I imagine buying a piece of property that is subject to a governmental land use regulation such as a zoning ordinance that restricts development or some other use of the property. 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 brought against the government for reimbursement of the regulatory taking, or inverse condemnation, has occurred forming the proposal of this Article, and Jaimie Lupow for her tremendous support and understanding throughout the writing process.

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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.”). For a simple definition of a zoning, see 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.”). 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), Gazz 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 transfer of property from owners to itself [...] or 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, if a forced purchase, rather than a forced sale is the claimant’s objective, the regulatory agency will grant a variance forgiving compliance with a particular regulation 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 Bremer, Selected Legal and Policy Trends in Takings Law: 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 [ ] 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 Bremer, 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. 539, 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, A New and Different Eminent Domain Law: The Extraordinary Necessity Defense, 57 Land Use L. Rev. 1 (1998) and A Different Eminent Domain Law: The Extraordinary Necessity Defense, 57 Land Use L. Rev. 1 (1998). 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.” 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. Second, real property, the subject of so many government regulations, changes hands at a high rate in this country, meaning that the postenactment purchaser problem is likely to arise in many future regulatory takings claims.

Given the divisive debate between staunch advocates of private-property rights and those favoring land use controls, 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. Some, including the U.S. Court of Appeals for the D.C. Circuit, have held that a property owner who purchased after the regulatory restriction became effective must demonstrate that he had a reasonable investment-backed expectation of the property's use at the time of purchase to be entitled to compensation. This approach requires the court to consider the nature of the regulation or restriction and the circumstances of the purchaser—leaving a considerable range of inquiry and decision making. This has sometimes resulted in a property owner subject to a regulatory restriction being unable to prove that the holder of the proceeds was adequately compensated for the use of the property at the time of purchase.

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/newresales.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 Min, Dow Jones Int’l News, Oct. 25, 2002, at 11 (reporting that in September, new home sales were up 0.4% and that in 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.”).


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 had only 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.”); Heoek v. City of Portland, 57 F.3d 781, 789 (9th Cir. 1995) (“Under the law at the time Heoek took title, he had no duty to maintain an aboveground 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-creatin-back expectation limits the scope of any action 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 inherited 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.15 On the other hand, a number of building in a flood plain, she may not complain about the loss of a right she never acquired.”; Steinberger v. City of Cambridge, 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, 641 (Mich. Ct. App. 2000) (deciding elimination of riparian rights 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 would be subject to a fear of regulating restriction was not 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 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 corporation concedes it already had become subject to the Wetlands Act.”); Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 716, 30 ELR 20420 (R.I. 2000), aff’d in part, rev’d in part, 533 U.S. 943 (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 subject to the restriction on use when the property was acquired.”); Grant v. South Carolina Coastal Council, 483 S.E.2d 388, 354 (S.C. 1999) (“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, 496 S.E.2d 414 (Va. 1998) (holding denial of permit was not a compensable taking because the zoning ordinance prejudiced 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 than those existing when the claimant acquired the property.”); 533 U.S. 943 (2001) (“This pre-existing permit requirement is relevant.”); see also Tavares, 746 A.2d at 716. See also Anello v. Zoning of Appeals of the Village of Dobbs Ferry, 273 A.D.2d 311, 712 N.Y.S.2d 262 (N.Y. App. Div. 1999) (“In the absence of notice of state court’s holding that preacquisition notice of existing regulations can never, without more, bar a regulatory takings claim or preclude a zoning variance.”

