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The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"

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THE 1997 REGULATORY TAKINGS QUARTET: RETREATING FROM THE "RULE OF LAW"

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* Professor of Law, George Mason University. I am pleased to participate in this "New York Court of Appeals Year in Review" issue. My regard for the court as one of America's foremost tribunals makes me especially appreciative of the opportunity to raise concerns about its jurisprudence on these issues of continuing nationwide importance.

INTRODUCTION

On February 18, 1997, the New York Court of Appeals handed down interrelated opinions in four regulatory takings cases; *Anello v. Zoning Board of Appeals*,[1] *Basile v. Town of Southampton*,[2] *Gazza v. New York State Department of Environmental Conservation*,[3] and *Kim v. City of New York*.[4] Viewed as a whole, this "takings quartet" makes it significantly easier for the State of New York and its subdivisions to resist the takings claims of private landowners.

The gravamen of the holdings is that preexisting regulations both inhere in a purchaser's title and preclude the purchaser from forming investment-backed expectations in the prohibited uses. The purchaser cannot challenge the constitutionality of the regulations, since the right to do so terminated with the transfer of the land from the owner at the time the regulations were imposed. Thus, the quartet raises important questions about the nature of property rights and whether the court's approach is consistent with United States Supreme Court precedent and the rule of law.

I. THE QUARTET CASES

It is useful to begin with a brief description of the individual quartet cases. The facts are relatively simple and the issues related.

A. *Anello v. Zoning Board of Appeals*

In *Anello*, the petitioner had been denied permission to construct a one-family dwelling on a lot she owned. The lot had been large enough for the house, but in 1989 the Village of Dobbs Ferry enacted a "steep slope" ordinance to "protect environmentally sensitive lands." The ordinance required that the parcel's "gross area" be reduced by a formula taking into account its slope in order to determine its "buildable area." Ms. Anello acquired her lot more than two years after the ordinance was passed. The lot was on a slope and, after the reduction formula was applied, was too small to permit construction under the zoning code. Ms. Anello applied for a variance from the steep slope ordinance.[5]

The Zoning Board of Appeals denied the variance, reasoning that petitioner "acquired the property over two years after the steep slope law

1. 678 N.E.2d 870 (N.Y. 1997), *cert. denied*, 118 S. Ct. 2 (1997).
2. 678 N.E.2d 489 (N.Y. 1997), *cert. denied*, 118 S. Ct. 264 (1997).
3. 679 N.E.2d 1035 (N.Y. 1997), *cert. denied*, 118 S. Ct. 58 (1997).
4. 681 N.E.2d 312 (N.Y. 1997), *cert. denied*, 118 S. Ct. 50 (1997).
5. *See Anello*, 678 N.E.2d at 870.

came into effect and therefore had full knowledge that the lot was unbuildable and non-conforming."[6] The Board also found that granting a "variance would have a substantial detrimental impact upon the surrounding area and constitute a detriment to the health, safety and welfare of the neighborhood."[7]

The supreme court originally determined that Ms. Anello was entitled to a variance under the "'single and separate ownership' theory," but that doctrine was rejected by the New York Court of Appeals while the Board's appeal in *Anello* was pending in the appellate division.[8] Subsequently, the appellate division ruled that the Board's denial was not arbitrary or capricious and was supported by substantial evidence.[9] The principal issue in the court of appeals was whether the Board's action constituted a taking under the Fifth Amendment to the United States Constitution[10] and Article I of the New York Constitution.[11] Notably, the trial or intermediate courts had not considered the takings issue.[12]

In a 5-1 decision, the court of appeals held that Ms. Anello's takings claim "must fail." Since she purchased two years after the steep slope ordinance was enacted, the "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." [13]

B. *Gazza v. New York State Department of Environmental Conservation*

In *Gazza*, the petitioner had purchased a one-acre parcel in Suffolk County, two-thirds of which previously had been inventoried as tidal wetlands by the Department of Environmental Conservation (DEC). In order to build, Gazza needed variances from required minimum setbacks from the tidal wetland boundary for his proposed house and for its planned septic system.[14] The DEC denied these variances on the grounds that

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6. *Id.*

7. *Id.* at 870-71.

8. *See id.* at 871 (referring to Khan v. Zoning Bd. of Appeals, 662 N.E.2d 782 (N.Y. 1996) (rejecting "single and separate ownership" doctrine)).

9. *See* Anello v. Zoning Bd. of Appeals, 641 N.Y.S.2d 52, 53 (App. Div. 1996).

10. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

11. N.Y. CONST. art. I, § 7(a) ("Private property shall not be taken for public use without just compensation.").

12. *See Anello*, 678 N.E.2d at 874 (Wesley, J., dissenting).

13. *Id.* at 871.

14. *See Gazza*, 679 N.E.2d at 1036.

> [t]he proposed project . . . would eliminate or diminish several tidal wetland benefits, in particular, values related to flood control, wildlife habitat, marine food production and silt/organic material absorption . . . . Moreover, the DEC made findings of fact that the proposed construction of a sanitary system threatened both marine life and humans, that other contaminants threatened the area and that flooding problems would be increased.[15]

The petitioner did not dispute that the DEC's determination was supported by substantial evidence, but instead asserted that the diminution of value engendered by the wetland regulations constituted a taking.[16] At the supreme court hearing on this issue, Gazza's appraiser testified that the land would be worth $396,000 without the restrictions.[17] The respondent DEC's appraiser testified that the parcel was worth $80,000 as restricted.[18] Gazza had paid $100,000 for the parcel. A local resident testified that he had made a still-outstanding offer for the parcel for $50,000.[19]

The supreme court found that no taking had occurred since "petitioner had failed to demonstrate that his property had 'but a bare residue of [its] value' due to the denial. . . ."[20] Alternatively, it held that since he knew of the restrictions at the time of his purchase, Gazza "did not own an interest in the property which could be 'taken' by the denial of the setback variances."[21] The appellate division affirmed, finding this latter argument to be "central."[22]

The court of appeals agreed, declaring that "[t]he relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title."[23] Alternatively, the court found that the petitioner's "reasonable expectations" at the time of his purchase "were not affected when the property remained restricted" and that "the alleged diminution of value and limitation of property uses caused by the environmental regulations would fall well within constitutional

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15. *Id.* at 1037.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *Id.* (quoting Gazza v. New York State Dep't of Envtl. Conservation, 605 N.Y.S.2d 642, 644 (Sup. Ct. Suffolk Co. 1993)).

21. *Id.*

22. *Id.* (quoting Gazza v. New York State Dep't of Envtl. Conservation, 634 N.Y.S.2d 740, 744 (App. Div. 1995)).

