forced transfer of a subcontractor's ship hulls and materials to the United States by virtue of the general contractor's default under a government ship-building contract] and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable

tutes a taking of private property, which is unconstitutional without awarding the owner just compensation.[67] The clearest example of a government action that constitutes a taking occurs not by the effects of a regulation, but when the government condemns or physically occupies a parcel of land for public use, such as a highway.[68] Accordingly, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[69] the Court held that any "permanent physical occupation of real property," no matter how minimal or inconsequential, constitutes a taking under the Fifth Amendment.[70] The Court later held that a physical taking of land occurs when the government itself occupies the property or "*requires* the landowner to submit to physical occupation of its land,"[71] by either the government or a third party.[72]

The Court in *Loretto* reasoned that this per se categorical rule[73] protects the traditional property rights to possess, use, dispose, and exclude strangers from the property.[74] In addition, this rule avoids "difficult line-drawing problems" involved in determining what physical invasions constitute a governmental taking, and would present a relatively simple matter of proof.[75] Thus, a traditional nonregulatory governmental taking has occurred when government takes title to, or physically encroaches upon, private land for a public purpose.

B. Regulatory Takings Jurisprudence

The more complicated situation[76] in which the postenactment purchaser problem often arises[77] does not occur when the government permanently and physically condemns or occupies a piece of private property, but instead enacts a use-restricting regulation, which the owner claims has ef-

> "takings" and what destructions are "consequential" and therefore not compensable.

Armstrong v. United States, 364 U.S. 40, 48 (1960) (citations omitted).

67. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 636 n.1, 32 ELR 20516 (2001) (O'Connor, J., concurring) ("The second question is whether the [s]tate must compensate a property owner for a diminution in value effected by the [s]tate's exercise of its police powers."); Gazza v. New York State Dep't of Envtl. Conservation, 657 N.Y.S.2d 555, 561, 28 ELR 20053 (N.Y. 1997) ("Once it has been established that the regulations at issue are a legitimate exercise of police power, we must next determine whether the regulations result in a taking of petitioner's property by depriving the landowner of his property rights.").

68. *See Palazzolo*, 533 U.S. at 617 ("The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use."); *id.* at 628 ("In a direct condemnation action, or when a [s]tate has physically invaded the property without filing suit, the fact and extent of the taking are known."); DUKEMINIER & KRIER, *supra* note 4, at 1124 (explaining the procedure that the government must follow to assure due process in a condemnation proceeding and concluding that "[i]n a straightforward condemnation action, . . . there is no question that the government is taking property (though there might well be questions about whether the taking is for a public use, and about the measure of compensation")); RABIN & KWALL, *supra* note 1, at 571 ("If the government builds a highway over your land it has obviously 'taken' your property and 'deprived' you of its use.").

69. 458 U.S. 419, 423 (1982) (holding that a New York law which prohibited a landlord from "interfering with the installation of cable television facilities upon his property or premises" without just compensation constituted an unconstitutional taking).

70. *Id*. at 427 (1982). *Cf.* United States v. Causby, 328 U.S. 256 (1946) (holding that "physical invasion of airspace over landowner's property by intermittent entry of government planes amounted to a taking"); Preseault v. United States, 27 Fed. Cl. 69, 91, 23 ELR 20391 (Fed. Cl. 1992)); Kaiser Aetna v. United States, 444 U.S. 164, 180, 10 ELR 20042 (1979) (a taking occurred where the "imposition of [a] navigational servitude . . . resulted in an actual physical invasion of [a] privately owned marina"). *But see* Miller v. Schoene, 276 U.S. 272, 278 (1928) (permitting the state to enter property and destroy diseased trees without affecting a taking).

71. Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

72. *See, e.g.*, Preseault v. United States, 100 F.3d 1525, 1552, 27 ELR 20349 (Fed. Cir. 1996) (en banc) (concluding that "the occupation of the Preseaults' property by the city of Burlington under the authority of the [f]ederal [g]overnment constituted a taking of their property for which the Constitution requires that just compensation be paid").

73. *See* Eagle, *Regulatory Takings Quartet*, *supra* note 23 at 393 ("*Loretto* establishes a categorical rule: Permanent physical occupations are not subject to the Court's *Penn Central* balancing test regardless of how minimal the area occupied or how important the occupation to the public welfare.").

74. *Loretto*, 458 U.S. at 435. *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 831, 17 ELR 20918 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (citing *Loretto*, 458 U.S. at 433) (internal quotations omitted); *Kaiser Aetna*, 444 U.S. at 179-80 ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the [g]overnment cannot take without compensation."). *But see* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 108 n.56 (2002) (noting that "[e]ven this right to exclude is not absolute") (collecting cases). *See, e.g.*, Burling, *Background Principles*, *supra* note 6, at 516 ("Rejecting what it described as 'western notions' of property law, the [Hawaii Supreme Court has] found that . . . any person with any Native Hawaiian blood has the right to gather natural resources on private undeveloped property, whether or not it is owned in fee by others.").

75. *Loretto*, 458 U.S. at 436. *See* Poirier, *supra* note 74, at 108-09 ("As to the rule concerning physical invasions, it is easy to tell when the rule has been violated—a boundary is traversed. The low information cost could explain the rule's easy clarity.").

76. *See* Poirier, *supra* note 74, at 97 ("Everyone has heard the grumbling about vagueness or messiness of the doctrine of regulatory takings."); *id.* at 97 n.2. Prof. Marc Poirier collects numerous commentators' enigmatic descriptions of the complexity and murkiness of the regulatory takings doctrine. My favorite is Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993), where the author describes regulatory takings as the "doctrine-in-most-desperate-need-of-a-principle." *See also* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 92 (1995) ("Regulatory takings are proving to be one of the enduring legal dilemmas of the twentieth century."); John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation, and Public Use*, 34 RUTGERS L. REV. 243, 244 (1982) (describing takings claims as "a farrago of fumblings which have suffered too long from a surfeit of deficient theories").

77. To be sure, the postenactment purchaser problem may arise in the face of either a physical encroachment upon property or a governmental regulation restricting use of property. *See, e.g.*, Kim v. City of New York, 659 N.Y.S.2d 145 (N.Y. 1997) (alleging that the dumping of soil on claimants land was a taking and noting that the postenactment purchaser bar is equally applicable in the case of a preexisting permanent physical occupation):

> A threshold inquiry into an owner's title is generally necessary to the proper analysis of a takings case, whether of a regulatory or physical nature . . . . Thus, regardless of whether this case is characterized as a physical or regulatory taking, . . . our analysis starts with a search into the bundle of rights and concomitant obligations contained in the plaintiff's title.

Id. However, it would seem impossible for this problem to arise when the government initiates a traditional condemnation action because the property owner would undoubtedly claim his right to just compensation in the direct condemnation proceeding rather than sell the land to a subsequent purchaser who might then bring a takings claim. *See* Stein, *supra* note 12, at 897 ("The [*Palazzolo*] Court confirm[ed] that an owner who suffers a direct taking and then transfers the property to a successor may not concurrently transfer the takings claim to that new owner.") (citing Palazzolo v. Rhode Island, 533 U.S. 606, 628, 32 ELR 20516 (2001).

fectively taken his property.[78] Since there are a seemingly endless number of land use regulations,[79] it is easy to see how determining which require just compensation and which do not quickly becomes a march up a slippery slope.

First, with respect to the facial constitutionality of such land use regulations, in *Village of Euclid, Ohio v. Ambler Realty Co.*,[80] the Court held that a government zoning ordinance constitutes a valid exercise of a state's police power if it bears a substantial relationship to the public health, safety, morals, or general welfare, and their enactment inflicts no irreparable injury upon the landowner.[81] Two years after *Euclid*, the Court struck down a zoning law as unreasonable in *Netcow v. City of Cambridge*[82] because it "d[id] not substantially advance the public welfare and seriously injure[d] the landowner."[83] Thus, *Euclid* and *Netcow* stand for the unremarkable proposition that "a reasonable zoning is valid but unreasonable zoning is not."[84]

Second, with respect to whether such a regulation constitutes a compensable taking, in *Pennsylvania Coal Co. v. Mahon*,[85] Justice Oliver Wendell Holmes feared that "if private property were subject to unbridled, uncompensated intrusion under the police power, 'the natural tendency of human nature would be to extend the qualification more and more until at last private property disappeared.'"[86] Hence, Justice Holmes decided that "while property may be regulated to a certain extent, if [a] regulation *goes too far* it will be recognized as a taking."[87] This oft-quoted rule is of little help in determining exactly when a governmental regulation rises to the level of a taking.[88] However, it recognizes an important concept—a regulation that prohibits land use or development without condemning or physically occupying the property can still give rise to a cognizable takings claim.[89] Thus, *Mahon* solidified the viability of regulatory takings claims in federal takings jurisprudence,[90] and has therefore been called the "granddaddy of all regulatory takings cases[.]"[91]

More than half a century after *Mahon*, the Court attempted to distill a more workable test for precisely when a land use regulation constitutes a taking in *Penn Central*.[92] The *Penn Central* Court recognized, however, that determining whether a compensable regulatory takings has occurred requires case-by-case analysis which necessarily in-

78. Hence the term "regulatory takings claim." For a simple explanation of the conceptual basis of a regulatory takings claim, see *supra* note 4.

79. *See supra* note 9-10 (listing types of land use regulations).

80. 272 U.S. 365, 379-80, 386 (1926) (holding that a "comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single-family houses, etc., the lot area to be built upon, the size and height of buildings, etc." was facially constitutional despite the fact that the ordinance "operate[d] greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial[,] and residential uses"). For a pessimistic review of Euclid's endorsement of zoning laws, see Rabin & Kwall *supra* note 1, at 582:

> In the long run, the decision [in *Euclid*] created employment for thousands of lawyers and planners, made planning commission and city council meetings a source of entertainment and exasperation for citizens across the country, and made land use regulation respectable. . . . [W]e believe that the abuse of the zoning power accounts for segregated living patterns, the growth of suburbs and the decline of cities, the homogeneity of suburbia, the high cost of land and housing, excessively low densities leading to urban sprawl, and other important matters.

81. *See* Agins v. City of Tiburon, 447 U.S. 255, 262, 10 ELR 20361 (1980) (paraphrasing *Euclid*, 272 U.S. at 395-97). The Court in *Agins* upheld an open-space zoning ordinance against an attack that it was facially unconstitutional because the ordinance substantially advanced legitimate state interest. *Id*. at 261. The Court also found that no taking occurred because the ordinance did not "prevent the best use of appellants' land, nor extinguish a fundamental attribute of ownership." *Id*. at 262 (citation omitted). *See also* Goldblatt v. Hempstead, 369 U.S. 590 (1962) (holding that a city safety ordinance banning any excavations below the water table, which required the plaintiff to abandon his sand and gravel mining business, did not amount to a governmental taking because the restriction served a substantial public purpose); Miller v. Schoene, 276 U.S. 272 (1928) (holding that an ordinance which required landowners to cut down red cedar trees which perpetuated a disease that was fatal to nearby apple trees was not a taking because the preservation of the apple industry was an important public purpose); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a law which prohibited the operation of brickyards because it was inconsistent with nearby residential uses and therefore analogous to a nuisance control measure).

82. 277 U.S. 183 (1928) (striking down a zoning ordinance which zoned plaintiffs property for residential use despite its proximity to industrially zoned parcels (the Ford Motor Company, a soap factory, and a railroad), rendering the claimant's property valueless).

83. Rabin & Kwall, *supra* note 1, at 583.

84. *Id*.

85. 260 U.S. 393, 412 (1922) (holding that Pennsylvania's Kohler Act, which "forb[ade] the mining of anthracite coal in such [a] way as to cause the subsidence of, among other things, any structure used as a habitation . . . ," was an unconstitutional taking without just compensation because it prevented the Pennsylvania Coal Company from exercising their contracted-for right to mine valuable coal beneath certain residential property).

86. Karam v. New Jersey Dep't of Envtl. Protection, 705 A.2d 1221, 1224-25 (N.J. 1998) (quoting *Mahon*, 260 U.S. at 415) (internal quotations and alterations omitted).

87. *Mahon*, 260 U.S. at 415 (emphasis added). Similarly, Holmes established that when a regulation "reaches a certain magnitude . . . there must be an exercise of eminent domain." *Id*. at 413.

88. *See id*. at 416 ("As we already have said this is a question of degree—and therefore cannot be disposed of by general propositions."); *id*. at 416 (Brandeis, J., dissenting) ("It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value, and that here the restriction destroys existing rights of property and contract. But values are relative."); Palazzolo v. Rhode Island, 533 U.S. 606, 617, 32 ELR 20516 (2001) (describing Justice Holmes' formulation as "well-known, if less than self-defining"); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, 22 ELR 21104 (1992) ("[O]ur decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment.").

89. The Court reiterated this proposition in *Lucas*, saying:

> Prior to Justice Holmes' exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a "direct appropriation" of property . . . . Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriation of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.

Lucas, 505 U.S. at 1014 (citations omitted).

90. *See* Chipchase, *supra* note 8, at 153 ("The Court examined the[ ] issues [of proliferation of states and federal regulations in the twentieth century] in the landmark case of *Pennsylvania Coal [Co.] v. Mahon* and established that restrictions on the use of land can result in a taking of property as surely as a physical invasion.").

91. Burling, *Background Principles*, *supra* note 6, at 498.

92. 438 U.S. at 136 (rejecting a takings claim premised on New York City's Landmark Preservation Commission's prohibition against constructing an office building atop New York's Grand Central Terminal because the decision did not interfere with the claimant's "primary expectation concerning the use of the parcel," and allowed the claimant to transfer their preexisting air rights to other buildings nearby the station).

volves "essentially ad hoc factual inquiries."[93] To help guide this inquiry, the Court "identified several factors that have particular significance."[94] These factors include "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[95] In addition, the Court noted that "the character of the governmental action," including the extent to which "the interference with [the] property can be characterized as a physical invasion by government," would weigh in favor of finding that a taking has occurred.[96] On the other hand, the extent to which the "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good" would militate against finding a governmental takings requiring just compensation.[97] Thus, *Penn Central* failed to set out a firm principle for determining when a land use regulation constitutes a regulatory taking, preferring instead to leave this determination to case-by-case factual inquiries.

In recent years, the Takings Clause has garnered a substantial amount of judicial attention, especially by the Court.[98] For example, the Court had occasion to revisit the inquiry into whether a regulatory takings occurred requiring just compensation in *Lucas*.[99] There, the Court considered a land use regulation which prohibited development on claimant's beachfront property.[100] In *Lucas*, building on language in *Penn Central* as well as other regulatory taking cases,[101] the Court concluded that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking."[102] The Court justified this rule stating, "the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation[,] . . . [f]or what is the land but the profits thereof?"[103] For this reason, a takings claim under *Lucas* is also known as a "total-takings inquiry."[104] Thus, the Court added another categorical rule[105] to the otherwise murky ad hoc regulatory takings jurisprudence.[106] Simply stated, when a land use regulation deprives the owner of all economically beneficial use of his land, a taking has occurred.