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 Gazette 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 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

17. See Johnny Cake, Inc. v. Zoning Bd. of Appeals of the Town of Burlington, 429 A.D. 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 not relied on the zoning ordinance.”); United States, 45 Fed. Cl. 154, 156, 30 ELR 20165 (Fed. Cl. 1999) (claimants who acquired certain oyster harvesting licenses in the United States, 177 F.3d 1360, 1366, 29 ELR 21174 (Fed. Cir. 1999) (claimant had no reasonable expectation that he would obtain approval when the petitioner concedes it already had become subject to 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, rev’d in part, 533 U.S. 943 (2001) (“This pre-existing permit requirement is relevant.”)
New York’s regulatory takings quartet. In all four cases, the New York Court of Appeals denied regulatory takings claims brought by postenactment purchasers. The court, relying in part on language from the landmark U.S. Supreme Court case of Lucas v. South Carolina Coastal Council, 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. Hence, the New York Court of Appeals held that postenactment purchasers are categorically barred from bringing regulatory takings claims, 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 claim that such proscribed rights have been taken.

Four years later, in Palazzolo v. Rhode Island, 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.” Interestingly, the Palazzolo Court also interpreted language in Lucas, yet reached the opposite result of New York’s highest court. Palazzolo prevents the New York Court of Appeals, and other courts that have reached similar holdings, 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.

However, the Court’s holding in Palazzolo presents an analytical problem recognized by the New York takings quartet which courts and commentators have not sufficiently addressed. If postenactment purchasers are allowed to bring a Penn Central Transportation Co. v. New York City partial takings claim which asserts, in part, that the regulation has frustrated their investment-backed expectations, 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.”

This Article argues that evaluating the preenactment owner’s investment-backed expectations as opposed to those of the postenactment 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. 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. 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. 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. 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.

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 a ‘taking’ must fail because he never owned an absolute right to build on his land without a variance.”).
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 ALA-ABA 381, 383 (2001) (“This government defense has been called the ‘notice rule,’ because the land buyer is seen as having been ‘on notice’ as to the possibility of [the proposed land use] being thwarted, and hence not deserving of compensation.”).
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 [state’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.
38. See infra notes 92-97.
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 an 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 which was reserved to the states by the Ninth and Tenth Amendments to the U.S. Constitution, and is often made explicit in state constitutions, legislation, or local enabling acts. The economic rationale for the power of eminent domain is to eliminate transaction costs associated with far-reaching public improvements.

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, provides that “private property [shall not] be taken for public use, without just compensation” 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.

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.” 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’.” 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.

Any challenge to a governmental action asserting a violation of the Takings Clause involves a two-pronged test. 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. amend. 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.

49. United States v. Green, 354 U.S. 451, 452 (1957). See also N.Y. Const. art. 1, § 6 (“[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.”).

50. See Rabin & Kwall, supra note 1, at 572 (“The 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.”).


53. See id. at 765-66 (“[C]ommentators 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. Perskin, 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 power61 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 constitutes...
stitutes a taking of private property, which is unconstitutional without awarding the owner just compensation. 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. Accordingly, in Loretto v. Teleprompter Manhattan CATV Corp., the Court held that any “permanent physical occupation of real property,” no matter how minimal or inconsequential, constitutes a taking under the Fifth Amendment. 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,” by either the government or a third party.

The Court in Loretto reasoned that this per se categorical rule protects the traditional property rights to possess, use, dispose, and exclude strangers from the property. 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. 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 in which the postenactment purchaser problem often arises 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 effective 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 [government] 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 4, 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.”).

Loretto, 458 U.S. at 436. See Poirier, supra note 74, at 108-9 (“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.”).

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 Rubinfeld, 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. Hubmack, A Unifying Theory for the Just-Compensation Cases: Takings, Regulation, and Public Use, 34 STAN. L. REV. 243, 244 (1982) (describing takings claims as “a farrago of fumbling which have suffered too long from a surfet of deficient theories”).

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 concluded 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. Since there are a seemingly endless number of land use regulations, 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., 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 conflicts no irreparable injury upon the landowner. Two years after Euclid, the Court struck down a zoning law as unreasonable in Netcow v. City of Cambridge because it “did [not] substantially advance the public welfare and seriously injure[d] the landowner.” Thus, Euclid and Netcow stand for the unremarkable proposition that “a reasonable zoning is valid but unreasonable zoning is not.”