23. *Id.* at 1040.

boundaries."[24] The holding of the court was 6-0 on the effect on economic value analysis,[25] and 5-1 on the property interests owned by petitioner analysis.[26]

C. *Basile v. Town of Southampton*

In *Basile*, the Town had condemned the claimant's fee ownership of twelve acres near Moriches Bay.[27] Prior to the land purchase by Basile's family in 1980, it was made subject to tidal wetlands regulations.[28] The purchase also was subject to covenants filed by the former owner.[29] These covenants stated that the parcel "may consist of wetlands and may not be suitable for erection of a dwelling" and no building shall be erected "unless and until" the parcel is "approved as a building lot" by the Town.[30] The Town's appraiser valued the parcel at $117,500 and the claimant's appraiser at $960,000.[31] This "wide disparity" resulted "primarily" from the fact that the former appraisal took into account the restrictions and the latter did not.[32]

In a memorandum decision joined in by five judges, the court of appeals affirmed the appellate division's determination that the parcel's value for condemnation purposes had to reflect the wetland restrictions.[33] The court added: "Moreover, as the concurrence notes, '[t]he wetlands regulations at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered' by virtue of the covenants . . . ."[34] Given this agreement that the claimant had already divested himself by contract of the rights he now asserts against the Town, the case should have been decided on that basis.

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24. *Id.* at 1043.

25. *See id.*

26. *See id.*

27. *See* Basile v. Town of Southampton, 678 N.E.2d 489, 490 (N.Y. 1997).

28. *See id.*

29. *See id.*

30. *Id.*

31. *See id.*

32. *See id.*

33. *See id.* at 491, *aff'g* 636 N.Y.S.2d 97 (App. Div. 1995) (Kaye, C.J., Bellacosa, Smith, Levine, and Ciparick, JJ. Judge Wesley concurred separately and Judge Titone did not participate).

34. *Id.* (alteration in original).

D. *Kim v. City of New York*

In *Kim*, the City had placed fill dirt on some 2400 square feet of private land abutting College Point Boulevard, in Queens.[35] The legal grade of the road had been raised from 9.1 to 13.5 feet in 1978 and a map showing the change was filed in the Borough President's office later that year.[36] The plaintiffs purchased their parcel ten years later. In 1990, the City rebuilt the boulevard, raising its grade.[37] It informed the plaintiffs in March of that year to raise their parcel to the legal grade and that, if they failed to comply or give timely consent to the City to regrade without reimbursing plaintiffs, then, the City could do the work and seek reimbursement from them.[38] The plaintiffs did not respond. In June 1990, the City rebuilt the road and placed the fill on plaintiffs' lands to support the street and prevent erosion.[39] The plaintiffs did not dispute the need for the support, but had filed suit in March 1990 contending that the regrading would constitute an unconstitutional taking without compensation.[40]

The supreme court held that no taking had occurred, since the City Charter authorized the city to compel the plaintiffs to raise the grade of their property. The appellate division affirmed.[41] The court of appeals refused to consider the plaintiffs' contention that the deposit of fill constituted a "physical taking" rather than a "regulatory taking." It held instead that "plaintiffs' title never encompassed the property interest they claim has been taken" by dint of their preexisting duty to provide lateral support to the road under the City Charter and, alternatively, under the common law.[42]

II. PROPERTY RIGHTS, THE POLICE POWER, AND THE RULE OF LAW

The specific legal issues raised by the takings quartet must be considered in light of some basic aspects of property rights and how the court of appeals construed them.

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35. *See* Kim v. City of New York, 681 N.E.2d 312, 314 (N.Y. 1997).

36. *See id.* at 313.

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.* at 314 (citing 613 N.Y.S.2d 31 (App. Div. 1994)).

42. *Id.* at 314-15.

A. *Property Rights in General*

One usage that presages analytical confusion is the court's continual preference for the term "the property" as a synonym for "the parcel" or "the land." As the United States Supreme Court has noted:

> The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the *right to possess, use and dispose* of it . . . ."[43]

By using the term "property" in its "untechnical sense," the court of appeals here makes it easy to confound rights with the object of those rights.[44]

Turning to the matter of what constitutes property rights, the court of appeals noted in *Kim* that "[p]roperty 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."[45] This is correct, but it is important to understand at the outset that "state law" is but one source of property rights and that state law itself is a source comprised of a long common law history in addition to contemporary statutes.

As Chief Judge Loren Smith of the United States Court of Federal Claims recently explained:

> In the concrete taking case the court must initially decide if the plaintiff has an actual property interest, if this is a point of dispute. This determination is based upon long and venerable

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43. Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82 n.6 (1980) (citing United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (alteration in original) (emphasis added)).

44. This problem is not new. The court in *Gazza*, for instance, quoted its opinion in *Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976): "[T]he 'value' of property is not a concrete or tangible attribute but an abstraction derived from the economic uses to which the property may be put." Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1040 (N.Y. 1997). However, where the court of appeals has perceived that an owner's rights *have* been confiscated, it has been quick to quote the words to which this footnote is appended. *See* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 485 (N.Y. 1994).

45. *Kim*, 681 N.E.2d at 314 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

> case precedent, developed over the last two centuries. It is further clarified in the light of our law's Common Law antecedents. The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium. The legal task is very unlike legislative policy-making because judicial decision-making builds historically and logically upon past precedent in narrow cases and controversies rather than current general exigencies or sweeping political mandates. The genius of our Framer's tripartite division of constitutional power is the creation of separated institutions that each best deal with different categories of governmental decisions.[46]

In New York, the Supreme Court of Judicature was created by the colonial legislature in 1691,[47] and this tribunal has been described as "the instrument by which the great body of the jurisprudence of the English Common Law was applied to New York."[48] The first New York State Constitution expressly received the common law,[49] and it continues to be the rule of last resort.[50] None of this is to minimize the role of positive law or of regulations promulgated pursuant to the mandate of the legislature. However, this background emphasizes that the historical principles of New York property law are firmly set in a long common law tradition.

When the United States Supreme Court declared in *Pruneyard*[51] and *General Motors*[52] that the "property" rights inhering in ownership include "the right to possess, use and dispose" of the physical thing owned,[53] it was making clear that these rights were themselves "property." The right

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46. Hage v. United States, 35 Fed. Cl. 147, 151 (1996) (citing THE FEDERALIST NO. 47 (James Madison)).

47. *See In re* Steinway, 53 N.E. 1103 (N.Y. 1899) (discussing colonial legislation).