To some extent, *Lucas* overruled the Court's long-standing rule of *Mulger v. Kansas*,[107] that prohibition of a noxious use was not compensable.[108] The Court dismissed the notion that a takings claim can fail merely because the regulated activity is labeled a noxious use because, "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[109] Thus, the Court shifted the emphasis of the categorical takings rule from the prevention of noxious uses in *Mulger* to the depravation of all economically beneficial use in *Lucas*.[110]

Nevertheless, the *Lucas* Court recognized that there are some circumstances when a government must be allowed to prevent certain land uses.[111] Thus, and significantly to the postenactment purchaser problem,[112] the *Lucas* Court pro-

93. *Id*. at 123. The Court also acknowledged that it had previously been unable "to develop any 'set formula'" for determining when a government land use regulation has triggered a compensable taking. *Id*. at 123-24.

94. *Id.* at 123.

95. *Id*. at 124.

96. *Id*. (citing United States v. Causby, 328 U.S. 256).

97. *Penn Central*, 438 U.S. at 124. This consideration speaks to the rationale behind the Fifth Amendment's requirement that any governmental taking be for public use. It follows that the government would be disinclined to take private property by eminent domain without at least some measure of benefit to the public. This is both because individual voters will be wary that the government will burden their land with the power of eminent domain without enjoying some measure of benefit and also because voting taxpayers would be less likely to acquiesce to paying individual landowners compensation out of their tax dollars without realizing some public benefit that justifies the cost. *See supra* notes 51-53 and accompanying text (discussing the rationale behind the Takings Clause).

98. *See* Robert J. Hopperton, *Ohio Supreme Court Regulatory Takings Jurisprudence: An Analytical Framework*, 29 CAP. U. L. REV. 321, 336 (2001) ("In recent years, there has been a dramatic revival of interest in the constitutional protection of property rights. Since 1987, the [Court] has deployed the Takings Clause of the Fifth Amendment as a significant limitation on the government's authority to regulate private property rights."). Notably:

> The [Court] has decided more Fifth Amendment takings cases within the last [15] years than it has in all the preceding [75]. The Court has launched an apparent quest to clarify its sometimes inconsistent decisions on takings claims and consequently has decided a series of significant cases in recent years.

John P. Seibels Jr., Nollan *and* Dolan: *Exaction-Packed Adventures in Takings Jurisprudence*, 4 S.C. ENVTL. L.J. 1, 1 (1995).

99. 505 U.S. at 1003. In *Lucas*, the Court held that the South Carolina Beachfront Management Act, which barred the plaintiff from building any permanent habitable structures on two beachfront parcels which he purchased for $975,000 two years before the regulation's enactment, constituted a taking because it completely extinguished the property's value. However, the Court left the door open to the possibility of defeating a takings claim on remand if the state could identify "background principles of nuisance and property law that prohibit[ed] the uses [Lucas] intend[ed] in the circumstances in which the property [was] found." *Id*. at 1031.

100. *Lucas*, 505 U.S. at 1007.

101. *Id*. at 1015 (citing Agins v. City of Tiburon, 447 U.S. 255, 260, 10 ELR 20361 (1980), Nollan v. California Coastal Comm'n, 483 U.S. 825, 17 ELR 20918 (1987), Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 17 ELR 20440 (1987), and Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 11 ELR 20569 (1981)).

102. *Lucas*, 505 U.S. at 1019 (emphasis in original). Further support for the Court's holding in *Lucas* can be found in Armstrong v. United States, 364 U.S. 40, 48 (1960) where the Court stated, "[t]he total destruction by the [g]overnment of all value of [the claimant's] liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure."

103. *Lucas,* 505 U.S. at 1017 (internal quotations and alterations omitted).

104. *See infra* note 124.

105. *See supra* notes 69-72 and accompanying text (discussing the categorical per se rule announced in *Loretto* that a permanent physical occupation constitutes a taking).

106. *See supra* notes 92-97 and accompanying text (discussing *Penn Central*'s ad hoc factual inquiry analysis).

107. 125 U.S. 623 (1887).

108. *See* Burling, *Background Principles*, *supra* note 6, at 503.

109. *Lucas*, 505 U.S. at 1024.

110. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 24 ELR 21072 (Fed. Cir. 1994); *see also* Burling, *Background Principles*, *supra* note 6, at 505-06 (describing the move from *Mulger* to *Lucas* and collecting cases).

111. *See Lucas*, 505 U.S. at 1029 (recognizing that the owner of a lakebed would not be entitled to compensation for the denial of a permit to "engage in a landfilling operation that would have the effect of flooding others' land," and the owner of a nuclear power plant would not be entitled to compensation for the denial of the right to "remove all improvements from its land upon discovery that the plant sits astride an earthquake fault").

112. *See infra* Parts II, III.

vided a vague exception to this otherwise categorical rule that the depravation of all economically beneficial use constitutes a compensable taking. Justice Antonin Scalia, writing for the majority, recognized that this rule

> does not make clear the "property interest" against which the loss of value is to be measured. . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the [s]tate's law of property—*i.e.*, whether and to what degree the [s]tate's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[113]

Building on this point, the Court later stated that

> where the [s]tate seeks to sustain a regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interest were not part of his title to begin with.[114]

In other words, the Court identified that if, for a yet unspecified reason, a property owner's title does not include a certain property right, then a prohibition against exercising that right (the aforementioned "proscribed use") would not entitle a property owner to compensation, even when the prohibition "deprives the land of all economically beneficial use."[115] The Court illustrated this proposition by stating that

> [w]here "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation) . . . though we assuredly *would* permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title. . . . We believe similar treatment must be accorded . . . [to] regulations that prohibit all economically beneficial use of the land: 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 [s]tate'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 . . . under the [s]tate's law of private nuisance, or by the [s]tate under its complementary power to abate nuisances that affect the public generally, or otherwise.[116]

Hence, the rule set out in *Lucas* can be restated: a land use regulation which strips a parcel of land of all economically beneficial use constitutes a compensable taking unless the land use proscribed by the regulation was never part of the owner's title to begin with because it would have been prohibited under certain background principles of the state's law of property and nuisance.

What the Court failed to make clear in *Lucas*, but would later clarify to some degree in *Palazzolo*,[117] was exactly when a preexisting restriction should be considered part of the "background principles of the [s]tate's law" such that it "inheres in the title itself."[118] In the aftermath of *Lucas*, some courts decided that these background principles were only composed of state common-law rules of property or nuisance,[119] while other courts determined that legislative enactments also become background principles for landowners who purchase a parcel of land after these enactments.[120] Thus, the way courts defined background principles determined, to a great extent, their outcome with respect to the postenactment purchaser problem.

C. A Summary of U.S. Takings Jurisprudence

Although many of the above considerations tend to blend together in some cases,[121] it seems possible to discern at least three distinct categories of cognizable takings claims within current U.S. takings law doctrine: two dealing with a regulatory takings claim and one dealing with a physical invasion.[122] First, in the face of a governmental land use regulation, a property owner can invoke *Lucas*' categorical rule requiring that a taking has occurred when all economically beneficial use of the property has been destroyed, also known as a total takings claim.[123] This categorical rule is

113. *Lucas*, 505 U.S. at 1017 n.7. This is essentially the denominator problem identified, *infra* note 160.

114. *Id*. at 1027. The Court went on to say that this exception is in accordance with their takings jurisprudence "which has traditionally been guided by the understanding of our citizens regarding the content of, and the state's power over, the "bundle of rights" that they acquire when they obtain title to property." *Id*.

115. *Id*. at 1029-39. On its face, this "preexisting limitation" language would seem to support some form of a postenactment purchaser bar. *See infra* Part II.B. However, in *Palazzolo*, the Court later repudiated this approach. *See infra* Part III.B.1.

116. *Id*. at 1028-29 (alterations and emphasis added). In the same vein, the Court concluded that, "an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Id*. at 1032 (emphasis in original).

117. *See infra* Part III.B.1.

118. *See Lucas*, 505 U.S. at 1032 ("There is no doubt that some leeway in a court's interpretation of what existing state law permits . . . ."). To be sure, the Court did express some doubt that the proscribed right in *Lucas*—the right to construct single-family homes on beachfront property—could be prohibited under the state's background principles of property or nuisance law. *See* Burling, *Background Principles*, *supra* note 6, at 500 (citing *Lucas*, 505 U.S. at 1031 ("[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land") (arguing for a narrow definition of background principles).

119. *See supra* note 17 (collecting cases). The Court even found reason to discuss background principles of property law in the landmark case of *Bush v. Gore*:

> [O]ur jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.

Bush v. Gore, 531 U.S. 98, 115 n.1 (2001).

120. *See infra* note 165.

121. For example, where a government regulation deprives an owner of all economically beneficial use (thereby establishing a takings under *Lucas*), it is likely that the regulation has also defeated the property owners reasonable investment-backed expectations (thereby weighing in favor or establishing a taking under *Penn Central*).

122. *See* Chipchase, *supra* note 8 (arguing persuasively that although *Lucas* total takings claims and *Penn Central* partial takings claims may be brought concurrently, the four-factor balancing test of *Penn Central*, particularly the reasonable investment-backed expectation prong, has no place in *Lucas*' categorical inquiry whether the claimant has suffered a "depravation of all economic use" of the subject property).

123. This is also known as a "total takings inquiry" because the claimant essentially argues that the government has worked a total taking of the economic value of his land. *See Lucas*, 505 U.S. at 1026 (identifying the rule set out as "our categorical rule that total regulatory takings must be compensated").

subject only to the vague qualification where "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"[124] because the land use restriction constitutes a background principle of state property law.

Second, if she cannot make out a *Lucas*-type takings claim, the owner of property subject to a governmental regulation can also ask a court to apply the balancing test set out in *Penn Central*, also known as a partial-takings claim.[125] This requires the court to consider "essentially ad hoc factual inquiries,"[126] including whether the governmental regulation has decreased the value of his land or otherwise interfered with her "distinct investment-backed expectations."[127]

Lastly, a property owner who has suffered a permanent physical occupation may invoke the categorical rule under *Loretto*, requiring the finding that a taking has occurred.[128] With this takings law jurisprudence in mind, it is now possible to examine the rationale behind the New York Court of Appeals' decisions with respect to the problem of the postenactment purchaser problem.

II. New York's Postenactment Purchaser Bar

In the regulatory takings quartet,[129] the New York Court of Appeals announced a postenactment purchaser bar. This principle states that where a property owner "acquire[s] her property after the enactment of [a land use regulation], its enforcement does not deprive her of any property interest."[130] Thus, a postenactment purchaser is *barred* from bringing a takings claim.[131] The postenactment purchaser bar is also known as the regulatory takings notice rule because it prevents purchasers with notice[132] of the applicable regulations from bringing a takings claim.[133]

In reaching this conclusion, the New York Court of Appeals relied heavily on the Court's language in *Lucas*, its holding in *Penn Central*, as well as various economic arguments.[134] In addition, the New York Court of Appeals sought to avoid a logical circularity problem in allowing a postenactment purchaser to bring a *Penn Central* regulatory takings claim.[135]

A. Just the Facts

The facts of the regulatory takings quartet are relatively simple and can be briefly stated. In *Kim*,[136] the legal grade of College Point Boulevard was raised to from 9.1 to 13.5 feet in 1978.[137] The Kims later purchased a piece of property adjacent to this street "with constructive notice that the property abutted a public road that was . . . more than four feet below the legal grade" at the time the Kims acquired title.[138] Finally, in 1990, the city of New York regraded the road to its legal level.[139] The New York City Charter §2904 as well as common-law principles of lateral support obligated the adjacent property owners to raise their property to the legal grade, and the New York Department of Transportation raised the Kims' property to the legal grade "by placing side fill on 2,390 square feet on the Kims' property abutting the public roadway."[140] The Kims then commenced an action claiming that a taking had occurred by virtue of a "permanent physical occupation" under *Loretto*.[141] The New York Court of Appeals concluded that "by virtue of the common-law and [c]ity [c]harter obligation of lateral support to a public roadway, plaintiffs' title never encompasses the property interest they claim has been taken" and therefore denied the takings claim.[142]

In *Gazza*,[143] prior to petitioner's purchase of the relevant property, the New York State Department of Environmental Conservation (DEC) inventoried 65% of the parcel as tidal wetlands, and imposed a requirement that any building be set back a certain distance from the tidal wetland boundary.[144] When the DEC denied petitioner's request for a building variance from these setback requirements, which prevented him from constructing a single-family home on the parcel, Gazza initiated a suit claiming that this denial amounted to an unconstitutional taking without just compensation.[145] The New York Court of Appeals held that "petitioner's claim that the denial of his variance was a 'taking'

124. *Id*. at 1027.

125. Suzanne Zazycki, *Investment-Backed Expectations After* Palazzolo v. Rhode Island, 34 U. Tol. L. Rev. 401, 406 (2003) ("If a regulation does not result in a per se taking, the plaintiff may still have a cause of action under a partial takings claim.").

126. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123, 8 ELR 20528 (1978).

127. *Id*. at 125.

128. *Id*. *See supra* notes 69-75 and accompanying text (discussing *Loretto*'s categorical rule that a permanent physical invasion by government constitutes a compensatory taking).

129. *See supra* notes 14-18 and accompanying text.

130. Anello v. Zoning of Appeals of the Village of Dobbs Ferry, 656 N.Y.S.2d 184, 185 (1997).

131. *See* Eagle, *Regulatory Takings Quartet*, *supra* note 23, at 346 ("The gravamen of the [New York Court of Appeals'] holdings is that preexisting regulations both inhere in a purchaser's title and preclude the purchaser from forming investment-backed expectations in the prohibited uses."). Notably, Professor Eagle appears to be mistaken in his further assertion that the New York Court of Appeals held that "[t]he purchaser cannot challenge the constitutionality of the regulations, since the right to do so terminated with the transfer of the land from the owner at the time the regulations were imposed." *Id*. In *Gazza*, the court of appeals clearly stated that "[o]f course, the [s]tate may exercise its police power of eminent domain only upon a showing of a valid legislative purpose. Thus, it has been recognized that a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government's legitimate police power." Gazza v. New York State Dep't of Envtl. Conservation, 657 N.Y.S.2d 555, 559, 28 ELR 20053 (N.Y. 1997). Thus, while the regulatory takings quartet stands for the proposition that a postenactment purchaser cannot bring a successful takings claim, such a purchaser could still challenge the constitutionality of a preexisting regulation.

132. *See supra* note 6 (explaining the concept of constructive notice).

133. *See* Burling, *Background Principles*, *supra* note 6, at 521 (referring to these cases as "[the] most dramatic adoption of the notice rule").