Second, with respect to whether such a regulation constitutes a compensable taking, in Pennsylvania Coal Co. v. Mahon 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.’” 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.” This oft-quoted rule is of little help in determining exactly when a governmental regulation rises to the level of a taking. 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. Thus, Mahon solidified the viability of regulatory takings claims in federal takings jurisprudence, and has therefore been called the “granddaddy of all regulatory takings cases.”

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. The Penn Central Court recognized, however, that determining whether a compensable regulatory takings has occurred requires case-by-case analysis which necessarily involves 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.

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.

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.
volves “essentially ad hoc factual inquiries.” To help guide this inquiry, the Court “identified several factors that have particular significance.” 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.” 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 invasión by government,” would weigh in favor of finding that a taking has occurred. 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. 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. For example, the Court had occasion to revisit the inquiry into whether a regulatory takings occurred requiring just compensation in *Lucas*. There, the Court considered a land use regulation which prohibited development on claimant’s beachfront property. In *Lucas*, building on language in *Penn Central* as well as other regulatory taking cases, 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.” 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[.]...[for what is the land but the profits thereof?]” For this reason, a takings claim under *Lucas* is also known as a “total-takings inquiry.” Thus, the Court added another categorical rule to the otherwise murky ad hoc regulatory takings jurisprudence. 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*, that prohibition of a noxious use was not compensable. 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.” Thus, the Court shifted the emphasis of the categorical takings rule from the prevention of noxious uses in *Mulger* to the deprivation of all economically beneficial use in *Lucas*.

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

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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.


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.
vided a vague exception to this otherwise categorical rule that the deprivation 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 state’s law of property—i.e., whether and to what degree the state’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 state 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 [r]egulations 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 state’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved . . . under the state’s law of private nuisance, or by the state under its complementary power to abate nuisances that affect the public generally, or otherwise.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 state’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.


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” 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. This requires the court to consider “essentially ad hoc factual inquiries,” including whether the governmental regulation has decreased the value of his land or otherwise interfered with her “distinct investment-backed expectations.”

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. 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, 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.” Thus, a postenactment purchaser is barred from bringing a takings claim. The postenactment purchaser bar is also known as the regulatory takings notice rule because it prevents purchasers with notice of the applicable regulations from bringing a takings claim.

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. 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.

A. Just the Facts

The facts of the regulatory takings quartet are relatively simple and can be briefly stated. In Kim, the legal grade of College Point Boulevard was raised to from 9.1 to 13.5 feet in 1978. 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. Finally, in 1990, the city of New York regraded the road to its legal level. 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.” The Kims then commenced an action claiming that a taking had occurred by virtue of a “permanent physical occupation” under Loretto. 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.

In Gazza, 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. 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. The New York Court of Appeals held that “petitioner’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.\textsuperscript{146}

In Anello,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{149} Hence, Anello argued that the ordinance amounted to a taking of her property.\textsuperscript{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.”\textsuperscript{151}

Finally, in Basile,\textsuperscript{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.\textsuperscript{153} In a subsequent condemnation proceeding,\textsuperscript{154} the town of Southampton offered Basile $117,500 in just compensation, reflecting the property value as restricted under the wetlands regulation.\textsuperscript{155} However, Basile demanded $960,000 in just compensation, which reflected the property value without the wetlands regulations.\textsuperscript{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.”\textsuperscript{157}

\textbf{B. The Bundle of Rights Concept and Lucas’s Background Principles}

In each of these cases, the New York Court of Appeals adopted a rights-based approach to the postenactment purchaser problem.\textsuperscript{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.\textsuperscript{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.\textsuperscript{160} However, in the

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 value of 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 Assoc’s. 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 multifaceted 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.