48. Rob't Ludlow Fowler, *Organization of the Supreme Court of Judicature of the Province of New York*, 19 ALB. L.J. 209, 211 (1879), *quoted in* 1 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 7.02(gg) (David A. Thomas ed., 1994) [hereinafter THOMPSON].

49. *See* N.Y. CONST. of 1777, art XXXV.

50. *See* THOMPSON, *supra* note 48 (citing *In re* Murphy, 63 N.E.2d 49 (N.Y. 1945)).

51. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 82 n.6 (1980).

52. *See* United States v. General Motors, 323 U.S. 373, 378 (1945).

53. *See supra* text accompanying note 43.

to exclude others has been the subject of the court's emphatic comment.[54] The right of use[55] and the right to dispose of one's rights[56] have also been restated by the Supreme Court with vigor. In the takings quartet it is not clear that the New York Court of Appeals gave sufficient consideration to these Supreme Court principles.

B. *The Police Power*

Just as private property rights are firmly rooted in the common law, so is the state's police power. The notion that one cannot use his property to the detriment of another can be traced at least to 1187.[57] Blackstone observed that individuals are bound "to conform their general behavior to the rule of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations."[58] The United States Supreme Court has developed a good working definition:

> There are, however, certain powers existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.[59]

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54. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (referring to the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

55. *See, e.g.*, *Pruneyard Shopping Ctr.*, 447 U.S. at 82 n.6 (discussing how the term "property" as applied in the Taking Clause refers to citizens' rights to use their property).

56. *See, e.g.*, Hodel v. Irving, 481 U.S. 704, 718 (1987); Babbitt v. Youpee, 117 S. Ct. 727, 729 (1997) (both holding that the provision of the Indian Land Consolidation Act escheating to the tribe upon owner's death that owner's fractional interests in the land allotments, and forbidding devise or descent of that allotment except to an owner of another fractional interest in the allotment is an unconstitutional taking).

57. *See* THOMPSON, *supra* note 48, at § 72.02 (1994) (quoting RANULF DE GLANVILLE, THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND OR DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE (1187-89) bk. 13, chs. 32-39, at 334-43 (John Beame trans., 1812) ("[I]f 'any Dyke should be raised or thrown down . . . to the injury of any person's freehold,' then a King's writ should issue.").

58. 4 WILLIAM BLACKSTONE, COMMENTARIES 162.

59. Lochner v. New York, 198 U.S. 45, 53 (1905).

The State's "police power" is not antithetical to respect for private property rights. On the contrary, they work smoothly together. As the influential American constitutional law scholar Thomas Cooley wrote over a century ago:

> The police power of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.[60]

The duality noted by Cooley, that the police power "prevent[s] offenses" while attempting to "insure to each the uninterrupted enjoyment of his own," suggests that government must walk a fine line between two evils. One evil would be the government's failure to protect against clear threats to the public welfare.[61] The other evil would be taking that which belongs to another.[62] The United States Supreme Court's opinion in *Lucas v. South Carolina Coastal Council*[63] largely is concerned with balancing these two concerns.[64]

C. *Eminent Domain*

As the court of appeals is aware, the state's power of eminent domain is separate and distinct from its police power.[65] Yet Judge George Bundy

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60. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 572 (1868).

61. *See* Spur Indus. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (requiring the relocation of a feedlot, albeit at the expense of the subdivision developer, the health of whose purchasers was endangered by odors and pests from the preexisting use).

62. *See id.*

63. 505 U.S. 1003 (1992).

64. *See id.*

65. *See, e.g.*, Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y. 1976). The court noted:

> The power of the State over private property extends from the regulation of its use under the police power to the actual taking of an easement or all or part of the fee under the eminent domain power. The distinction, although definable, between a compensable taking and a noncompensable regulation is not always susceptible of precise demarcation.

Smith's opinion in *Gazza* confusingly ran the two powers together: "Under a State's power of eminent domain, the legitimate exercise of police power to advance the general welfare may result in the redefinition of property interests in favor of the public. It is that redefinition of a landowner's title that can serve as the basis of a takings claim."[66]

While the police power permits the state to *regulate* property rights in the use of land, the power of eminent domain permits the state to *acquire* those rights without the owner's consent.[67] The state may acquire an owner's use rights "in favor of the public." It may regulate use rights so as to prevent harm to the public. But it may not regulate use rights in favor of the public in the sense that the public may enjoy the benefit of use rights taken from the owner without paying for them. This is no small semantic point. The United States Supreme Court's decision in *Lucas* was directed towards this distinction,[68] and the mis-impression may have influenced the court of appeal's entire analysis of *Lucas* in the quartet cases.[69]

As the United States Supreme Court affirmed in 1875 in *Kohl v. United States*,[70] the power of individual states and the federal government to "take" private property for a permissible public use or purpose is an inherent attribute of sovereignty. It is instructive to note that *Kohl* also made clear that eminent domain has nothing to do with any residual ownership claim that government might have with respect to an owner's property. There is no "redefinition" of property rights, but rather an assertion of the political will of the sovereign:

> No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political

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Id. at 384.

66. Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1039 (N.Y. 1997).

67. This confusion might be related to the confusion regarding a successor's right to assert a variance or takings claim *acquired* from a prior owner instead of one arising from the terms of his own purchase. *See infra* notes 112-40 and accompanying text.

68. *See Lucas*, 505 U.S. at 1053 (rejecting "the notion that the State always can prohibit uses it deems a harm to the public without granting compensation").

69. *See infra* text accompanying notes 243-48.

70. 91 U.S. 367 (1875).

> necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.[71]

Putting the issue another way, the police power is not inconsistent with "private law," but the power of eminent domain is a manifestation of "public law." Property law is "private law" in the sense that it is a basis for adjudicating the claim brought by one individual that another has interfered with his property rights.[72] The task of the court is to do justice to the parties in the context of their bipolar relationship. Thus, the classic nuisance case represents the assertion by plaintiff that defendant has acted so as to deprive plaintiff of his use right (i.e., of the reasonable use of his land). The role of the judiciary is to provide corrective justice. An injunction in favor of plaintiff confirms his right, and the award of damages compensates for the harm caused by the defendant's action. In all cases, there is an essential congruence between the defendant's wrong and the plaintiff's relief.[73] Where the defendant's actions harm many individuals, the public prosecutor may act to vindicate their aggregate rights under the rubric of "public nuisance."[74]

Eminent domain, however, explicitly seeks to achieve social goals that are propounded by legislators and implemented by administrators. When government condemns the perfectly sound building of one individual because that is convenient for the urban renewal efforts of others,[75] it acts out of no fault of the landowner. The purpose of condemnation is not "corrective" in the sense that the condemnee committed a wrong; rather it is political. Doing good by taking the property of one and transferring it to another is deemed by the legislature a means of redistributive justice. The court's corrective function is only to ensure that the owner receives the constitutionally required substitute for his property, namely "just compensation." Unfortunately, just compensation is rarely "full compensation."[76]

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71. *Id.* at 371-72 (citations omitted).

72. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

73. The "master feature" of private law is this direct connection between plaintiff and defendant, and that the institutional features of litigation and adjudication merely are the vehicle for the vindication of the plaintiff's claim. *See id.* at 10.

74. *See id.*

75. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954).

76. At any given time, most owners are adverse to selling at the market price, in the sense that relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs makes them value their property at more than its fair market value. The taking of their rights with "just compensation" (i.e., at fair market value) in effect confiscates the personal value (i.e., the "consumer surplus") that they obtain from the property. *See* Coniston Corp. v. Village of Hoffman

The proclivity of the court of appeals to transmute the private law function of corrective justice into the public law goal of redistributive justice is not new. In the well-known case of *Boomer v. Atlantic Cement Co.*,[77] for instance, the court largely acknowledged this distinction,[78] but proceeded to deny the private nuisance claimants the injunctive relief against the dust-generating cement plant to which they were entitled under settled law.[79] The effect was an arrogation of the power of eminent domain from the legislature to the court.[80] As the court of appeals later explained: "[I]t was logical in *Boomer*, where the adverse economic effects of a permanent injunction far outweighed the loss plaintiffs there would suffer, to limit the relief to monetary damages as compensation for the 'servitude' which had been imposed upon them."[81]

D. *The Rule of Law*

The bedrock principle of American justice was enunciated by Chief Justice Marshall in the celebrated case of *Marbury v. Madison*: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[82]

What makes for a "government of laws," or, more generally, the Rule of Law, is not an altogether simple thing. Richard Fallon recently noted that "the Rule of Law needs to be understood as a concept of multiple,

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Estates, 844 F.2d 461, 464 (7th Cir. 1988).

77. 257 N.E.2d 870 (N.Y. 1970).

78. The court stated:

> A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Id. at 871.

79. *See id.* at 875,

80. The court also appeared undisturbed by the fact that "inverse condemnation . . . may not be invoked by a private person or corporation for private gain or advantage." *Id.* at 876 (Jasen, J., dissenting in part).

81. Little Joseph Realty v. Town of Babylon, 363 N.E.2d 1163, 1168 (N.Y. 1977).

82. 5 U.S. (1 Cranch) 137, 163 (1803).

complexly interwoven strands."[83] While interpretation and emphasis are points on which scholars differ, Fallon elucidated five basic elements of the Rule of Law that modern accounts generally emphasize. These elements are: (1) capacity (rules must be able to guide people in their affairs); (2) efficacy (rules actually do serve to guide people); (3) stability (the rule must be reasonably stable so that people can plan and coordinate their actions over time); (4) supremacy of legal authority (the law should rule officials, including judges, as well as ordinary citizens); and (5) impartiality (courts should enforce the law and use fair procedures).[84]

When considering property rights and inverse condemnation actions, we must recall that the state itself has a vital interest in the outcome of adjudications. If the state must compensate a landowner for a diminution in his rights, the state thereby is encouraged to weigh carefully the value it places on those rights against the compensation that it must pay the owner. Just as important, compensation enhances political accountability by forcing officials to explain their actions to the electorate that supplies the public fisc from which compensation is paid.[85] After all, the takings clauses of the federal and state constitutions were established largely to place restraints upon the ability of the government of the day to finance its political agenda at the expense of the few.[86]

With this problem of governmental over-reaching in mind, it is useful to note two other views about the Rule of Law. In an influential book, Lon Fuller argued that the Rule of Law requires publicly promulgated rules, laid down in advance, and adherence to at least some natural law values.[87] In another prominent book, Friedrich Hayek argued that adherence to the Rule of Law requires that government in all its actions is bound by rules determined and announced in advance. Nothing less would permit the people to anticipate with reasonable certainty how government will use its coercive powers in given circumstances and to plan one's affairs based on this knowledge.[88]

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83. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997).

84. *See id.* at 8-9.

85. *See infra* notes 252-53 and accompanying text.

86. *See supra* text accompanying note 65; *see also* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19 (1987) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960): "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'").

87. *See generally* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

88. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-73 (1944).

Judicial holdings that permit the state substantial latitude in redefining property rights while at the same time enacting legislation that would have required it to compensate landowners absent the redefinition cannot coexist easily with the Rule of Law. Bluntly put, there is greater need for judicial oversight when "the State's self-interest is at stake."[89]

In its opinion in *Gazza*, the court of appeals declined to reconsider *de St. Aubin v. Flacke*,[90] the 1986 case in which it imposed on landowners asserting takings claims a "beyond a reasonable doubt" standard of proof. In *Gazza*, the petitioner had contended that this burden was so onerous as to deny him the equal protection of the law, but the court responded that Gazza would have lost under a lesser standard such as preponderance of the evidence.[91] While the "beyond a reasonable doubt" formulation has been adopted in some states,[92] other jurisdictions require lesser burdens.[93] It seems anomalous, especially in light of governmental self-interest and the immense practical impediments facing owners who seek to raise regulatory takings claims,[94] that plaintiffs in a takings case would have to meet the same burden of proof to which the state is subjected in securing a criminal conviction. Given their holdings, the quartet cases make it more necessary than before that *de St. Aubin v. Flacke* be revisited.

While a detailed treatment of the issue would be beyond the scope of this article, the holdings in the quartet cases that bar successors from making "as applied" challenges to restrictions imposed during a prior ownership serves as a functional statute of limitations.[95] Statutes of limitations can result in state intrusions upon private land for the requisite

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89. United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).

90. 496 N.E.2d 879, 885 (N.Y. 1986) (A "landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt.") *quoted in* Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1038 (N.Y. 1997).

91. *See Gazza*, 679 N.E.2d at 1038 n.3.

92. *See, e.g.*, Zavala v. City of Denver, 759 P.2d 664, 670 (Colo. 1988); Village of Cahokia v. Wright, 296 N.E.2d 30, 35 (Ill. App. Ct. 1973), *aff'd* 311 N.E.2d 153 (Ill. 1974).

93. *See, e.g.*, Lindsey v. City of Camden, 393 S.W.2d 864, 865 (Ark. 1965) (requiring preponderance of the evidence); Candler & Assocs. v. City of Roswell, 373 S.E.2d 19, 20 (Ga. 1988) (requiring clear and convincing evidence); *In re* Miller, 482 A.2d 688, 692 (Pa. Commw. Ct. 1984) (requiring a "heavy burden").