134. *See infra* Part II.D.

135. *See infra* Part II.C.

136. 659 N.Y.S.2d at 145.

137. *Id.* at 146.

138. *Id*.

139. *Id*.

140. *Id*.

141. *Id*. at 147. *See supra* notes 69-75 (describing *Loretto*'s categorical rule that a permanent physical occupation constitutes a taking).

142. *Id*.

143. 657 N.Y.S.2d at 559.

144. *Id*. at 556.

145. *Id*. at 557.

must fail because he never owned an absolute right to build on his land without a variance."[146]

In *Anello*,[147] the plaintiff sought a variance from the village of Dobbs Ferry's steep slope ordinance, which required "a percentage reduction of the property's gross area depending upon the degree of the property's slope, which yields that buildable area."[148] The ordinance, which was enacted two years before Anello took title to the property, reduced the buildable area to a size substantially less than the zoning code's minimum area required to build a single-family home on the property.[149] Hence, Anello argued that the ordinance amounted to a taking of her property.[150] In upholding the New York Supreme Court's denial of a variance, the New York Court of Appeals concluded that "because petitioner acquired her property after the enactment of the steep-slope ordinance, its enforcement does not deprive her of any property interest."[151]

Finally, in *Basile*,[152] claimant acquired 12 acres of property which was zoned for residential development but was subject to further regulation because over 95% of the parcel was inventoried as tidal wetlands under the Tidal Wetlands Act.[153] In a subsequent condemnation proceeding,[154] the town of Southampton offered Basile $117,500 in just compensation, reflecting the property value as restricted under the wetlands regulation.[155] However, Basile demanded $960,000 in just compensation, which reflected the property value without the wetlands regulations.[156] In ruling for the town, the New York Court of Appeals held that "[s]ince claimant took title to her property subject to wetlands regulations . . . she cannot claim the value of the property without such restrictions."[157]

B. The Bundle of Rights Concept and Lucas*' Background Principles*

In each of these cases, the New York Court of Appeals adopted a rights-based approach to the postenactment purchaser problem.[158] Accordingly, in determining whether the claimant had a cognizable takings claim, the New York Court of Appeals focused on the bundle of rights that the postenactment purchaser acquired when he or she purchased the property in question.[159] Asking what bundle of rights a claimant acquired is sometimes expressed as the "denominator" of rights the claimant possesses, some of which have purportedly been taken.[160] However, in the

146. *Id*. at 560.

147. 656 N.Y.S.2d at 185.

148. *Id*.

149. *Id*.

150. *Id*. at 185.

151. *Id*. at 184.

152. 655 N.Y.S.2d at 877.

153. *Id*. at 878.

154. *Basile*, as opposed to *Anello*, *Gazza*, and *Kim*, involved a direct condemnation proceeding. Nevertheless, the Court in *Basile* reached the same conclusion as in the three inverse condemnation cases. For an explanation of the procedural difference between an inverse and a direct condemnation suit, see *supra* notes 5, 68.

155. *Basile*, 655 N.Y.S.2d at 878.

156. *Id*.

157. *Id*. at 879 The *Basile* holding also rested on the fact that the claimant purchased the property subject to certain covenants which stated that "no building or structure shall be erected on the parcel unless and until said parcel is approved as a building lot by the Planning Board of the Town of Southampton." *Id*. at 878.

158. *See* Gazza v. New York State Dep't of Envtl. Conservation, 657 N.Y.S.2d 555, 559, 28 ELR 20053 (N.Y. 1997) ("the purchase of a 'bundle of rights' necessarily includes the acquisition of a bundle of limitations"). This rights-based approach is in stark contrast to the reasoning of the Court in Palazzolo v. Rhode Island, which explains the Court's euphemism in *Palazzolo* that "[t]he [s]tate may not put so potent a Hobbesian stick into the Lockean bundle," Palazzolo v. Rhode Island, 533 U.S. 606, 626, 32 ELR 20516 (2001), when analyzing the reasoning behind the postenactment purchaser bar. *See infra* Part III.B.

159. *See* Kim v. City of New York, 659 N.Y.S.2d 145, 147 (N.Y. 1997) ("[T]he threshold step in a takings inquiry is to determine whether, in light of the existing rules or understandings of [s]tate law, plaintiffs ever possessed the property interest they now claim has been taken by the challenged governmental action.") (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030, 22 ELR 21104 (1992)) (internal quotations omitted).

160. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 17 ELR 20440 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'") (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1192 (1967)); *see also* Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 Dick. L. Rev. 571, 616 (2003):

> The difficulty in defining the relevant parcel of property, known as the "denominator problem," is inherent in the divisibility of property. When calculating the economic impact of a regulation, courts must compare the loss of value to the affected property against the original value of that property—the "denominator" constitutes the original value of the property at issue. By engaging in "conceptual severance"—considering only part of the bundle of rights owned—a court can interpret the regulation of property to that property was taken. By engaging in "conceptual agglomeration," a court can also achieve the opposite result, adding unaffected property to the denominator that is not properly considered by the court.

The denominator problem most commonly arises when a claimant seeks to conceptually sever a portion of his property for takings claims purposes in an attempt to show that a portion of the property has to be subject to a taking, where the property as a whole has not. This is known as vertical or horizontal separability and was succinctly explained in Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1180, 24 ELR 21072 (Fed. Cir. 1994) as follows:

> If the tract of land that is the measure of the economic value after the regulatory imposition is defined as only that land for which the use permit is denied, that provides the easiest case for those arguing that a categorical taking occurred. On the other hand, if the tract of land is defined as some larger piece, one with substantial residuary value independent of the wetlands regulation, then either a partial or no taking occurred, ... This is the denominator problem.

See also DeBenedictis, 480 U.S. 470 (discussing vertical separability); East Cape May Assocs. v. New Jersey Dep't of Envtl. Protection, 693 A.2d 114, 124 (N.J. 1997) (outlining the "denominator" problem in the context of horizontal separability). *See generally* Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch*, 44 Admin. L. Rev. 403, 423-24 (1992) (discussing some of the policy considerations in determining the relevant denominator); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 725 (1996) (examining the problem of defining the set of rights against which a various takings claims are analyzed and concluding that "courts must remain flexible in making their denominator determinations when the factual nuances of a case indicate the need for a multifactored approach"); *cf.* K & K Constr., Inc. v. Department of Natural Resources, 575 N.W.2d 531, 536, 28 ELR 21156 (Mich. 1998) ("Determining the size of the denominator parcel is inherently a factual inquiry.").

postenactment purchaser problem, the denominator problem is one of chronology.[161]

With this approach in mind, the New York Court of Appeals reasoned that because the regulation was in effect at the time the claimants purchased the property, the property owner never acquired the right to develop the parcel beyond the limitations of the zoning regulation and would not be heard to complain that his right was taken.[162]

In adopting this approach, the New York Court of Appeals heavily relied on the Court's bundle of rights language in *Lucas*.[163] In explaining the logically antecedent inquiry exception to the otherwise per se rule that a depravation of all economically beneficial use constitutes a taking,[164] the *Lucas* Court noted that, "this accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the [s]tate's power over, the '*bundle of rights*' that they acquire when they obtain title to the property."[165]

For example, when the plaintiff in *Kim*[166] claimed that the city's regrading project, which placed side fill on 2,390 square feet of their property, constituted a permanent physical occupation, and therefore a categorical taking under *Loretto*,[167] the New York Court of Appeals first sought to "determine whether the allegedly taken property interest was a stick in the '*bundle of property rights*' acquired by the owner."[168] The New York Court of Appeals stated that "regardless of whether this case is characterized as a physical or regulatory taking . . . our analysis starts with a search into the *bundle of rights* and concomitant obligations contained in plaintiffs' title."[169] Thus, because the legal regrading of the public road adjoining Kim's property and the obligation to provide lateral support predated Kim's acquisition of the parcel, Judge Ciparick concluded that "the [c]ity did not take any property interest from plaintiffs for which compensation is due."[170]

In *Gazza*,[171] the claimant argued that the denial of a building variance from a tidal wetlands regulation, which prohibited the building of a residence on the property, constituted an unconstitutional taking without just compensation despite the fact that it was "fully enacted and in force when he purchased the property."[172] The New York Court of Appeals, this time speaking through Judge Robert S. Smith, again focused on *Lucas*' "logically antecedent inquiry" into the nature of the owner's estate[173] in concluding that, "the purchase of a 'bundle of rights' necessarily includes the acquisition of a bundle of limitations."[174] Applying this seemingly straightforward reasoning to the facts of *Gazza*, the New York Court of Appeals decided that the prohibited land use was not "part of his title to begin with,"[175] and the state may therefore resist compensation because the tidal wetlands regulation was in effect at the time the claimant purchased the property.

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161. To illustrate, suppose X represents the property rights claimant originally acquired and Y represents the rights he possesses in light of the governmental regulation, then the formula Y/X represents the proportion of claimant's original property rights that remain after the taking. However, if X = Y, that is, claimant's set of right in light of the regulation are the same as those he originally acquired, then claimant still possesses the set of rights he originally acquired and no taking has occurred.

162. *See Gazza*, 657 N.Y.S.2d at 558 ("Petitioner cannot base a taking[s] claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those [s]tate laws enacted and in effect at the time he took title . . . ."); *Kim*, 659 N.Y.S.2d at 146 ("In [enforcing a city land use provision], the [c]ity acted pursuant to a long-standing common-law principle and in conformity with a provision of its [c]harter that was in force when plaintiffs acquired title to their property. Therefore, we conclude that the [c]ity did not take any property interest from plaintiffs for which compensation is due."); *Basile*, 655 N.Y.S.2d at 879 ("Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations."). *See also* Anello v. Zoning of Appeals of the Village of Dobbs Ferry, 656 N.Y.S.2d 184, 185 (N.Y. 1997):

> [B]ecause petitioner acquired her property after the enactment of the steep slope ordinance, its enforcement does not deprive her of any property interest. . . . This statutory restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her.

163. *Lucas*, 505 U.S. at 1027.

164. *See supra* notes 102-04 and accompanying text (discussing *Lucas*' total takings inquiry).

165. *Lucas*, 505 U.S. at 1027 (emphasis added). *See supra* notes 108-19 (discussing *Lucas*' background principles exception). Other courts have also adopted the notice rule based on the background principles reasoning of *Lucas*. *See* Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (holding that where claimant bought the parcel with knowledge that the proposed billboards were nonconforming uses "the [c]ity need not compensate Outdoor, under a per se takings theory, since the right to erect a billboard did not inure in Outdoor's title"); City of Va. Beach v. Bell, 498 S.E.2d 414 (Va. 1998); Grant v. South Carolina Coastal Council, 461 S.E.2d 348, 354 (S.C. 1995) ("Grant has *never* had the right to fill critical area tidelands on his Folly Beach property. In 1987, when Grant purchased the Folly Beach property, South Carolina law forbade his filling critical areas without a permit from the Coastal Council.") (citing *Lucas*, 505 U.S. at 1027); Huntzinger v. State, 519 N.W.2d 367, 371 (Iowa 1994) (noting that "the 'bundle of rights' the plaintiffs acquired by their fee simple title did not include the right to use the land contrary to the provisions of those three Iowa Code sections" because the sections predated plaintiff's acquisition of title; concluding that, under *Lucas*, "[t]his limitation or restriction on the use of the land inhered in the plaintiffs' title"); M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995); Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 716 (R.I. 2000), *aff'd in part and rev'd in part*, 533 U.S. 606 (2001) ("[W]hen Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired."). *See also* Armentano, *supra* note 27 ("[The Court of Appeals] stated that Ms. Anello's takings claim had to fail because she had acquired her property after the enactment of the ordinance and its enforcement therefore did not deprive her of any property interest that she had acquired.").

166. 659 N.Y.S.2d at 145.

167. *See id*. at 147. *See supra* notes 68-75 (discussing the *Loretto*'s rule that a permanent physical occupation amounts to a categorical per se taking).

168. *Id.* at 147 (emphasis added).

169. *Id*. at 147-48 (emphasis added). As Professor Eagle points out, *Kim* was the only one of the four New York Court of Appeals' cases that involved a permanent physical occupation under *Loretto* rather than a regulatory takings under *Lucas* or *Penn Central*, yet the court fails to fully explain its application of *Lucas*' background principles test to such a claim. *See* Eagle, *Regulatory Takings Quartet*, *supra* note 23 at 394 ("The court of appeals' failure to tie down this loose end is troublesome, especially given the serious nature of physical invasions.").

170. *Id*. at 146. *See id*. at 147 ("We conclude that, by virtue of the common-law and [c]ity [c]harter obligation of lateral support to a public roadway, plaintiff's title never encompassed the property interest they claim has been taken.").

171. 657 N.Y.S.2d at 555.

172. *Id*. at 556.

173. *Id*. at 559 (quoting *Lucas*, 505 U.S. at 1027). *See supra* notes 108-19 and accompanying text (discussing *Lucas*' background principles exception).

174. *Gazza*, 657 N.Y.S.2d at 559.

175. *Id*. (quoting *Lucas*, 505 U.S. at 1027).

Finally, in *Anello*,[176] the New York Court of Appeals again affirmed this bundle of rights approach. Although it did not quote *Lucas*' logically antecedent inquiry analysis directly, the court stated that the "enforcement of a preexisting statutory [land use restriction is] not a taking of a property interest."[177] In doing so, Judge Ciparick adopted the reasoning that a purchaser's bundle of rights in a piece of property, and therefore her right to bring a takings claim, is necessarily defined by the developmental restrictions that exist at the time of her purchase.[178] Thus, as in *Kim* and *Gazza*, the New York Court of Appeals decided that Anello's takings claim must fail because she purchased the property after the enactment of the steep slope ordinance, which effectively prohibited her from building a single-family home on the land.[179]

The New York Court of Appeals then took it upon itself to explain precisely what preexisting property laws affect an owner's bundle of rights such that they inhere in the claimant's title, and thereby prevent a postenactment purchaser from sustaining a takings claim. At the outset, the court recognized that "property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[180] The next question, then, is exactly which "existing rules or understandings of [s]tate law" act to limit a property owner's bundle of rights, such that these limitations inhere in the title itself, and cannot thereafter be the subject of a takings claim?