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.”\(^{165}\)

\(^{161}\) 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 Gazzza, 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.C. 2d 348, 354 (S.C. 1995) (“Grant 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 (“[T]he 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 Quaretet, supra note 23 at 394 (“The court of appeals’ failure to tie down this loose end is troublesome, especially given the serious nature of [i]owa’s 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).

\(^{174}\) Gazzza, 657 N.Y.S.2d at 559.

\(^{175}\) Id. (quoting Lucas, 505 U.S. at 1027).
Finally, in Anello, the New York Court of Appeals agreed that this bundle of rights approach is the proper one. 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.” 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. 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.

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.” The next question, then, is exactly which “existing rules or understandings of [state 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 property and nuisance rules recognized at common law, and that statutory law should not factor into the analysis.” 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 [state law’s] law of property and nuisance already place upon land ownership.” 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 [state’s] law of private nuisance, or by the [state] under its complementary power to abate nuisance that affect the public generally.

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, and not the statutory provisions at issue in the takings quartet. However, the New York Court of Appeals believed that this set of limitations should not be restricted to common-law nuisance doctrines. Instead, it stated:

The corpus juris of this [state] 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 [state] 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.

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. 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.

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

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).
179. 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.
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 [state 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, 556, 28 ELR 20053 (N.Y. 1997) (“Thus, common-law principles and [state] 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 [state] 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 [city] charter 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 state property law, while ignoring statutory law in force when the owner acquired title.\textsuperscript{190}

Accordingly, the New York Court of Appeals favored statutory law over common law,\textsuperscript{18} which is a widely accepted canon of judicial decisionmaking.\textsuperscript{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,\textsuperscript{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 charter provision would be allowing the [c]ity, by ipse dixit to transform private property into public property without compensation.”\textsuperscript{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.\textsuperscript{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 [state law to justify what would otherwise amount to an unconstitutional taking[,]”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{200} Thus, the New York Court

\begin{itemize}
  \item 190. \textit{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.
  \item 191. Kim, 659 N.Y.S.2d at 148 (“To accept the 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.”).
  \item 192. See Benjamin N. Cardozo, \textit{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.
  \item 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.
  \item 194. \textit{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).
  \item 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, \textit{Regulatory Takings Quartet, supra} note 23, at 388. Unfortunately, he follows up this point with a fuzzy proposition that, “[t]he background principles test] does imply that legislative change, except in true emergencies, must have the common-law flavor of incremental development with no

\item 196. Kim, 659 N.Y.S.2d at 152 (quoting Lucas, 505 U.S. at 1032) (emphasis in original) (internal quotations omitted).
  \item 197. \textit{Id.} (emphasis added).
  \item 199. \textit{Penn Central}, 438 U.S. at 124.
  \item 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 intervenes with her investment-backed expectations, which would in turn depend on the possible success of the compensatory takings claim, and so on”).
\end{itemize}
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.”

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. 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.” Judge Richard C. Wesley of the New York Court in *Anello*. In *Gazza*, after surveying the prevailing regulatory takings law jurisprudence, the New York Court of Appeals made the alternative 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.

In *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.

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 what 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., deprivation of all economically beneficial use, is a categorical rule, distinguishable from *Penn Central*’s ad hoc factual inquiries. See *Lucas*, 505 U.S. at 1035. In 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.

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

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.” This is because, under the majority’s regime, a
preenactment owner would be forced to bring any potential takings claim, even ones of “doubtful validity” 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. 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 dissent’s 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.” 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. 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” for the postenactment purchaser at the expense of the public in the form of unjust compensation.

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, which more closely approximates the estimated $80,000 value of the land subject to the building restrictions of the Tidal Wetlands Act than the estimated $396,000 value of the land, had the variances been granted. 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.” As a result, allowing the postenactment purchaser to bring a compensatory takings claim for the deprivation of a right he never paid for would grant him a windfall.

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 [state].” 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 undermine 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).