94. *See infra* text accompanying note 194.

95. *See* Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953 (1995).

period depriving owners of property rights through "adverse taking."[96] They also may impose so short a filing period as to make it difficult even for an alert owner to launch a timely appeal.[97] Statutes of limitations, to the extent they are applicable to challenges to governmental regulations, implicate the state's self-interest whether they are based on the passage of time or on the transfer of title. Thus their reasonableness should be subjected to stricter judicial monitoring.

III. ISSUES

The takings quartet raises two principal constitutional issues: (1) the extent to which a preexisting regulation inheres in a purchaser's title under *Lucas v. South Carolina Coastal Council*;[98] and (2) the extent to which it precludes the purchaser from forming an "investment-backed expectation" in the proscribed use under *Penn Central Transportation Co. v. City of New York*.[99] Before considering these issues, however, we will consider the practical justifications offered by the court of appeals for not permitting purchasers to challenge preexisting regulations in the context of its existing jurisprudence in related areas.

A. *Claims of Post-Enactment Purchasers Before the Quartet*

Prior to the quartet cases, the New York Court of Appeals developed doctrines permitting successors to challenge preexisting land use regulations on the ground of facial unconstitutionality, but disallowing successors from challenging the denial of variances.

As a historical backdrop to these divergent lines of cases, it is useful to recall that in the earliest period of the common law land was transferred with strings attached.[100] However, the statute *Quia Emptores*[101] was

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96. *See, e.g.*, Weidner v. Alaska Dep't of Transp. and Pub. Facilities, 860 P.2d 1205, 1212 (Alaska 1993) (holding that prescription by the state is not a takings after the prescription term had been satisfied).

97. *See, e.g.*, Hensler v. City of Glendale, 876 P.2d 1043, 1056-61 (Cal. 1994) (barring claim because of failure to file within required 120 days after statute became effective).

98. 505 U.S. 1003 (1992).

99. 438 U.S. 104, 124 (1978).

100. *See* De Peyster v. Michael, 6 N.Y. 467 (1852) (surmising that many of the early enfeoffments were made so as to require the feoffee to render personal service) *discussed in* 1 THOMPSON, *supra* note 48, at § 29.02.

101. Statute of Quia Emptores, *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 174 (Carl Stephenson & Frederick George Marcham eds., rev. ed. 1972).

intended to make land alienable, and the power of alienation has since "become an integral part of the fee simple."[102]

1. Facial Takings Claims

In its opinion in *Gazza*, the court of appeals noted: "Of course, the State may exercise its police power of eminent domain only upon a showing of a valid legislative purpose. Thus, it has been recognized that a subsequent purchaser may attack previously enacted regulations that affect the purchased property as beyond government's legitimate police power."[103]

The court of appeals quoted as authority the United States Supreme Court's 1922 landmark decision in *Pennsylvania Coal Co. v. Mahon*,[104] which held that non-physical regulations could result in a constitutional taking; a holding that remains the foundation of regulatory takings law:[105] "[I]t always is open to interested parties to contend that the legislature has gone beyond its constitutional power."[106]

The court of appeals also quoted from its own decision in *Vernon Park Realty v. City of Mount Vernon*[107] as follows: "Purchase of property with knowledge of the restriction does not bar the purchaser from testing the validity of the zoning ordinance since the zoning ordinance in the very nature of things has reference to land rather than to owner. Knowledge of the owner cannot validate an otherwise invalid ordinance."[108]

The decision in *Vernon Park* seems eminently sensible. In it, the court of appeals also had summarily rejected the city's argument that the purchaser had not acted in good faith because the purchaser's contract permitted it to reconvey the parcel to the seller if the purchaser could not obtain permission to use the parcel for business purposes.[109] The crucial

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102. 1 THOMPSON, *supra* note 48, at § 29.02 n.83 (1994) (citing Coke on Littleton, 201 b. 2 WILLIAM BLACKSTONE, COMMENTARIES ch. 7).

103. Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1039 (N.Y. 1997), *cert. denied*, 118 S. Ct. 58 (1997).

104. 260 U.S. 393 (1922).

105. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting).

106. *Gazza*, 679 N.E.2d at 1039-40 (quoting *Pennsylvania Coal Co.*, 260 U.S. at 413).

107. 121 N.E.2d 517 (N.Y. 1954).

108. *Id.* at 520 (citation omitted).

109. *See id.*

issue was not the identity of the owner or conjectures about its bona fides; "in the very nature of things" it was the land itself.[110]

Thus, had Gazza challenged the constitutionality of the wetland ordinance on its face, the fact that he was a purchaser with knowledge would not have barred him from asserting his claim. However, the *Gazza* court continued, *Vernon Park* was inapplicable:

> While any party adversely affected by government action may attack such action as unconstitutional and illegitimate, petitioner does not claim that wetlands regulation is beyond the State's power. Rather, petitioner simply claims that the property interest he had in building a dwelling on his land was taken by the State through the denial of the setback variance.[111]

2. Claims to a Variance

As one might infer from the previous discussion, the court of appeals has accorded quite different treatment to the knowing purchaser who seeks a variance. In what became a leading national case on variances, *Otto v. Steinhilber*,[112] the court of appeals held that a landowner had to demonstrate "unnecessary hardship" in order to obtain what in that case was a use variance.[113]

After *Otto*, the substantive requirements for use and area variances have diverged. The treatment of area variances generally has been more liberal, although marked at one point by "hopeless confusion."[114]

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110. *See id.*

111. *Gazza*, 679 N.E.2d at 1040.

112. 24 N.E.2d 851 (N.Y. 1939).

113. *Id.* at 852. While the term "use variance" was not mentioned in *Otto*, the appellate division subsequently explained that "unnecessary hardship" language in *Otto* "is intended to apply to a variance in the *use* of premises and not to a variance in the *area* upon which a building may be constructed." Village of Bronxville v. Francis, 150 N.Y.S.2d 906, 908-09 (App. Div. 1956), *aff'd* 135 N.E.2d 724 (N.Y. 1956). The justification of a stricter rule for the variance is that "[t]he classification of a particular use as permitted in a zoning district is 'tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood' as opposed to a variance which would allow an otherwise prohibited use." Twin County Recycling Corp. v. Yevoli, 688 N.E.2d 501 (N.Y. 1997) (quoting North Shore Steak House v. Board of Appeals, 282 N.E.2d 606, 609 (N.Y. 1972)).