The New York Court of Appeals recognized that certain language in *Lucas* would seem to indicate that "the 'logically antecedent inquiry,' . . . should be limited to a review of those property and nuisance rules recognized at common law, and that statutory law should not factor into the analysis."[181] Indeed, the Court in *Lucas* reasoned that the government may resist compensation based on a regulation that prohibits all economically beneficial use of the land, only if the limitation "inhere[s] in the title itself, in the restrictions that *background principles of [s]tate's law of property and nuisance* already place upon land ownership."[182] The Court went on to say that

> [a] law or decree with such an effect [as to inhere in the claimant's title] must, in other words, do no more than duplicate the *result that could have been achieved in the courts*—by adjacent landowners (or other uniquely affected persons) under the *[s]tate's law of private nuisance*, or by the [s]tate under its complementary *power to abate nuisance* that affect the public generally.[183]

Taken on its face, this language would indeed seem to indicate that the *Lucas* Court intended background restrictions of state law to include only common-law property and nuisance rules,[184] and not the statutory provisions at issue in the takings quartet.[185]

However, the New York Court of Appeals believed that this set of limitations should not be restricted to common-law nuisance doctrines.[186] Instead, it stated:

> The *corpus juris* of this [s]tate comprises constitutional law, statutory law[,] and common law. To the extent that each of these sources establishes binding rules of property law, each plays a role in defining the rights and restrictions contained in a property owner's title. Therefore, in identifying the background rules of [s]tate property law that inhere in an owner's title, a court should look to the law in force, *whatever its source*, when the owner acquired the property.[187]

In other words, the New York Court of Appeals decided that background principles of state law include *all* preexisting state laws, both statutory and judge-made common law. Indeed, Justice Anthony M. Kennedy's concurring opinion in *Lucas* would seem to support this conclusion.[188] Thus, according to the New York court, both of these forms of law may constitute background principles of state law that inhere in the claimant's title at the time of purchase, and may not thereafter be the subject of a takings claim.[189]

To support this conclusion, Judge Ciparick opined that "it would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to iden-

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176. 656 N.Y.S.2d at 185.

177. *Id.* at 185.

178. *See id.* ("Petitioner purchased the property . . . *after* the steep-slope ordinance was enacted. The statutory restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her.") (emphasis in original).

Professor Eagle points out the irony in the New York Court of Appeals' premise that a postenactment purchaser might not acquire the right to bring a takings claim from his seller by noting:

> Even as *Kim v. City of New York* was being decided . . . the state law for over a century had been that "a devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom . . . ."

Eagle, *Regulatory Takings Notice Rule*, *supra* note 6, at 553.

179. *Id.*

180. *Kim*, 659 N.Y.S.2d at 147 (quoting *Lucas*, 505 U.S. at 1030).

181. *Id.* at 148, 152 ("To guard against this possibility [that the government might offer up novel interpretations of state law to avoid a cognizable takings claim, the Court] explained that only those rules derived from an '*objectively reasonable application*' of preexisting [s]tate law can be said to inhere in a property owner's title.") (citing *Lucas*, 505 U.S. at 1032 n.18) (emphasis added).

182. *Lucas*, 505 U.S. at 1029 (emphasis added).

183. *Id.* (emphasis added).

184. *See Kim*, 659 N.Y.S.2d at 148. ("It has been suggested that this 'logically antecedent inquiry' into the owner's title should be limited to a review of those property and nuisance rules recognized at common law, and that statutory law should not factor into the analysis."). *See also* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle, in* Takings: Land-Development Conditions and Regulatory Takings After *Dolan* and *Lucas* 110-12 (David Callies, ed. 1996), *cited by* the New York Court of Appeals in *Kim*, 659 N.Y.S.2d at 148.

185. *See supra* Part II.B.

186. *Kim*, 659 N.Y.S.2d at 148 ("However, we do not think that aspect of the *Lucas* opinion should be read so narrowly.").

187. *Id.* at 148-49 (emphasis added). *Cf.* Gazza v. New York State Dep't of Envtl. Conservation, 657 N.Y.S.2d 555, 561, 28 ELR 20053 (N.Y. 1997) ("Thus, common-law principles and [s]tate statutes may be examined to determine the limits and right of a landowner's title.").

188. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring):

> I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property [for example] may present such unique concerns . . . that the [s]tate can go further in regulating its development and use than the common law of nuisance might otherwise permit.

189. Based on this supposition, Judge Ciparick denied Kim's takings claim, "by virtue of the [preexisting] *common-law and [c]ity [c]harter obligation* of lateral support to a public roadway," and concluded that, "plaintiff's title never encompassed the property interest they claim has been taken." *Kim*, 659 N.Y.S.2d at 147 (emphasis added).

tify the preexisting rules of [s]tate property law, while ignoring statutory law in force when the owner acquired title."[190] Accordingly, the New York Court of Appeals favored statutory law over common law,[191] which is a widely accepted canon of judicial decisionmaking.[192]

Judge Smith's dissent in *Kim* called upon the majority to defend its inclusion of statutory law in the set of background principles of state law. After arguing that neither New York common law nor the New York City Charter §2904 placed an obligation of lateral support on owners of land adjacent to a public road as the majority has decided,[193] the dissent warned that "allowing the [c]ity to justify the permanent physical occupation of part of plaintiff's property on the basis of a spontaneous construction of the common law and a [c]ity [c]harter provision would be allowing the [c]ity, by ipse dixit to transform private property into public property without compensation."[194] In other words, the dissent in *Kim* was concerned that a legislature or, in this case, a court, could craft new land use rules that were not clearly established at the time the claimant took title to the property in order to destroy that claimant's takings claim by asserting that the regulations were among the background principles of state's law of property and nuisance, and therefore inhered in the claimant's title.[195]

To rebut this argument, Judge Ciparick attempted to reassure the dissent that to guard against the possibility of the government "proffer[ing] novel interpretations of [s]tate law to justify what would otherwise amount to an unconstitutional taking[,]"[196] only those rules derived from an "*objectively reasonable application*" of preexisting state law can be said to inhere in a property owner's title."[197] In other words, *Lucas*' requirement that a governmental action that burdens claimant's land be pursuant to an "objectively reasonable application" of some preexisting state law, ensures that postenactment purchasers are truly on notice that the application of a preexisting law will deprive them of a certain land use right in the land.

C. Reasonable Investment-Backed Expectations and the Logical Circularity Problem

As a corollary to *Lucas*' bundle of rights approach, the New York Court of Appeals provided an alternate rationale for denying postenactment purchasers the right to bring a regulatory takings claim. In doing so, the New York Court of Appeals addressed an analytic problem that would arise if "property owners were permitted to assert compensatory takings claims based on enforcement of preexisting regulations."[198] To help explain this problem, recall that under the *Penn Central* "ad hoc factual inquiry" branch of regulatory takings analysis, one of the factors to be considered is whether "the regulation has interfered with distinct investment-backed expectations."[199] Thus, if a postenactment purchaser were allowed to bring a *Penn Central* takings claim, the success of that claim would rest in part on whether the claimant's reasonable investment-backed expectations were defeated by the government land use regulation.

The problem that the New York Court of Appeals identified is that in the case of a postenactment purchaser, the claimant's investment-backed expectations in purchasing the property would largely be shaped by his perceived chances of mounting a successful takings claim and thereby winning just compensation. However, under *Penn Central* analysis, the success of that takings claim would rest on his investment-backed expectations and result in the logical circularity problem.

To illustrate, assume a postenactment purchaser was allowed to bring a regulatory takings claim. The success of that claim would depend on whether the land use regulation interfered with his investment-backed expectations which would depend on the success of the claim and on whether the regulation interfered with his investment-backed expectations . . . *ad infinitum*.[200] Thus, the New York Court

190. *Id*. at 148. As it turns out, however, the Court would later make the contrary decision in *Palazzolo*, which, in large part, accounts for the two courts' divergent outcomes with respect to the postenactment purchaser problem. *See supra* Part II.B.

191. *Kim*, 659 N.Y.S.2d at 148 ("To accept th[e] provision [that only common-law principles comprise the background principles of state law that inhere in a title itself] would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law.").

192. *See* Benjamin N. Cardozo, The Nature of the Judicial Process 14 (Yale Univ. Press 1991) ("Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther."). Indeed, the contrary interpretation of *Lucas*, that background principles are composed only of common-law doctrine, as opposed to legislative acts has been criticized as follows:

> [*Lucas*] effectively froze the common law with respect to land use regulation and placed severe restraints on the ability of legislatures to react to changes in scientific understanding and attitudes toward protecting the environment. In doing so, the Court strayed from the general understanding that the evolution of the common law and society are inextricably intertwined and that this evolution, with respect to the common law, is meant to continue until the legislature puts an end to the process by statute.

Martin M. Randall, *Coastal Development Run Amuck: A Policy of Retreat May Be the Only Hope*, 18 J. Envtl. L. & Litig. 145, 173-74 (2003).

193. *See Kim*, 659 N.Y.S.2d at 154-59 (Smith, J., dissenting). The New York Court of Appeals' in-depth interpretation of the New York common law and the New York City Charter obligation of lateral support does not directly speak to the postenactment purchaser problem, and is therefore beyond the scope of this note.

194. *Id.* at 159 (Smith, J., dissenting) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031, 22 ELR 21104 (1992)) (internal quotations and alterations omitted).

195. Professor Eagle echoes this concern in arguing that the background principles test "is designed to require sufficient continuity with the law as it has evolved." Eagle, *Regulatory Takings Quartet*, *supra* note 23, at 388. Unfortunately, he follows up this point with a fuzzy proposition that, "[the background principles test] does imply that legislative change, except in true emergencies, must have the *common-law flavor* of incremental development with no sudden shunting aside of established precedents and rights." *Id*. (emphasis added).

196. *Kim*, 659 N.Y.S.2d at 152 (quoting *Lucas*, 505 U.S. at 1032) (emphasis in original) (internal quotations omitted).

197. *Id.* (emphasis added).

198. Anello v. Zoning of Appeals of the Village of Dobbs Ferry, 656 N.Y.S.2d 184, 185 (N.Y. 1997).

199. *Penn Central*, 438 U.S. at 124.

200. *See Anello*, 656 N.Y.S.2d at 185 ("the success of her compensatory takings lawsuit would depend largely on the extent to which the ordinance interferes with her investment-backed expectations, which would in turn depend on the possible success of the compensatory takings claim, and so on").

Ironically, though, the New York Court of Appeals' majority in *Gazza* was guilty of the very logical circularity that it sought to avoid of Appeals concluded that "[t]his inevitable circularity points up the analytical flaw in permitting a subsequent purchaser to assert a compensatory takings claim based on a property interest that has already been defined out of the owner's title."[201]

The dissent in *Anello* attempted to address this concern by once again conjuring up language from *Lucas*. In his concurring opinion in *Lucas*, Justice Kennedy seemingly recognized the circularity problem in allowing a postenactment purchaser to bring a *Penn Central* takings claim.[202] He noted that "[t]here is an inherent tendency towards circularity in this synthesis, . . . for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."[203] Judge Richard C. Wesley of the New York Court of Appeals, in his dissenting opinion in *Anello*, picked up Justice Kennedy's language and assured that "the definition is not entirely circular as long as the expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved."[204] Applying these supposedly "objective rules and customs" to the facts of *Gazza*, Judge Wesley opined that "the takings issue was not determined by Mr. Gazza's expectation that the property would be worth $396,000 as a single-family residential lot. That expectation was not reasonable because . . . the property had value as a result of other uses permitted under the [land use regulations]."[205]

However, Judge Ciparick correctly noted that Justice Kennedy "was discussing the impact of *newly enacted* regulations on a property owner's investment-backed expectations, and not the separate issue of *preexisting* restrictions inhering in title."[206] It seems then, that neither Justice Kennedy's concurrence in *Lucas*, nor Judge Wesley's dissent in *Anello* recognized the possibility that Gazza purchased the property from the previous owner with the expectation of bringing a regulatory takings claim and ultimately winning the full value of the property as just compensation. As a result, Judge Wesley's dissent failed to adequately explain why the court should not allow Gazza's expectation of receiving just compensation to determine the takings issue.[207]

In conclusion, the New York Court of Appeals recognized a serious analytic flaw in allowing a postenactment purchaser to bring a *Penn Central* takings claim that a land use regulation defeated her reasonable investment-backed expectations. This is because a postenactment purchaser's expectations at the time of purchase might very well include the prospect of bringing a successful takings claim and winning just compensation. The fact that the dissent in *Anello* failed to adequately address this problem would seem to bolster the argument in favor of a postenactment purchaser bar.

D. Other Concerns: Promoting Economic Efficiency, Avoiding Windfalls, and Bright-Line Rules

In addition to the somewhat abstract rights-based approach and the reasonable investment-backed expectations argument set out above, the New York Court of Appeals found several economic arguments to further support its postenactment purchaser bar. In *Anello*, and *Gazza*, the dissent and concurring opinions raised the economic concern that barring a postenactment purchaser from bringing a takings claim would "threaten the free transferability of real estate."[208] This is because, under the majority's regime, a

in *Anello*. In *Gazza*, after surveying the prevailing regulatory takings law jurisprudence, the New York Court of Appeals made the alternate holding that even if the claimant were allowed to bring a takings claim, this claim would fail. The wetlands regulation did not amount to a per se taking under *Lucas*, nor an economic taking under *Penn Central* because,

> the economic value of the property had not been extinguished since it could still be used for recreational purposes and that petitioner's reasonable expectations were reflected by his consideration of the inherent limitations on the property when he made the purchase offer for thousands less than its worth without the restrictions.

Gazza v. New York State Dep't of Envtl. Conservation, 657 N.Y.S.2d 555, 563, 28 ELR 20053 (N.Y. 1997).

201. *Anello*, 656 N.Y.S.2d at 186.
Interestingly, regulatory takings jurisprudence is not the only instance where courts have faced the problem of the logical circularity of allowing reasonable expectations to effect the outcome of a case. For example, under the Fourth Amendment's protection against unreasonable searches and seizures, see U.S. CONST. amend. IV, courts have faced the problem of defining reasonable expectation of privacy which impact the analysis of whether a search is deemed reasonable or unreasonable. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring) (setting out a "reasonable expectation of privacy" standard); Richard S. Julie, *High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age*, 37 AM. CRIM. L. REV. 127 (2000). To be sure, the postenactment purchaser problem presents a circularity problem of greater degree than that of the reasonable expectation of privacy problem because the former not only involves expectations impacting the outcome of a case but also a temporal circularity problem of defining what those expectations are to begin with.

202. To be sure, it seems that Justice Kennedy would apply the claimant's investment-backed expectations even to *Lucas* takings claims where the property owner asserts that the regulation deprived his property of all value. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034, 22 ELR 21104 (1992) (Kennedy, J., concurring) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."); Zach Whitney, *Regulatory Takings: Distinguishing Between the Privilege of Use and Duty*, 86 MARQ. L. REV. 617, 632 (2002) ("Justice Kennedy's concurrence in *Lucas* supports the two-prong test by indicating that investment-backed expectations must be considered when determining whether or not a regulation has stripped property of its value."). However, as the majority opinion in *Lucas* made clear, the "total takings" inquiry, i.e., depravation of all economically beneficial use, is a categorical rule, distinguishable from *Penn Central*'s ad hoc factual inquiries. *See Lucas*, 505 U.S. at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."). *See infra* note 306 (citing commentators who argue that courts must disentangle *Penn Central* and *Lucas*-type takings inquiries). Thus, for the purposes of this Article, it is sufficient to analyze investment-backed expectations as a component of only the *Penn Central* "ad hoc factual takings" inquiry and not of the *Lucas* "total takings" inquiry.

203. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

204. *Anello*, 656 N.Y.S.2d at 187.

205. *Id.*

206. *Id.* at 186 n.1.

207. One possible explanation why Judge Wesley failed to consider the postenactment purchaser's expectation of winning just compensation as a reasonable investment-backed expectation under *Penn Central* analysis is that he believes that the purchaser's title was encumbered by the land use regulation from the outset, and thus never owned the right to develop beyond these regulations. However, this explanation mirrors the reasoning of the majority in establishing the postenactment purchaser bar and would defeat Judge Wesley's contention that "[t]he fact that a parcel is transferred should not make a once-compensable taking become noncompensable." *Id.* at 186.

208. *Anello*, 656 N.Y.S.2d at 187 (Wesley, J., dissenting). *See also Gazza*, 657 N.Y.S.2d at 563 (Wesley, J., concurring) ("There is no need to create a rule of law that restricts the alienability of property in New

preenactment owner would be forced to bring any potential takings claim, even ones of "doubtful validity"[209] before selling the land. Otherwise, any takings claim would disappear entirely, along with any hopes of just compensation, and the preenactment owner would be forced to sell at a reduced price reflecting the land use regulation.[210]

Judge Ciparick, again writing for the New York Court of Appeals majority, recognized that a land use regulation would affect the value of the property. However, he answered the dissents' criticism by reasoning that the decrease in market value of the preenactment owner's property would actually provide a beneficial "incentive to the prior owner . . . to assert whatever compensatory takings claim it might have."[211] Accordingly, if the preenactment owner fails to bring a takings claim, it would be his own loss because the purchase price would presumably reflect "any restrictions inhering in title" caused by the regulation.[212] Thus, the New York Court of Appeals feared that granting a postenactment purchaser just compensation, after purchasing the property at a price discounted by the impact of the land use regulation, "would amount to a windfall"[213] for the postenactment purchaser at the expense of the public in the form of unjust compensation.[214]

This rationale is perhaps easiest to justify on the facts of *Gazza*. In this case, the postenactment purchaser bought the property in question for only $100,000[215] which more closely approximates the estimated $80,000 value of the land subject to the building restrictions of the Tidal Wetlands Act[216] than the estimated $396,000 value of the land, had the variances been granted.[217] Thus, as the New York Supreme Court found, "the purchase price reflected the fact that the variance would be required to build a residence on the property due to its incorporating tidal wetlands."[218] As a result, allowing the postenactment purchaser to bring a compensatory takings claim for the depravation of a right he never paid for would grant him a windfall.[219]

Additionally, the New York Court of Appeals worried that allowing a postenactment purchaser to bring a compensatory takings claim would "have the effect of unsettling property law and other land use restrictions throughout the [s]tate."[220] Presumably, this is because allowing postenactment purchasers to bring takings claims would potentially open every land use regulation to judicial scrutiny, even where land has changed hands several times. On the other hand, adopting the postenactment purchaser bar would un-

York in this manner . . . ."). *Cf.* Lopes v. City of Peabody, 629 N.E.2d 1312, 1315 (Mass. 1994) ("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."); Rocheleau v. Town of Greene, 708 A.2d 660, 662 n.1. (Me. 1998) ("The [notice] rule contravenes the historical policy of protecting the alienability of real property.") (alteration omitted) (citing Strout v. Gammon, 629 A.2d 43, 46 (Me. 1993)); Myron v. City of Plymouth, 562 N.W.2d 21, 23 (Minn. Ct. App. 1997), *aff'd*, 581 N.W.2d 815 (Minn. 1998) ("[A] blanket bar to granting variances [to purchasers on notice of existing zoning ordinances] . . . is [ ] inconsistent with the general property-law goal to preserve alienability."). *See also* Stewart E. Sterk, *How Not to Limit Takings Litigation*, 11 N.Y. Real Est. L. Rep. 8 (1997). Prof. Stewart Sterk takes up Judge Wesley's argument that the postenactment purchaser bar will work a restraint on alienability and concludes that "restraints on alienation should be imposed with great caution. One can only hope that the [New York Court of Appeals] marks a quick retreat from its ill-considered opinions." *Id*. at *3. *See generally* Posner, *supra* note 47, at 86 ("In order to facilitate the transfer of resources from less to more valuable uses, the law should, in principle, make property rights freely transferable.").

209. *Anello*, 656 N.Y.S.2d at 187.

210. *See Gazza*, 657 N.Y.S.2d at 563 (Wesley, J., concurring) ("By conveying the property to another party who may be willing and able to develop it or seek compensation for the taking of its value, the prior owner has instead, under the majority's holding, ensured the destruction of the property's economic value."); Sterk, *supra* note 208, at *2 ("The [c]ourt of [a]ppeals' holding . . . makes the sale option unavailable to landowner, whose only choice is to challenge the ordinance herself, or to take the loss created by the regulation."). This was the principle reason for the Court's rejection of the postenactment purchaser bar in *Palazzolo*. *See infra* Part III.C.1.

211. *Anello*, 656 N.Y.S.2d at 185. To be sure, property law often adopts rules that encourage individuals to assert their rights early on. For example, one purpose of the doctrine of adverse possession is to encourage the true owner of property to assert his property rights by excluding the potential adverse possessor before the statutory period expires. *See* Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135, 135 (1918) ("[T]he great purpose is automatically to quiet all titles which are *openly and consistently asserted*, to provide proof of meritorious titles, and correct errors in conveyancing [sic].") (emphasis added).

Presumably, in this situation, the earlier a landowner brings a takings claim, the less the government will have to compensate the owner if he is successful. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320, 17 ELR 20787 (1987) (Where a taking is found, "the valuation of property which has been taken must be calculated as of the time of the taking" irrespective of whether the regulation is later invalidated.). Hence, encouraging a landowner to bring a takings claim as soon as possible will allow the government to minimize the total amount of compensation it must pay.

212. *Anello*, 656 N.Y.S.2d at 185. Implicit in this reasoning is the assumption that the preenactment owner is not passing the right to challenge the regulation as an unconstitutional taking to the postenactment purchaser. Otherwise, the price would reflect the market value of the land subject to "any restrictions inhering in the title" in addition to the market value of the land without the regulation (just compensation) discounted by the chance that a takings claim would succeed. *See infra* note 297 (setting out a formula to illustrate the purchase price of a regulated parcel).

213. *Id*.

214. Meaning that the postenactment purchaser would be doubly compensated, not that the compensation would in fact be below market value. *See* Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1363, 30 ELR 20481 (Fed. Cir. 2000) ("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]o assess the government for such a loss is to give the purchaser a windfall to which she is not entitled."). The Supreme Court of Rhode Island put forth the same argument against allowing postenactment purchasers to bring regulatory takings claims. *See* Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 30 ELR 20420 (R.I. 2000) ("Palazzolo's argument that the time of acquisition is irrelevant could lead to pernicious 'takings claims' based on speculative purchases in which an individual intentionally purchases land, the use of which is severely limited by environmental restrictions, and then seeks compensation from the state for that 'taking.'").

215. *Gazza*, 657 N.Y.S.2d 555.

216. *Id*. at 557.

217. *Id*. at 556.

218. *Id*.

219. To illustrate, the claimant purchased the property with the expectation (as reflected in the purchaser price) that he would not be able to substantially develop the property, but now claims that he should be entitled to so. If his takings claim was allowed to go forward, he would receive much more than he bargained for—at the expense of the public's tax dollars. In other words, the postenactment purchaser is claiming that his right to develop the property has been taken, despite the fact that he never purchased this right. "He thus knew that he was purchasing property with limitations on its use. It followed that he took title to the property with restrictions and no compensation was warranted." *Id*. at 558.

220. Anello v. Zoning of Appeals of the Village of Dobbs Ferry, 656 N.Y.S.2d 184, 185 (N.Y. 1997).

equivocally tell purchasers what their rights are with respect to the regulated property. Accordingly, the court recognized that the postenactment purchaser bar would provide a "bright-line rule, . . . which allows for a subsequent purchaser to challenge the validity of previously enacted laws (as opposed to pursuing a compensatory takings claim), [and would] enhance certainty and, to that extent, facilitate transferability of title."[221]

Interestingly then, those in favor of the postenactment purchaser bar and those opposed to it believe that adopting their respective rules will lead to the free transferability and alienability of land. The majority believes so because *adopting* the postenactment purchaser bar will foreclose many land use regulations from regulatory takings scrutiny. The dissenting opinions believe so because *rejecting* the postenactment purchaser bar would allow preenactment owners to sell their land before bringing a takings claim without fear that their sale price would be diminished by the land use regulation without the prospect of winning just compensation.

III. *Palazzolo* Rejects a Blanket Notice Rule

If there was any question whether the Court would allow a takings claim to be defeated simply because the claimant took title to the property after the enactment of the land use regulation, the Court answered those doubts in *Palazzolo*[222] with a resounding "no." However, it also left unanswered significant questions which leaves the logical circularity problem unsolved.

A. The Facts and Procedural History of Palazzolo

In *Palazzolo*, Anthony Palazzolo and his associates formed Shore Gardens, Inc. (SGI) to purchase several undeveloped, adjoining parcels of wetlands in Westerly, Rhode Island.[223] After several proposals to develop the land were denied by the Rhode Island Division of Harbors and Rivers (DHR), the newly created Rhode Island Coastal Resources Management Council (Council) promulgated land use regulations, which designated the lands owned by SGI as protected coastal wetlands, and greatly limited their development.[224] Several years later, SGI's corporate charter was revoked for failure to pay corporate income taxes, and title to the property passed by operation of law to Palazzolo who by this time had become SGI's sole shareholder.[225] Palazzolo renewed the efforts to develop the property, putting forth several development plans to fill the wetlands and construct 74 lots for single-family homes, all of which were denied.[226] Finally, Palazzolo filed an inverse condemnation action asserting that the state's wetlands regulations, as applied by the Council to his parcel, had taken the property without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution.[227] Specifically, Palazzolo alleged that the Council's action deprived him of all economically beneficial use of his property, resulting in a total taking requiring compensation under *Lucas*.[228]

A bench trail was held in June 1997,[229] and on October 24, 1997, the trial judge issued an opinion concluding that Palazzolo property "had not been taken for public use and that no compensation was required under the Rhode Island or [U.S.] Constitutions."[230] Palazzolo appealed to the Rhode Island Supreme Court, which initially held that Palazzolo's claim was unripe.[231]

The Rhode Island Supreme Court went on to address Palazzolo's claim on its merits. The court first affirmed the trial court's finding that he was not "deprived of all beneficial and reasonable use of his land" under *Lucas*' total-takings inquiry.[232] Significantly, the Rhode Island Supreme Court reached the alternative holding that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property."[233] The court reasoned that Palazzolo's total takings claim failed because he acquired title to the property after the enactment of the wetlands regulations and thus affirmed the trial court's reasoning that "the right to fill the wetlands was not part of Palazzolo's estate to begin with, and [ ] he was therefore not owed any compensation for the deprivation of that right."[234] In doing so, the Rhode Island Supreme Court relied on *Lucas*' logically antecedent inquiry language, just as the New York Court of Appeals had in announcing its postenactment purchaser bar.[235]

Following the usual regulatory takings jurisprudence, the Rhode Island Supreme Court next asked whether a partial regulatory takings had occurred under *Penn Central*.[236] The court held that Palazzolo's postenactment acquisition was

221. *Id.* This assertion seems hard to justify. It may be true that adopting the postenactment purchaser bar would provide certainty in land sale, but only to the extent that the postenactment purchaser would "certainly" know that his takings claim would fail. In fact, under the postenactment purchaser bar, a subsequent purchaser could still challenge the government regulation as an unconstitutional exercise of the state's police power, which would seem to lead to *un*certainty in a heavily regulated area of land. Despite this reasoning, or perhaps because of it, the New York Court of Appeals does not explain why adopting the opposite rule—allowing a postenactment purchaser to bring a regulatory takings claim—would provide any less certainty in the area of land speculation. Moreover, it is hard to see how the above statement holds water when, just two sentences before it, Judge Ciparick recognizes that adopting the dissent's view would "*reward land speculation*," though, "to the detriment of the public fisc." *Id.* (emphasis added).

222. 533 U.S. at 606.

223. *Id*. at 613.

224. *Id*. at 614.

225. *Id*.

226. *Id*.

227. *Id*. 615.

228. *Id*. at 615-16. *See supra* note 5 (describing inverse condemnation suits).

229. Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 711, 30 ELR 20420 (R.I. 2000), *aff'd in part and rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606, 32 ELR 20516 (2001).

230. *Id*.

231. *Id*. at 713-14 (reasoning that Palazzolo failed to file certain development proposals and did not seek permission for less ambitious development plans). *See infra* notes 271-78 (discussing the federal ripeness requirements to regulatory takings claims).

232. *Id*. at 715 (noting that "there was testimony that the wetlands would have value in the amount of $157,500 as an open-space gift").

233. *Id*. at 709.

234. *Id*.

235. *Id. See supra* Part II.B. (discussing the New York Court of Appeals' analysis of *Lucas*' "logically antecedent inquiry"); Armentano, *supra* note 27 ("The [Rhode Island Supreme Court's] underlying rationale was that the buyer purchased the bundle of rights constituting the property without the stick which was removed from the bundle by regulation. Under such circumstances, the court would not allow the buyer to seek compensation for the unincluded stick and thus obtain a windfall.").

236. *See supra* Part I.C.

also fatal to a *Penn Central* takings claim because "[at the time Palazzolo acquired title], there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development[, and, in] light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a 74-lot subdivision."[237] However, in considering Palazzolo's investment-backed expectations, the Rhode Island Supreme Court ignored the possibility that Palazzolo's expectations included winning compensation by bringing a successful takings claim—leading to the same logical circularity problem addressed by the New York Court of Appeals in the takings quartet.[238]

B. The Court's Opinion

Palazzolo's petition to the Court for a writ of certiorari to review the Rhode Island Supreme Court's decision was granted on October 10, 2000,[239] and the Court issued an opinion on June 28, 2001.[240] The Court first held that Palazzolo's claim was ripe for review,[241] and then turned to the regulatory takings claim itself. In answering Palazzolo's claim that government-imposed land use regulations deprived him of all economically beneficial use of his land under *Lucas*' total takings inquiry,[242] the Court, through Justice Kennedy's majority opinion,[243] ultimately affirmed the Rhode Island Supreme Court's holding that Palazzolo had not suffered a total taking.[244]

However, before reaching the merits of Palazzolo's regulatory takings claim, the Court had to address the Rhode Island Supreme Court's conclusion that the claim must fail because he acquired title to the property after the coastal wetlands regulations were enacted.[245] On this point, the Court announced flatly that, "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."[246] Thus, although this may not have been the ideal case to do so,[247] the Court rejected the notice rule, at least with respect to regulatory takings claims.[248]

In doing so, the *Palazzolo* Court drastically limited the effect of the logically antecedent inquiry set out in *Lucas*[249] and "put to rest the notion that title to property is altered when it changes hands."[250] However, it divided over the extent to which reasonable investment-backed expectations play a role in postenactment purchaser's regulatory takings claims.