209. Id.

210. 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. . . .”) (To assess the government for such a loss is to give the purchaser’s 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.’”) (emphasis added).

211. Anello, 656 N.Y.S.2d at 185.

213. See infra Part III.C.1.

214. 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 do 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.


216. Id. at 557.

217. Id. at 556.

218. Id.

219. Presumably, in this situation, the earlier a landowner brings a takings claim, the less the government will have to compensate the owner if it 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 his claim as soon as possible will allow the government to minimize the total amount of compensation it must pay.

equívocally 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 trial 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 uncertainty 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).
223. Id.
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.”247 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 quarter.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 same logical circularity problem addressed by the New York Court of Appeals in the takings quarter.”238

In doing so, the Palazzolo Court drastically limited the effect of the logically antecedent inquiry set out in Lucas 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’ argument that a corporation has an identity independent of its shareholders, 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 postenactment 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.


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).

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).


241. Id. at 617-25.

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


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


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 preenactment purchaser, and was not on notice of the regulations at the time he first acquired title to the property and their effect on the property.
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 spelt 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 Is-

land 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


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 Gazzia 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 inequa-
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."286 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 ripetaking claim.287

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 winning 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."

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."285 The Court’s holding thus enables the transferability of regulated property by giving an experienced land owner the ability to transfer the interest which was possessed prior to the regulation.

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.

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."

Thus, the Nollans, as Justice Brennan pointed out in his dissent, were on notice... under the procedure in effect at the time they acquired the land.289

"The Nollans’ rights [are not] altered because of the postenactment purchaser bar... Because the Nollans were on notice that the California Coastal Commission was requiring lateral beach access as a condition of new development, they could not have had reasonable investment-backed expectations respecting an easement-free beachfront for themselves.

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

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 [comission], they could have had 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—Soberity, 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 any reasonable BEs [investment-backed expectations] respecting an easement-free beachfront for themselves.”).
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. As a result, the Court left open the logical circularity issue involved in *Penn Central* claims brought by postenactment purchasers, 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, 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.” 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. This analysis shows that the merits of a takings claim, less the cost of ripening and litigating 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.

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 “[t]he 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.” 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]late’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.” 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.” These dualing 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 remains unsolved.

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?


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

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 inhere 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 inhere 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.”).


not have the reasonable investment-backed expectations that his or her rights will prevail.

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.

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.” 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” 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, and therefore the increasing numbers of post-enactment purchaser takings claims will likely be analyzed under Penn Central’s partial takings inquiry.

C. Proposal: Analyzing the Preenactment Purchaser’s Expectations

One way to resolve this issue is by analyzing the preenactment owner’s investment-backed expectations rather than those of the postenactment 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.

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, rather than Justice O’Connor’s view that such expectations should be “important, [though] not talismanic under Penn Central.”

This is because the proposal essentially ignores the fact that the claimant purchased the property with notice of the existing land use regulation, and not by the transfer of ownership of the property. For example, just compensation is calculated from the date of the taking. 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[,]” and the statute of limitations begins to run as of the date of enactment. 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 preacquisition notice ‘step[s] into the shoes’ of the prior owner upon transfer of title.” 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.” This is because, Justice Stevens asserted, “[a] taking is a discrete event . . . like 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.” 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, 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 Modifieds, 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”).
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.
ment-backed expectations, as originally formulated by the Penn Central Court. 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. In this way, the Court can be seen as objectifying, to some degree, the Penn Central investment-backed expectation inquiry. 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 without regard to that owner’s subjective belief about his chances of bringing a successful takings claim. 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 within the already muddled area of regulatory takings jurisprudence. 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. 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. 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. 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. 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. In doing so, it left the logical circularity problem identified by the New York Court of Appeals unanswered. 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.

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.

Witney, supra note 202, at 652 n.145.

333. See Eagle, Regulatory Takings Notice Rule, supra note 6, at 583 (de-crying 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, Gazzal, 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.