114. James A. Coon et al., *The Land Use Recodification Project*, 13 PACE L. REV. 559, 577 (1993) (referring to Fulling v. Palumbo, 233 N.E.2d 272 (N.Y. 1967)); *see also* 1 ANDERSON'S AMERICAN LAW OF ZONING § 3.17 (Kenneth H. Young ed., 4th ed. 1996) [hereinafter ANDERSON] (*Fulling* was routinely used in constitutional litigation until "the New York Court of Appeals rejected any application of the *Fulling* decision to

It has been clear that the court will not permit purchasers to obtain variances from use restrictions predating their purchase.[115] However, a striking aspect of the rule is that the court has never presented a justification for it.[116] The leading case, *Clark v. Board of Zoning Appeals*,[117] was decided in 1950 upon egregious facts.[118] After reciting the facts and as a prelude to its analysis, the court of appeals declared: "We could end this opinion at this point by saying that one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of 'special hardship.'"[119] While the purchaser clearly was undeserving of the variance, the court did not explain why his status as a purchaser should contribute to the result.

The court's subsequent decision in *Hoffman v. Harris*[120] reiterated its *Clark* holding but explained only the substantive differences between use and area variances.[121] In *DeSena v. Board of Zoning Appeals*,[122] it did no more than restate the rule.[123]

Another important omission is that the court of appeals has never analyzed whether the term "self-created hardship" should be limited to a hardship that is *created* by the purchaser, or should include a preexisting hardship that is *acquired* by the purchaser. In *Clark*, there was no proof

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constitutional cases"); Sasso v. Osgood, 657 N.E.2d 254 (N.Y. 1995) (Zoning Board must undertake a balancing test, weighing benefits to applicant against detriment to health, safety, and welfare of the neighborhood); Stewart v. Ferris, 653 N.Y.S.2d 973 (App. Div. 1997) (Zoning Board's denial of an application for area variance was upheld because petitioner's hardship was self-created).

115. *See infra* text accompanying notes 117-23.

116. *See id.*

117. 92 N.E.2d 903 (N.Y. 1950).

118. A funeral home, then located on a main thoroughfare, purchased a lot on a nearby residential street that also had some authorized nonresidential uses such as physicians' homes and offices, and a church and its school. A real estate broker testified for the buyer that the lot would not be suitable for a fine residence, but admitted that no effort had been made to market it for any of the purposes permitted by the statute. There also was evidence that the planned funeral home would hurt the neighborhood. *See id.*

119. *Id.* at 903 (quoting Henry Steers, Inc. v. Rembaugh, 20 N.Y.S.2d 72 (App. Div. 1940)).

120. 216 N.E.2d 326 (N.Y. 1996).

121. *See id.* at 330 (declaring that conversion of building and gatehouse on large estate to residences would require a use variance and an area variance, respectively).

122. 379 N.E.2d 1144 (N.Y. 1978) (involving a small area variance).

123. "That a landowner's difficulty is in a sense self-created is certainly a factor to be taken into account in considering an application for an area variance, although it is less significant a consideration in such cases than in those involving use variances." *Id.* at 1145.

that a hardship ever existed, making the court's statement that a knowing buyer "cannot thereafter have a variance on the ground of 'special hardship'"[124] nothing more than dicta. If we hypothesize that the previous owner had lived in an existing modest residence and that the undertaker demolished it and constructed a large mansion before seeking a use variance, the undertaker's accurate representation that the building could not earn a fair return in residential use would be to no avail. This is the classic self-created hardship. The undertaker was familiar with the attributes of the neighborhood and with zoning restrictions. Its construction of a building that would not be financially viable under existing law was its own fault. An alternative assumption is that the previous owner had constructed the fine mansion and that a subsequent and unanticipated zoning enactment precluded its conversion into a commercial use. If the undertaker now purchases and seeks a variance, it has assumed the hardship, but did not create it. *Clark* does not address this situation at all. Neither do subsequent appellate division cases allow for this possibility, as exemplified by the flat assertion that "[h]ardship is self-created, for zoning purposes, where the applicant for a variance acquired the property subject to the restrictions from which he or she seeks relief."[125]

Clark has considerable support in black letter law.[126] Yet it seems largely illogical, since the variance is concerned with the attributes of the land and not the attributes of the owner. The best justification of the rule is the "windfall" argument—the purchaser paid a price that took the rule into account.[127] Yet the "windfall," if that is the correct term, did not come at the expense of the seller, who for one reason or another did not challenge the rule.[128] Nor would the possibility of a "windfall" preclude a facial constitutional challenge to the underlying zoning ordinance under the *Vernon Park* doctrine.[129] Nor would an owner who rejects purchase

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124. Clark v. Board of Zoning Appeals, 92 N.E.2d 903, 903 (N.Y. 1950).

125. Lim-Kim v. Zoning Bd. of Appeals, 586 N.Y.S.2d 633, 635 (App. Div. 1992) (citing Tharp v. Zoning Bd. of Appeals, 526 N.Y.S.2d 646 (App. Div. 1988); *see also* First Nat'l Bank of Downsville v. Board of Zoning Appeals, 628 N.Y.S.2d 199 (App. Div. 1995) (holding bank's failure to exercise reasonable diligence in ascertaining applicable zoning prior to purchase constituted substantial evidence of self-imposed hardship).

126. *See* 3 ANDERSON, *supra* note 114, at § 20.30.

127. *See, e.g.*, Fordham Manor Reformed Church v. Walsh, 155 N.E. 575 (N.Y. 1927).

128. *See infra* text accompanying note 162 (discussing some of the reasons sellers often do not challenge such rules).

129. Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517 (N.Y. 1954); *see also supra* text accompanying notes 107-11.

offers at fair market value and instead litigates a challenge to restrictive zoning be deemed to seek an undeserved "windfall."[130]

Courts consistently have held that the difficulties that might constitute a "hardship" cannot be specific to the applicant or his family.[131] As one New York court noted: "It is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight which is the criterion."[132] Indeed, a variance runs with the land, and once it is granted its benefits may be enjoyed by successors to the owner who obtained it.[133]

Decisions of the New Jersey Supreme[134] and Superior[135] Courts, and of the Commonwealth Court of Pennsylvania[136] articulately express the view that the real issue is not whether the regulation precedes the purchase, but whether it precedes the activity or investment giving rise to the hardship. The Supreme Court of Virginia recently has adhered to this principle in a case where the purchaser bought at a low price with the intent of seeking a variance.[137] The court rejected the argument that self-inflicted hardship constituted a bar, "because, under [this] analysis, nonconforming property could never be developed by obtaining a variance after the property is sold."[138] A comprehensive study of "self-induced hardship" in variances by Osborne Reynolds concludes that no single

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130. *See Vernon Park*, 121 N.E.2d at 517.