1. *Palazzolo*'s Effect on *Lucas*' Total Takings Inquiry

Most significant to the New York Court of Appeals' bundle of rights approach,[251] *Palazzolo* drastically limited the effect of *Lucas*' logically antecedent inquiry on the background principles that inhere in the claimant's title.[252] First, the Court identified the New York Court of Appeals' argu-

237. *Palazzolo*, 746 A.2d at 717. This is example of what Prof. Steven Eagle calls the "Expectations Notice Rule." *See* Eagle, *Regulatory Takings Notice Rule*, *supra* note 6, at 565.

238. *See supra* Part II.C. (discussing the logical circularity problem).

239. Palazzolo v. Rhode Island, 531 U.S. 923 (2000).

240. Palazzolo v. Rhode Island, 533 U.S. 606, 32 ELR 20516 (2001).

241. *Id*. at 617-25.

242. *See supra* notes 102-04 and accompanying text.

243. The majority opinion was joined by Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas. Justices O'Connor and Scalia issued concurring opinions which differed drastically on the postenactment purchaser problem. Justices John Paul Stevens, Ruth Bader Ginsburg, David H. Souter, and Stephen Breyer dissented. *Palazzolo*, 533 U.S. 606.

244. *Palazzolo*, 533 U.S. at 632 ("The [Rhode Island Supreme Court] did not err in finding that the petitioner failed to establish a depravation of all economic value for it is undisputed that the parcel retains significant worth for construction of a residence.").

245. Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 715-17, 30 ELR 20420 (R.I. 2000).

246. *Palazzolo*, 533 U.S. at 628.

247. Recall that Palazzolo formed a corporation, SGI Inc., in which he later became the shareholder, to purchase the wetland property in 1959—12 years before the Rhode Island Coastal Resources Management Council promulgated the regulations which limited development on the wetlands. *Id*. at 613-14. As a result, but for the fiction that a corporation has an identity independent of its shareholders, Palazzolo was actually a *pre*enactment purchaser, and was not on notice of the regulations at the time he first acquired title to the property through SGI. *See generally* BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 110 (William A. Klein & John C. Coffee Jr. eds., 2002) ("In general, the corporation is reified. . . . . That is, the law conceives of the corporation as having an existence separate from that of its employees, customers, suppliers, and so forth—but mainly, form its shareholders."). Moreover, the transfer dissolution of SGI, which resulted in Palazzolo taking title to the property, was merely the result of Palazzolo's failure to pay SGI's $100 registration fee. *See* Burling, *Background Principles*, *supra* note 6, at 518. Thus, it seems strange that the Court announced a rule pertaining to *post*enactment purchasers on the facts of *Palazzolo*.

To be fair, though, courts have rejected arguments by takings claimants in Palazzolo's position that they acquired title when the corporation acquired title (which was prior to the regulatory enactment), rather than when title was transferred to them from the corporation (which, of course, was after the regulatory enactment). These courts reasoned:

> The petitioner contends that the corporation was merely his alter ego and that he therefore should be considered the true owner of the property since 1958. However, since he received the benefits of corporate ownership for many years and previously succeeded in preventing the DEC from obtaining disclosure on the issue of his involvement in the corporation, he may not now disregard the corporate form of ownership merely because it no longer serves his interests.

Brotherton v. New York Dep't of Envtl. Conservation, 675 N.Y.S.2d 121, 122 (N.Y. App. Div. 1998). *See also* City of Va. Beach v. Bell, 498 S.E.2d 414, 418 (deciding that the corporation, not its shareholders, was owner of property for purposes of takings analysis).

248. With respect to direct condemnation actions, however, the Court sanctioned such a bar saying:

> Direct condemnation . . . presents different considerations than cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or when a [s]tate has physically invaded the property without filing the suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser.

Palazzolo, 533 U.S. at 628; *accord* United States v. Dow, 357 U.S. 17 (1958). *See also* Daniels v. County of Santa Barbara, 288 F.3d 375, 384, 32 ELR 20504 (9th Cir. 2002) (recognizing that *Palazzolo*'s "blanket rule" does not apply to claims of physical takings). *See generally supra* note 68 (explaining that direct condemnation cases and physical takings claims are different than inverse condemnation cases or regulatory takings claims because the date and manner of taking in the former cases is clear).

249. *See supra* notes 108-19.

250. Burling, *Background Principles*, *supra* note 6, at 527.

251. *See supra* Part II.B.

252. *See supra* notes 108-19 and accompanying text (discussing *Lucas* background principles inquiry).

ment that, "any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment."[253] To this end, the New York Court of Appeals spilled a great deal of ink determining what rules of law constitute background principles of state law.[254] In contrast, the Court merely stated:

> We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here. It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the [s]tate's law by mere virtue of the passage of title.[255]

Further, echoing the dissent in the regulatory takings quartet,[256] the Court explained that "the determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed."[257] In one fell swoop, the Court cut down the philosophical foundation of the New York Court of Appeals' postenactment purchaser bar by deciding that "[a] law does not become a background principle for subsequent owners by enactment itself."[258] Thus, in the wake of *Palazzolo*, government agencies are precluded from arguing that preexisting regulation "inheres in the title" merely due to the passage of title, with respect to *Lucas*' total takings inquiry.

2. *Palazzolo*'s Effect on *Penn Central* Partial Takings Inquiry

Although Palazzolo initially claimed that a *Lucas* total taking had occurred,[259] after rejecting this claim, the Rhode Island Supreme Court then considered whether Palazzolo could make out a *Penn Central* partial takings claim. It held that, "[i]n light of [the preacquisition] regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a [74]-lot subdivision."[260] On this issue, the Court did not directly decide whether Palazzolo was deprived of reasonable investment-backed expectations, and instead "remand[ed] for further consideration of the [takings] claim under the principles set forth in *Penn Central*."[261]

Nevertheless, much of the Court's language in rejecting a blanket notice rule implicates *Penn Central*'s reasonable investment-backed expectations inquiry. For instance, the Court characterized the respondent's argument as asserting that "by prospective legislation the [s]tate can shape and define property rights *and reasonable investment-backed expectations*, and subsequent owners cannot claim any injury from lost value."[262] The Court rejected this contention, deciding that "[t]his ought not to be the rule[,]"[263] and ultimately concluded that "[p]etitioner's claim under *Penn Central* . . . is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[264] Thus, with respect to *Penn Central* partial takings analysis, the majority opinion in *Palazzolo* stands for the proposition that a postenactment purchaser's expectations are not destroyed merely because he took title after the regulatory enactment.[265]

C. The Court's Reasoning

To support its holding that postenactment purchasers are not barred from bringing regulatory takings claims, the Court argued that preventing such claims, when combined with the traditionally cumbersome ripeness requirements for bringing a regulatory takings claim, would act as a restraint on free alienability of property, and work an injustice to those who inherit property subject to land use regulations.[266] In addition, the Court found precedent for its newly elucidated rule in another relatively recent Court regulatory takings case.[267]

253. *Palazzolo*, 533 U.S. at 629.

254. *See supra* Part II.B.

255. *Palazzolo*, 533 U.S. at 629-30.

256. *See supra* notes 192-97.

257. *Palazzolo*, 533 U.S. at 630.

258. *Id*. at 630. A number of commentators have noted that *Palazzolo* leaves room for the proposition that land use restrictions which do no more than effectuate long-standing common-law public trust and custom doctrines fit within *Lucas*' background principles, thereby defeating a takings claim premised on such land use regulation. *See* Eagle, *Regulatory Takings Notice Rule*, *supra* note 6, at 579 ("The [Court's] repudiation of the positive background principles rule in *Palazzolo* provides great incentive for courts to attempt to demonstrate that stringent new regulations really have their genesis in long[-]standing public trust theory."); Burling, *Background Principles*, *supra* note 6, at 508-17 (describing how the public trust and custom doctrines have been fit into *Lucas*' background principle exception). Even before *Palazzolo*, courts interpreted elements of the public trust and custom doctrines as background principles of state property law that inhere in the claimant's title under *Lucas* and therefore preclude a taking. *See, e.g.*, Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (Or. 1993) (holding that the common-law doctrine of custom preventing landowners from excluding the public from the dry sand areas of the ocean shore is not, in the words of *Lucas*, "newly legislated or decreed" and instead, "inhere[s] in the title itself, in the restrictions that background principles of the [s]tate's law of property and nuisance already placed upon land ownership," thereby precluding a compensable taking) (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029, 22 ELR 21104 (1992)). The precise scope of public trust and custom doctrines is beyond the scope of this Article.

259. *See Palazzolo*, 533 U.S. at 616-16 ("Petitioner . . . assert[ed] that the [s]tate's wetlands regulations . . . had taken the property without compensation in violation of the Fifth and Fourteenth Amendments. [His] suit alleged the Council's action deprived him of 'all economically beneficial use' of his property, resulting in a total taking requiring compensation under *Lucas*.") (citations omitted).

260. Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 717, 30 ELR 20420 (R.I. 2000) (citing Good v. United States, 189 F.3d 1355, 1361-62, 30 ELR 20102 (Fed. Cir. 1999).

261. *Palazzolo*, 533 U.S. at 616.

262. *Id*. at 626.

263. *Id*. at 627 (reasoning that "[were] we to accept the [s]tate's rule, the postenactment transfer of title would absolve the [s]tate of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A [s]tate would be allowed, in effect, to put an expiration date on the Takings Clause.").

264. *Id*. at 630.

265. *See* 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, 31 (2003) ("The [*Palazzolo*] Court rejected the Rhode Island Supreme Court's holding that acquisition of title after the date of a regulation was fatal to a property owner's *Lucas* takings claim and [also] held that notice of regulations that preexist [sic] a property owner's acquisition of title is not an absolute bar to a *Penn Central* takings challenge.").

266. *See infra* Part III.C.1.

267. *See infra* Part III.C.2.

1. A Dangerous Combination: Heightened Ripeness Requirements and the Regulatory Takings Notice Rule

In addition to clarifying *Lucas*' philosophical bundle of rights approach, the Court in *Palazzolo* turned its attention to the more practical economic concern of promoting the free transferability of property. As the dissenting opinions in *Anello* and *Gazza* recognized,[268] barring a postenactment purchaser from bringing a takings claim would likely act as a restraint on alienation.[269] In *Palazzolo*, the Court embraced this argument saying, "the [s]tate's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation."[270] However, the Court picked up where the New York Court of Appeals' dissenters left off by noting that this restraint on alienability would be exacerbated by the relatively stringent ripeness requirements associated with regulatory takings claims.

To illustrate, before a regulatory takings claim may be brought, the claimant must satisfy certain requirements before his claim becomes ripe.[271] In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[272] the Court set out an arduous test for determining whether a regulatory takings claim is ripe.[273] It established that, "a claim that the application of government regulations effects 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."[274] The Court also explained that a takings claim will be deemed unripe for judicial review if the claimant fails to "seek compensation through the procedures the [s]tate has provided for doing so."[275] These two procedural hurdles for regulatory takings are known as the "final determination" and "denial of compensation" tests.[276] The ripeness requirement is necessary because, in order to determine whether a taking has occurred, the court must be able to ascertain "the nature and extent of permitted development" on the property.[277] In practice, however, this two-part threshold requirement often means that it will be many years from the time a regulatory takings claimant first desires to develop the land until the time he has a justiciable takings claim.[278]

In light of these heightened ripeness requirements, the Court in *Palazzolo* was worried that under a postenactment purchaser bar regime, an owner who wanted to sell a newly regulated piece of property would be forced into one of two unappealing courses of action. On the one hand, the preenactment owner could expend considerable time and energy required to bring a ripe takings claim.[279] This option would likely be inefficient both because most landowners do not possess the requisite expertise or resources to put forth the comprehensive development plans required to establish a ripe takings claim, and because it would prevent the land from being sold to someone who could put the land to a more efficient use.[280] Recognizing this as the inequita-

268. *See supra* Part II.D.

269. *Id*. Other courts to recognize this undesirable consequence of barring postenactment purchaser from bringing regulatory takings claims include Rocheleau v. Town of Greene, 708 A.2d 660, 662 n.1 (Me. 1998) ("Few parties will be willing to purchase a nonconforming lot that cannot be developed even when the other variance requirements are met."). Furthermore, Maine's Supreme Judicial Court recognized in *Rocheleau* that a regulatory takings notice rule would not only inhibit the sale of encumbered property but might also "encourage otherwise undesired development of nonconforming lots in order to facilitate their sale." *Id*. *See supra* note 208 (collecting cases that reject the regulatory takings notice rule as a restraint on alienation).

270. *Palazzolo*, 533 U.S. at 627. To be sure, New York's postenactment purchaser bar might avoid this problem. In *Anello*, the New York Court of Appeals assured that, "the parties can condition sale [of the property in question] on receipt of the necessary use allowances or prosecution of a takings claim[,]" and in *Gazza*, the New York Court of Appeals left open the question whether "an existing taking[s] claim may be donated, sold, inherited[,] or otherwise assigned." *Gazza*, 657 N.Y.S.2d at 560 n.4. Thus, it would seem that under the New York Court of Appeals' regime a preenactment purchaser could inexplicitly sell his takings claim to the postenactment purchaser, thereby alleviating this concern expressed by the Court and the dissenters in the takings quartet.

271. Ripeness requirements are limited to regulatory takings claims as opposed to physical takings claims "[b]ecause regulatory takings claims must ripen before they are brought, whereas the ripeness of physical takings claims are apparent as soon as the invasion occurs." Albert, *supra* note 52, at 763.

272. 473 U.S. 172 (1985).

273. *See* Eagle, *Regulatory Takings Notice Rule*, *supra* note 6, at 577 ("The immense difficulties faced by landowners in dealing with the Court's Byzantine Williamson County ripeness rules have been the subject of considerable discussion.") (citing John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 Urb. Law. 195 (1999)).

274. *Williamson*, 473 U.S. at 186. *See also Palazzolo*, 533 U.S. at 618 ("The central question in resolving the ripeness issue, under *Williamson County* and other relevant decisions, is whether a petitioner obtained a final decision from the Council determining the permitted use for the land."). In Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967), the "Court discussed the basic rationale of the ripeness doctrine, in which the Court explained that unless administrative decisions resulted in cases that were ripe for judicial resolution, courts would become enmeshed in 'abstract disagreements' concerning administrative policies." Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 713, 30 ELR 20420 (R.I. 2000).

275. *Williamson County*, 473 U.S. at 194. The rationale for this additional requirement is that "the Fifth Amendment prohibits only uncompensated takings, and if [the landowner] has not sought compensation, she does not yet know if her constitutional right[s] have been violated." Stein, *supra* note 12, at 908.

276. Eagle, *Regulatory Takings Notice Rule*, *supra* note 6, at 577 n.287. *See generally* Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1 (1995) (discussing the elements of the ripeness test).

277. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351, 16 ELR 20807 (1986).

278. *See Palazzolo*, 533 U.S. at 627 (noting that the process of ripening a takings claim, "as this case demonstrates, will often take years"); Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 978 (2000) (noting that because of ripeness hurdles, "[t]he adjudication of conceptually straightforward regulatory takings claims may take a decade or longer"); *see, e.g.*, *Williamson County*, 473 U.S. at 176-82 (concluding that even after eight years of revision, the development plan at issue was not ripe because the claimant had not filed for variances from newly adopted zoning ordinances); St. Clair v. City of Chico, 880 F.2d 199, 204 n.1 (1989) (noting that "a delay of up to eight years may still be inadequate to satisfy the ripeness requirement [to bring a takings claim]").

279. *See supra* notes 271-78 and accompanying text (discussing ripeness requirements to bring a regulatory takings claim). *See also* Sterk, *supra* note 208, at *2 ("takings litigation can drag on for years and, in the meantime, landowner is disabled from selling her property without forfeiting the right to challenge the ordinance as a taking").

280. *Id*. at *2 ("If landowner's goal is to sell the land to a developer, and to allow the developer to worry about the details of any development proposal, the [New York Court of Appeals'] doctrine denies him that option.").

ble consequence of a postenactment purchaser bar, the Court in *Palazzolo* remarked that such a scheme would be "capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic."[281] The Court saw the same unfairness with respect to a beneficiary who inherited a heavily regulated parcel of land from a decedent who had not survived long enough to establish a ripe takings claim.[282]

On the other hand, under a notice rule regime, the owner could sell the land to a postenactment purchaser, thereby destroying any potential takings claim and forgoing any hope of wining just compensation. This option would lead to a windfall for the government, which could avoid having to pay just compensation, and a loss to the seller who would be forced to sell at a price discounted by the effect of the land use regulation. Indeed, the Court recognized that "[t]he [s]tate's [notice] rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation."[283] It therefore decided that "[t]he [s]tate may not by this means secure a windfall for itself."[284] Put differently, "[a]n outright prohibition on transfer in this context might unfairly allow the government to escape liability because of a fortuitous sale by a predecessor owner who never ripened his case."[285]

Recognizing that neither a restraint on alienation, nor a governmental windfall is a desirable outcome, the Court concluded, "it would be illogical, and unfair, to bar a regulatory takings claim because of the postenactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner."[286] The Court's holding thus enables the transferability of regulated property by giving an experienced land developer an incentive to purchase regulated property. The developer could more easily complete the requisite development plans and, if such plans are rejected, bring a regulatory takings claim.[287] In addition, the Court's holding would prevent a windfall to the government by requiring it to pay just compensation for a regulatory taking, irrespective of what point in the chain of title such regulations were enacted.

2. Legal Precedent for *Palazzolo*

Lastly, in *Palazzolo*, the Court was able to find precedent for its rejection of the regulatory takings claim notice rule. In *Nollan v. California Coastal Commission*,[288] the Court addressed Justice William J. Brennan's dissenting opinion which argued that the Nollan's takings claim must fail because they exercised their option to purchase the property after the government first required lateral beach access as a condition for new development, thereby defeating their investment-backed expectations.[289] In a footnote, the majority opinion in *Nollan* dismissed this line of reasoning, saying the following:

> [T]he Nollans' rights [are not] altered [merely] because they acquired the land well after the [c]ommission had begun to implement its policy. So long as the [c]ommission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.[290]

Thus, even though the Nollans took title after implementation of the lateral access requirement, the Court rejected the theory that they were therefore precluded from bringing a regulatory takings claim. Although this footnote had previously been largely ignored,[291] the *Palazzolo* Court cited *Nollan* as controlling precedent for its conclusion that a postenactment transfer of ownership cannot be a bar to a regulatory takings claim.[292] Thus, the Court found some, albeit narrow, legal precedent for its rejection of a postenactment purchaser bar in *Palazzolo*.

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281. *Palazzolo*, 533 U.S. at 628.

282. *Id*. ("Should an owner attempt to challenge the new regulation, but not survive the process of ripening his or her claim . . . under the proposed [postenactment purchaser bar] rule the right to compensation may not by [sic] asserted by an heir or successor, and so may not be asserted at all.").

283. *Palazzolo*, 533 U.S. at 627.

284. *Id*.

285. Stein, *supra* note 12, at 904.

286. *Id*. at 628.

287. *See supra* Part III.C.1.

288. 483 U.S. 825, 17 ELR 20918 (1987) (holding that a "state may not condition building permit on the property owner's grant of a public easement [without paying just compensation]" (citing United States v. Oliveras, 905 F.2d 623, 628 (2d Cir. 1990))). For an extensive discussion of *Nollan*'s essential holding and impact on the Court's regulatory takings jurisprudence, see J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373 *passim* (2002).

Notably, the California Coastal Commission itself has come under fire recently. *See* Dean E. Murphy, *A Challenge in California Over Decisions for the Coast*, N.Y. Times, Feb. 19, 2003, at A17. The article describes the far-reaching scope of the commission's powers and a lawsuit pending in the California Supreme Court that alleges that the commission is an unconstitutional violation of separation of powers because "8 of its 12 members are appointed by the [l]egislature and do not have fixed terms . . . [yet] functions as an executive agency." *Id*. In a suitable claim for many real property issues, one supporter of the commission is quoted as saying that, "'[w]e are seeing a battle between what some people perceive to be sacrosanct property rights and what some see as sacrosanct public rights.'" *Id.*

289. Justice Brennan reasoned that,

> [t]he deed restriction was authorized by law at the time of appellants' permit submission, ... Appellants thus were on notice that new developments would be approved only if provisions were made for lateral beach access. In requesting a new development permit from the [c]ommission, they could have no reasonable expectation of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean.

Nollan, 483 U.S. at 860 (Brennan, J., dissenting) (internal citations omitted). *See* Anne C. Dowling, *"Un-Locke-ing" a "Just Right" Environmental Regime: Overcoming the Three Bears of International Environmentalism—Sovereignty, Locke, and Compensation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 891, 994 (2002) ("The Nollans, as Justice Brennan pointed out in his dissent, were on notice and should therefore have had no reasonable IBEs [investment-backed expectations] respecting an easement-free beachfront for themselves.").

290. *Nollan*, 483 U.S. at 833 n.2.

291. *See* Burling, *Background Principles*, *supra* note 6, at 520 ("The Rhode Island court, and other courts that considered the notice rule, however, largely ignored this language [in *Nollan*].").

292. *Palazzolo*, 533 U.S. at 628-29.

IV. Proposal: Avoiding Logical Circularity in *Penn Central* Postenactment Purchaser Claims by Looking at the Proper Set of Expectations

In *Palazzolo*, after concluding that Palazzolo had not suffered a total taking under *Lucas*, the Court declined to pass on the merits of Palazzolo's *Penn Central* takings claim, remanding the issue back to the Rhode Island trial court.[293] As a result, the Court left open the logical circularity issue involved in *Penn Central* claims brought by postenactment purchasers,[294] which has not been adequately addressed by courts or commentators. This problem can be solved by examining the preenactment purchaser's reasonable investment-backed expectations.

A. Palazzolo *Leaves the Logical Circularity Problem Unanswered*

Although the Court's reasoning with respect to avoiding governmental windfall has been criticized as conclusory,[295] it is important to note that the Court followed the view that "the most practical way of solving [the postenactment purchaser problem] is to allow the market to work to value the claim in the purchase price paid to the original owner."[296] Thus, in practice, the regulated property will be sold at a price equal to the value of the land with the land use limitations plus an amount equal to the diminution in value caused by the regulation (the amount of just compensation), multiplied by the perceived chance of mounting a successful takings claim, less the cost of ripening and litigating a takings claim.[297] This analysis shows that the merits of a takings claim will be part of a purchaser's expectations in acquiring regulated property, thereby raising the logical circularity problem. Indeed, Justice Sandra Day O'Connor's statements at oral argument for *Palazzolo* seem to recognize the likelihood that postenactment purchasers will buy the property with the expectation of bringing a successful takings claim.[298]

The problem was made even more evident by Justice O'Connor and Justice Scalia's conflicting concurrences in *Palazzolo* with respect to what effect, if any, the claimant's status as a postenactment purchaser should have on a partial takings claim. On the one hand, Justice O'Connor opined that "[the Court's holding] does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis."[299] On the other hand, Justice Scalia stated that, "the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the background principles of the [s]tate's law of property and nuisance) . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."[300] More to the point, Justice Scalia went on to proclaim that "[t]he 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional."[301] These dueling concurrences highlight the fact that the *Palazzolo* Court did not definitively preclude subsequent courts from considering preacquisition notice as a component of *Penn Central*'s partial takings inquiry. Hence, the logical circularity problem addressed by the New York Court of Appeals in the takings quartet[302] remains unsolved.[303]

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293. *Id*. at 632 ("The claims under the *Penn Central* analysis were not examined, and for this purpose the case should be remanded.").

294. *See* Burling, *Background Principles*, *supra* note 6, at 528 ("Some ambiguity, however, remains as to the extent that investment-backed expectations may be driven by preexisting regulations."). *See generally supra* Part I.B. In some courts, however, this problem of investment-backed expectations potentially goes beyond *Penn Central* partial takings claims. *See* Whitney, *supra* note 202, at 631 (investment-backed expectations may be examined as a multifactor test, a categorical rule, or part of the two prong test used to determine whether a regulation has deprived the landowner of all economically viable use, "depending upon which Justice's opinion prevails").

295. *See* Brown, *supra* note 265, at 67 ("[T]he windfall argument is circular. If a takings claim does not survive a property transfer, then the successive interest holder pays nothing for it in the purchase price. But if the successive interest holder receives the full takings claim transferred by the original owner, the discounted sales price will reflect the value of the takings claim.").

296. Brown, *supra* note 265, at 68 n.303.

297. This sale price can be expressed as the formula,

$$P = V_L + (W)(V_L - V_U) - C$$

where P represents the postenactment sale price, V_L is the value of the property with the land use limitations, W is the purchaser's perceived chance of wining a compensatory takings claim, V_U is the value of the land without the land use limitation ($V_L - V_U$ is thus the amount of just compensation), and C is the cost of ripening and litigating a compensatory takings claim. *See* Brown, *supra* note 265, at 68-72 (describing the valuation analysis that buyers and sellers of regulated property will engage in if takings claims are deemed transferable).

298. Justice O'Connor inquired:

> Think of this, there is a poor little widow woman who owns it and she can't possibly develop it or deal with it and she puts it on the market. And somebody comes along and knows the regulation is there but says, look, that regulation is going to have to be applied in a reasonable manner, I'm going to pay you X amount for this property and then challenge it. I mean what's the matter with that?

Transcript, *Palazzolo*, 533 U.S. at 606 (No. 99-2047), 2001 U.S. TRANS LEXIS 18, at *52.

299. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring). O'Connor's concurrence was cited with approval by the Court in Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321-22, 32 ELR 20627 (2002).

300. *Id*. at 637 (Scalia, J., concurring) (citation omitted) (internal quotation omitted).

301. *Id*. It seems that Justice Scalia's comments confuse the marked differences between takings claims under *Penn Central* and those under *Lucas*. In the above quoted passage, Justice Scalia begins by discussing the effect the claimant's status as a postenactment purchaser on reasonable investment-backed expectations—a component of the *Penn Central* "ad hoc" takings inquiry. *See supra* notes 92-97 (discussing *Penn Central*-type takings claims). However, he finishes the sentence speaking about restrictions that deprive the property of all value—a component of the *Lucas* "total" takings inquiry. *See supra* notes 102-04 and accompanying text (discussing the *Lucas*-type total takings).

302. *See supra* Part II.C.

303. For example, in Commonwealth Edison Co. v. United States, 271 F.3d 1327, 32 ELR 20322 (Fed. Cir. 2001) (en banc), the Federal Circuit stated: "As Justice O'Connor's concurring opinion . . . makes clear, however, even in that context the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations." *Id*. at 1350 n.22. As a result, it is clear that when postenactment purchasers bring *Penn Central* takings claims, which *Palazzolo* surely allows, *see supra* Part III.B.2., the preacquisition regulation remains a component of the claimant's reasonable investment-backed expectations. *See* Stein, *supra* note 12, at 896-97:

> At least five of the Justices—and possibly as many as eight—reaffirmed the viability of *Penn Central*'s open-ended approach to analyzing reasonable invest-

A possible explanation why the *Palazzolo* Court left the logical circularity problem unsettled is that Palazzolo took title by operation of law and not by an arm's-length transaction.[304] This is significant because, conceivably, he may not have had *any* investment-backed expectations when he acquired the parcels from SGI.[305] As a result, the *Palazzolo* Court had no cause to consider the logical circularity problem of allowing postenactment purchasers to bring regulatory takings claims because investment-backed expectations were not really at issue in the case before them.

B. Some Attempted Solutions

Many commentators have recognized a logical problem in *denying* regulatory takings claims brought by postenactment purchasers.[306] However, a surprising few commentators have recognized the logical circularity problem inherent in *allowing* postenactment purchasers to bring *Penn Central* takings claims.[307] Unfortunately, they have not offered satisfactory solutions. For example, Prof. Steven J. Eagle identifies the problem that "[t]he 'inevitable circularity' of which the [New York Court of Appeals] complains is not alleviated by its position."[308] He goes on to suggest that

> [i]f the use right asserted is consistent with "background principles" of property law, and if the statute would be a sufficiently great departure from those principles so as not to inhere in the owner's title under *Lucas*, then a purchaser subsequent to the enactment of the statute should not have the reasonable investment-backed expectations that his or her rights will prevail.[309]

The problem with this proposition is that it intermingles the *Lucas* background principles exception to its categorical takings inquiry with the *Penn Central* ad hoc factual inquiry[310] and, in doing so, ignores the independent force which investment-backed expectations were intended to have on the partial takings inquiry.[311]

Similarly, Prof. Gregory M. Stein succinctly articulates the logical circularity problem as follows:

> The *Palazzolo* Court held that those who acquire property with notice of a pre-existing change in the law may nonetheless challenge that law as a taking. *A buyer's investment-backed expectations may therefore reasonably include the right to challenge existing laws and occasionally recover*. The reasonable buyer may pay slightly more than she otherwise would have for land that has recently been restricted, because *Palazzolo* tells her that the land comes with an additional stick in the bundle of rights, namely the legal ability to bring a takings claim. Similarly, the reasonable seller will receive slightly more because he is selling a possible legal victory along with his land.[312]

> ment[-]backed expectations in the specific context *Palazzolo* presented. . . . The fact that Palazzolo's notice of the restrictions is not an outright bar to his claim, however, does not imply that his knowledge is of no relevance at all. The [C]ourt was fractured on the critical question of just how much weight this factor should bear.