131. *See* 3 ANDERSON, *supra* note 114, at § 20.30.

132. Congregation Beth El v. Crowley, 217 N.Y.S.2d 937, 942 (Sup. Ct. 1961).

133. *See* 3 ANDERSON, *supra* note 114, at § 20.30 & n.31.

134. *See* Wilson v. Borough of Mountainside, 201 A.2d 540 (N.J. 1964).

> We wish to make it clear that if a prior owner would be entitled to such relief, that right is not lost to a purchaser simply because he bought with knowledge of the zoning regulation involved. This situation is not within the realm of the self-created hardship which will generally bar relief.

Id. at 554.

135. *See* Moreney v. Borough of Old Tappan, 633 A.2d 1045 (N.J. Super. Ct. 1993) (collecting cases since *Wilson* and reiterating principle).

136. *See* Zoning Hearing Bd. v. Grace Bldg. Co., 395 A.2d 1049 (Pa. Commw. Ct. 1979).

> Certainly, the mere fact that property changes hands after the adoption of zoning cannot be a basis for holding that no variance can thereafter be granted with respect to any matter of which the purchaser could be aware. Because zoning considerations relate primarily to the circumstances of the property and not to the identity of the owners, it would seem that subsequent purchasers can stand in the shoes of the original owner with respect to a variance, provided that the claimed hardship does not arise out of the purchase itself . . . .

Id. at 1052.

137. *See* Spence v. Board of Zoning Appeals, 496 S.E.2d 61, (Va. 1998).

138. *See id.* at 63.

factor should be determinative and that courts should consider the circumstances of the purchase together with the other factors that might have a bearing.[139]

However, as Professor Reynolds adds: "Variances are exceptional, discretionary, and never a matter of absolute right."[140]

B. *The Denial of Standing for Purchasers' "As Applied" Takings Claims*

While entitlement to a variance might not be a matter of "absolute right," just compensation for a taking is.[141] Thus, the court of appeals' decision in the quartet cases to disallow challenges by subsequent purchasers is one of constitutional dimensions. The court's principal analysis was contained in *Anello v. Zoning Board of Appeals*.[142]

1. The Non-Applicability of the *Vernon Park* Doctrine

In *Anello*, the petitioner had sought permission to construct a one-family dwelling, although her lot was deemed too small under a preexisting "steep slope" ordinance.[143] The Zoning Board of Appeals had denied a variance, based on petitioner's "full knowledge" and because the variance would have a "substantial detrimental impact."[144]

At the court of appeals, petitioner did not press the variance denial, but instead asserted her takings claim.[145] Writing for the court, Judge Ciparick began by noting that petitioner's "as applied" challenge was not the frontal attack on the ordinance that was required of a subsequent purchaser under *Vernon Park*.[146] Why did petitioner not seek shelter under *Vernon Park*? To borrow a short answer, "a facial attack on the

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139. *See* Osborne M. Reynolds, Jr., *Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One but Himself to Blame?*, 20 URB. LAW. 1, 22 (1988).

140. *Id.*

141. *See* United States v. Clarke, 445 U.S. 253, 257 (1980) (holding the Takings Clause of the Fifth Amendment to be "self-executing").

142. 678 N.E.2d 870 (N.Y. 1997), *cert. denied*, 118 S. Ct. 2 (1997).

143. *See id.* at 870.

144. *See id.*

145. *See id.* at 871.

146. *See id.* ("Importantly, petitioner does not seek to invalidate the steep-slope ordinance as an improper exercise of the Village's police power, but only challenges the ordinance as applied to her property.") (citing Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997)); *see also supra* text accompanying notes 104-08.

regulation results in a case which the property owner *can* litigate, but virtually *cannot* win."[147]

2. Takings Losses as Inuring to Sellers

Judge Ciparick then fashioned an opinion that operated on two levels. He asserted directly that the quartet landowners had no rights to, or expectations about, property, and that this view was congruent with United States Supreme Court decisions. Also, he asserted that the practical elements of the seller's and purchaser's situations resulted in no taking. The direct constitutional arguments will be addressed later,[148] but the practical arguments are taken up here. In this connection, Judge Ciparick wrote:

> The rule that preexisting regulations inhere in a property owner's title will affect the *value* of property, but this should furnish ample incentive to the prior owner–the party whose title has been redefined by the promulgation of a new regulation–to assert whatever compensatory takings claim it might have. If a prior owner, whether immediate or not, fails to assert a takings claim, it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title. Of course, the parties can condition sale on receipt of the necessary use allowances or prosecution of a takings claim. Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc. Additionally, the rule advanced by the dissent would have the effect of unsettling property law and other land-use restrictions throughout the State. The bright-line rule articulated in *Kim* and *Gazza*, which allows for a subsequent purchaser to challenge the validity of previously enacted laws (as opposed to pursuing a compensatory takings claim), will enhance certainty and, to that extent, facilitate transferability of title.[149]

This paragraph provides a plethora of justifications and is well worth parsing:

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147. MICHAEL M. BERGER, REGULATORY TAKINGS UNDER THE FIFTH AMENDMENT: A CONSTITUTIONAL PRIMER 19 (1994) (discussing ripeness issues). *See infra* Part III.B.3.

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

149. *Anello*, 678 N.E.2d at 871 (emphasis in original).

> *The rule that preexisting regulations inhere in a property owner's title will affect the* value *of property, but this should furnish ample incentive to the prior owner—the party whose title has been redefined by the promulgation of a new regulation—to assert whatever compensatory takings claim it might have.*[150]

At the outset, the fact that regulations will affect "value" is not relevant to ownership—landowners own rights in use and not in value.[151] The court implies that buyers will not suffer losses as a result of the quartet holdings since these will inure to sellers. Sellers, in turn, will change their behavior. They will ferret out impermissible regulations and obtain any compensation due by suing in inverse condemnation prior to sale. Buyers also will suffer no loss, since they will receive implicit compensation in the form of a reduced purchase price. This analysis bespeaks touching faith in the ability of the market to quickly and effortlessly adjust burdens and reduce losses. It is the same faith that led California Supreme Court Justice Roger Traynor to assume that, in tort cases, insurance could effortlessly be substituted for fault.[152] While this account is appealing, it ignores reality for several reasons.