304. *See supra* note 247.

305. Presumably, though, Palazzolo and his associates had reasonable investment-backed expectations when SGI purchased the parcels, but that was not the acquisition relevant to the takings claim according to the Court. *See Palazzolo*, 533 U.S. at 613.

306. The perceived problem occurs when courts decide that a preacquisition regulation constitutes a background principle which inheres in the claimant's title under *Lucas* and therefore eliminates any investment-backed expectations under *Penn Central*. However, this problem is readily solved by addressing the *Lucas* background principles inquiry of whether a restriction constitutes a background principle which inheres in the claimant's title separately from the *Penn Central* inquiry of whether the restriction interferes with investment-backed expectations. Stated another way, the problem is merely the result of "conflating expectations and notice rules with *Lucas*' references to background principles of law and limitations that inhere in title, courts have [thus] rendered the doctrine of investment-backed expectations ineluctably circular." R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 521 (2001); *see also* Chipchase, *supra* note 8 (arguing that *Penn Central* and *Lucas*-type claims must be analyzed separately).

307. *See, e.g.*, Gold, *supra* note 160, at 610 n.239 ("In fact, the ad hoc nature of *Penn Central* accentuates this danger [of circularity], as it may be less than clear whether courts that deny compensation under that test were swayed by an 'objective rule' or some more subjective element of the balancing test."); Stein, *supra* note 12, at 934 ("The *Palazzolo* Court held that those who acquire property with notice of a preexisting change in the law may nonetheless challenge that law as a taking. A buyer's investment-backed expectations may therefore reasonably include the right to challenge existing laws and—occasionally—recover.").

308. Eagle, *Regulatory Takings Quartet*, *supra* note 23, at 404.

309. *Id.*

310. A number of courts and commentators have recognized that while *Lucas* and *Penn Central* claims may be brought in the alternative, the two should be analytically distinct. *See, e.g.*, Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1364, 30 ELR 20481 (Fed. Cir. 2000):

> In sum, we conclude that . . . when a regulatory taking, properly determined to be "categorical," is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations. In such a case, "reasonable investment-backed expectations" are not a proper part of the analysis, just as they are not in physical takings cases.

Chipchase, *supra* note 8; Stein, *supra* note 12, at 900 (criticizing the *Palazzolo* Court for conflating the "two different, if overlapping, issues" of whether the "restriction already formed an inherent limitation on the owner's use of her property when she acquired it" under *Lucas*' total takings inquiry, and the expectations issue in "claims of less-than-total takings that fall within the *Penn Central* analytical framework[,]" and noting that "[t]he per se *Lucas* rule does not apply in this distinct setting . . .").

311. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 14 ELR 20539 (1984) (noting that the reasonable investment-backed expectations prong of *Penn Central* is "so overwhelming . . . that it disposes of the takings questions" and holding that claimant had no reasonable investment-backed expectations that data submitted to the U.S. Environmental Protection Agency (EPA) would be kept confidential because he was on notice that EPA was authorized to use and disclose such data); Brown, *supra* note 265, at 23 ("The requirement of demonstrating thwarted investment-backed expectations is critical because regulatory takings occur when a government constraint so diminishes the individual's property value as to compel the exercise of eminent domain and the payment of compensation."); *see generally* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

312. Stein, *supra* note 12, at 934 (emphasis added). Professor Stein goes on to recognize the corollary logical circularity problem identified by the *Palazzolo* Court, *see supra* note 282, asserting:

> Had Palazzolo come out the other way, the result would be just as circular. This stick in the property bundle would be nontransferable, buyers would pay just a bit less for recently regulated land, sellers would receive less, and the Court would have shaped expectations in just the opposite way.

Stein, *supra* note 12, at 934-35.

However, he concedes the problem by maintaining that, "[t]his type of recursiveness is acceptable and probably unavoidable."[313] Hence, it seems that no satisfactory solution has yet to be presented.

The recognition that "concerns regarding circularity in the definitions of expectations and rights have played an important role in the regulatory takings debate"[314] indicates that the logical circularity problem looms large in regulatory takings jurisprudence and a resolution is sorely needed. Moreover, a workable solution is needed because, as the *Lucas* Court recognized, a total takings will rarely be found,[315] and therefore the increasing numbers of postenactment purchaser takings claims[316] will likely be analyzed under *Penn Central*'s partial takings inquiry.[317]

C. Proposal: Analyzing the Preenactment Purchaser's Expectations

One way to resolve this issue is by analyzing the *pre*enactment owner's investment-backed expectations rather than those of the *post*enactment purchaser. Thus, courts would examine the expectations of the owner at the time the parcel was unencumbered by the land use regulation. Notably, this proposition was argued to the Rhode Island Supreme Court and was not rejected.[318]

To be sure, this approach more closely follows Justice Scalia's view that preacquisition notice should have no effect on the *Penn Central* expectations inquiry,[319] rather than Justice O'Connor's view that such expectations should be "important, [though] not talismanic under *Penn Central*."[320] This is because the proposal essentially ignores the fact that the claimant purchased the property with notice of the existing land use regulation.[321] However, there appears to be no way to take a postenactment purchaser's expectations into account, as Justice O'Connor would do, without falling into the logical circularity problem identified by the New York Court of Appeals.[322]

Despite conflicting, in some respects, with Justice O'Connor's position, this proposal is analytically and doctrinally sound for a number of reasons. First, this approach more closely approximates the purpose of the investment-backed expectation inquiry, which is to determine what expectations were defeated by the enactment of the land use regulation itself,[323] and not by the transfer of ownership of the property. For example, just compensation is calculated from the time of the taking.[324] In addition, "the amount of the [just compensation] award is measured by the value of the property at the time of the taking, not at some later date[,]"[325] and the statute of limitations begins to run as of the date of enactment.[326] This emphasizes the fact that the time of the regulatory enactment is the critical moment in analyzing whether a taking may have occurred.

Furthermore, *Palazzolo* itself has been read for the proposition that "a takings claimant with [p]reacquisition notice 'step[s] into the shoes' of the prior owner upon transfer of title."[327] As Justice John Paul Stevens noted: "[I]t is the person who owned the property at the time of the taking that is entitled to the recovery."[328] This is because, Justice Stevens asserted, "[a] taking is a discrete event . . . [l]ike other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner."[329] Hence, analyzing the claimant's expectations from the perspective of the preenactment purchaser in partial takings claims would effectively place the claimant into the shoes of the prior owner.

Additional support for this approach can be found in the Court's more recent usage of the term *reasonable* investment-backed expectations,[330] as opposed to *distinct* invest-

313. *Id*. at 935.

314. Eagle, *Regulatory Takings Notice Rule*, *supra* note 6, at 584.

315. *Lucas*, 505 U.S. at 1017 (noting it is "the extraordinary circumstance when no productive or economically beneficial use of land is permitted . . ."). *See also* James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons From Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENVTL. L. 595, 648 (2003) ("The concern about an increase in total wipe-out takings claims is probably exaggerated.").

316. *See supra* note 8.

317. *See* Gold, *supra* note 160, at 577 (noting that the Court now applies *Penn Central*'s ad hoc balancing test to "most regulatory takings cases" and concluding that "the Court has adopted Penn Central as its standard, and will seek to avoid categorical rules in future regulatory cases"); Randall, *supra* note 192, at 176:

> There is a growing recognition that total regulatory takings are the exception rather than the rule. Even with the most stringent of regulations, affected property is likely to retain some residual value. The *Penn Central* analysis provides courts and regulators much greater flexibility in determining whether a compensable taking has occurred.

Stein, *supra* note 12, at 926 ("Reasonable investment-backed expectations will continue to weigh heavily in future takings cases, including those cases in which an owner acquires property with notice of an existing restriction in the land use law.").

318. *See* Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 717 n.9, 30 ELR 20420 (R.I. 2000) ("During oral argument it was suggested that a party to whom property passes through operation of law could assume the investment-backed expectations of the original owner . . . .").

319. Palazzolo v. Rhode Island, 533 U.S. 606, 637, 32 ELR 20516 (2001) (Scalia, J., concurring) ("In my view, the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.").

320. *Id*. at 633 (O'Connor, J., concurring) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.").

321. Of course, the preenactment purchaser (whose expectations this proposal focuses on) cannot be on notice as to a *future* land use regulation.

322. *See supra* Part II.C.

323. *See* Whitney, *supra* note 202, at 634-35 (noting that the purpose of the investment-backed expectation inquiry is to "evaluate the validity of government prohibition on the prospective use of property").

324. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 320, 17 ELR 20787 (1987).

325. *Palazzolo*, 533 U.S. at 639 (Justice Stevens also noted that "[s]imilarly, interest on the award runs from that date [of the taking]").

326. *See* Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 686-89 (9th Cir. 1993) (concluding that the statute of limitations for a facial takings claim runs from the date the ordinance is enacted).

327. Albert, *supra* note 52, at 796. *See also* Brown, *supra* note 265, at 72 ("Successive interest holders need to have the right to stand in the shoes of their predecessors in title and assert the same takings claims that their predecessors could assert.").

328. *Palazzolo*, 533 U.S. at 639 (Stevens, J., concurring in part and dissenting in part).

329. *Id*. at 638-39.

330. Kaiser Aetna v. United States, 444 U.S. 164, 175, 10 ELR 20042 (1979) appears to be the first time this phrase appeared, and it was reasserted in *Lucas*. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 n.7, 22 ELR 21104 (1992).

ment-backed expectations, as originally formulated by the *Penn Central* Court.[331] The former represents a more objective view of the expectations defeated by the government land use regulation, while the latter represents a more subjective inquiry into the claimant's expectations in investing in the property.[332] In this way, the Court can be seen as objectifying, to some degree, the *Penn Central* investment-backed expectation inquiry.[333] In the postenactment purchaser context, an inquiry into the investment-backed expectations destroyed by virtue of the regulatory enactment represents an objective view, whereas an inquiry into the investment-backed expectations of the postenactment purchaser represents a more subjective view. This is because the former inquiry simply focuses on what investment-backed expectations the preenactment purchaser had in acquiring title[334] without regard to that owner's subjective belief about his chances of bringing a successful takings claim.[335] In other words, the regulation itself is dislodged from the expectations inquiry. On the other hand, an inquiry into the postenactment purchaser's investment-backed expectations would necessarily ask whether he expected to win compensation by mounting a regulatory takings claim, thereby pulling a court into logical circularity. Therefore, analyzing the preenactment owner's expectations is a more appropriate means of examining the investment-backed expectations under *Penn Central* partial takings analysis.

V. Conclusion

Addressing takings claims brought by postenactment purchasers has proven to be a divisive and controversial, yet important issue[336] within the already muddled area of regulatory takings jurisprudence.[337] In 1997, the New York Court of Appeals decided that it would not hear takings claims brought by purchasers who took title after the enactment of the regulation at issue.[338] Four years later however, the Court rejected any such bar to regulatory takings claims based solely on the fact that the claimant was on notice of existing land use regulations.[339]

By acknowledging that owners of regulated property transfer any potential regulatory takings claim along with title to the property, the New York Court of Appeals would adhere to the Court's decision in *Palazzolo*. This would prevent the restraint on alienability identified by the dissenters in the regulatory takings quartet as well as the Court in *Palazzolo*.[340] In addition, it would prevent the governmental windfall in not having to compensate for regulatory takings once property has changed hands.

Thus, looking forward, it remains to be seen how the New York Court of Appeals, and courts across the country for that matter, will analyze partial takings claims brought by postenactment purchasers in the wake of *Palazzolo*.[341] This is because the Court is divided on the question of what effect the fact that the claimant took title with notice of a preexisting land use regulation will have on the claimant's reasonable investment-backed expectations under the *Penn Central* partial takings analysis.[342] In doing so, it left the logical circularity problem identified by the New York Court of Appeals unanswered.[343] In fact, the New York courts do not appear to have taken up the issue of the postenactment purchaser since the Court's decision in *Palazzolo*. As this Article has argued, courts could avoid this logical circularity and inject at least a modicum of consistency into regulatory takings jurisprudence by analyzing the preenactment purchaser's reasonable investment-backed expectations.[344]

331. *Penn Central*, 438 U.S. at 124.

332. At least one commentator has recognized this shifting emphasis:

> Although there was some initial controversy over whether the investment-backed expectations doctrine was designed as a subjective or an objective standard, ever since the term "distinct," used in describing the expectations, was replaced by the term "reasonable" in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), there has been a gradual shift towards a general recognition that investment-backed expectations is an objective standard.

Whitney, *supra* note 202, at 652 n.145.

333. *See* Eagle, *Regulatory Takings Notice Rule*, *supra* note 6, at 583 (decrying the "subjectivity associated with an amorphous expectations notice rule standard"); Eagle, *Regulatory Takings Quartet*, *supra* note 23, at 404 ("What is needed is a more objective yardstick against which both the statute and the claim might be measured.").

334. Such as plans to develop the parcel or selling it to a developer.

335. To be sure, even this analysis is not completely objective because it takes into account what the preenactment owner expected to do with the land. However, as noted above, this degree of subjectivity is tempered by the Court's recent usage of *reasonable* investment-backed expectations rather than *distinct* investment-backed expectations.

336. *See supra* notes 8-9 (discussing the prevalence of governmental land use controls and the high rate of real estate sales.

337. *See supra* note 66.

338. *See supra* Parts II.B., C.

339. *See* Armentano, *supra* note 27:

> A decision by the [Court] this past June [*Palazzolo v. Rhode Island*], has effectively rejected the prohibition against suing for damages set forth by New York's highest court in [*Anello*, *Gazza*, *Kim*, and *Basile*]. . . . The [Court's] decision in *Palazzolo* makes one thing clear: New York may not bar a takings claim merely because the claimant had notice of the regulation before taking title to the property subject to the regulation.

See supra Part II.B.

340. *See supra* Parts II.D., III.C.1.

341. *See* Armentano, *supra* note 27 ("How this [divergence between the New York Court of Appeals and the Court] ultimately will be resolved remains to be seen and will probably be influenced by the equities of the case that reaches the Court first.").

342. *Id*. ("What remains to be resolved is the extent to which such prior notice will affect a court's conclusions on whether there in fact was a taking."). *See supra* Part III.B.2.

343. *See supra* Part III.B.2.

344. *See supra* Part IV.C.