Two reasons are ably presented in Judge Wesley's dissent. The more simple one is that the prior owner might have been a decedent who, "through infirmity or other reason, could not challenge a confiscatory regulation prior to the decedent's death."[153] Judge Ciparick's opinion converts an important component of the fee simple—the right to use one's land—into a personal right that has to be exercised during life or else vanishes.[154] As the dissent might have gleaned, this use-it-or-lose-it theory seems eerily reminiscent of a feudal unfairness that had been cured in the year 1176.[155] Second, the prior owner might have overlooked or

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150. *Id.*

151. A new interstate highway will greatly reduce the "value" of a motel on the old main road nearby, but that is not a taking, since the motel did not "own" the stream of weary travelers passing its front door.

152. *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring). "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* at 441.

153. *See Anello*, 678 N.E.2d at 873 (Wesley, J., dissenting).

154. *See id.*

155. If *A* was seised of land (i.e., had ownership) in fee simple and *B* entered and ousted *A*, claiming a freehold, *B* now had seisin and *A* was disseised. *A* could recover seisin through self-help, or through an elaborate process that was the equivalent of a full action to quiet title. The assize of novel disseisin (1166) compelled the summary

misinterpreted a regulation.[156] Judge Wesley's dissent in *Anello* reiterated the concern raised in his dissent in *Kim* that the takings quartet effectively forces upon landowners a duty "to keep abreast of regulatory enactments."[157] If the facts in *Anello* suggest only that a high burden is involved, *Kim* makes it clear how unreasonable that duty can be.

According to Judge Ciparick, after the legal grade of the road fronting the Kims land had been raised, a map reflecting the change "was properly filed in the office of the Queens Borough President." When they purchased their parcel ten years later, "[p]laintiffs had constructive notice of this feature by virtue of the filed map."[158]

Yet as the tenor of a contemporary account in a respected legal newspaper indicates, this casual assertion of notice did not comport with local practice and added confusion and the possibility of extra expense to the transfer of real estate generally:

> Why the plaintiffs (or their title insurers) should have had, or how they could have had, any notice of this map was not discussed. There is no indication that the map was filed in the Registrar's office or in the County Clerk's office. Further, there was no indication whether the map was indexed against the property in the Borough President's office. The question must be posed: to what extent must title companies hereafter be required to search such places as the Queens Borough President's office?[159]
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> *If a prior owner, whether immediate or not, fails to assert a takings claim, it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title.*[160]

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restoration of the person who had been ejected and forced the ousting claimant to bring an action at law. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 358-59 (5th ed. 1956). However, if *A* died prior to recovering under assize of novel disseisin, his heir could not pursue it. Since *A*'s right was regarded as a chose in action and not as real property, it died with him. *See* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 100-01 (2d ed. 1988). The assize of *mort d'ancestor*, established ten years later, permitted the heir to pursue the claim. *See* PLUCKNETT, *supra*, at 360.

156. *See Anello*, 678 N.E.2d at 873 (Wesley, J., dissenting).

157. *See id.*

158. Kim v. City of New York, 681 N.E.2d 312, 313 (N.Y. 1997).

159. John M. Armentano, *Taking Claims; Property Owners Limited in Challenging Zoning Regulations*, N.Y.L.J., Mar. 5, 1997, at 5.

160. *See Anello*, 678 N.E.2d at 871.

Another reason why the court's analysis ignores reality is that its requirement that the prior owner "assert whatever compensatory takings claim it might have" assumes a sharply defined claim extant under then-current law. Perhaps the court's paradigmatic case would be one in which a parcel of undeveloped land in the immediate path of suburban development is restricted to remain in its natural state. The owner likely would be deprived of all economic value in the parcel and thus enjoy a clear regulatory takings cause of action under *Lucas*.[161] Yet often, or perhaps most of the time, the owner's deprivation is not so clear-cut. Assume, for instance, that there is no obvious best use for a parcel of land and that its "fair market value" derives from the fact that it is close enough to a city so that five or ten years later some more intense use will materialize. Is the owner now to devote considerable resources to challenging an ordinance that might preclude one of those possible uses? Perhaps not, but on the other hand the surrounding lands probably will be developed with uses consistent with the ordinance, so that a court would be much more likely to uphold it when challenged ten years hence than if challenged today. Also, the owner might die within ten years, or be forced to sell before the time is ripe for development. The buyer, for whom the restriction would be "preexisting," would be foreclosed from litigating when contemplating a sale to an actual developer of the land. In short, premature challenges to regulations are just as wasteful as premature development of land.[162] This cuts at cross-purposes to the orderly growth that the New York Court of Appeals has pioneered in trying to achieve.[163]

> *Of course, the parties can condition sale on receipt of the necessary use allowances or prosecution of a takings claim.*[164]

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161. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

162. The pressure on current owners to challenge restrictions under the quartet cases even if the land is years away from viable economic development is part of a larger pattern. The state and its localities signal that there will be caps on development but do not provide clear rules on how development rights are to be allocated. This creates a "common pool" of permissible development, which owners (prematurely) rush to exploit. *See generally* Alan E. Friedman, *The Economics of the Common Pool: Property Rights in Exhaustible Resources*, 18 UCLA L. REV. 855 (1971). The resulting waste reduces the aggregate wealth for all. *See* H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

163. *See* Golden v. Planning Bd., 285 N.E.2d 291 (N.Y. 1972) (approving 18-year phased growth scheme with points awarded to prospective developers based on factors such as infrastructure availability).

164. *Anello*, 678 N.E.2d at 871.

If the land is ripe for development so soon after the enactment of the restriction that the owner at that time likely has not died or sold out, the buyer and seller can coordinate a joint strategy. It is likely that the buyer will be more sophisticated and will control the litigation. Some purchasers (and sellers) will benefit from this exception, but many will not. The effect of highlighting it is to make it clear that the rule is a trap for the unwary or unlucky who cannot avail themselves of it. In his opinion in *Gazza*, Judge Smith added "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court."[165] If there is a pressing reason why a takings claim should be enforceable by no one other than the owner at the time of its enactment, there is little sense in leaving open the possibility of assignment or sale. If the court were inclined to proceed incrementally, in good common law fashion, a good place to start would have been to explain the *Clark* line of cases and to reconcile them with *Vernon Park*.[166] In the court's development in the takings quartet of the doctrine that regulatory takings claims do not survive a sale, the question of whether the seller could assign them to the buyer by a separate instrument is not an "entirely separate inquiry."[167]

> *Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc.*[168]

The sentence is dubious in three respects. First, the "windfall" would arise only to the extent that the court of appeals relents from the stringency of a rule that it rather casually adopted without any focus upon the type of problem now at hand. Beyond that, the buyer would gain only upon procuring a determination that the application of the land use restriction to the parcel was invalid and if the seller had failed to challenge the application. Thus, the buyer's victory would be based on diligence, legal acumen, and a sizeable investment in litigation. These factors would hardly make the buyer's victory undeserved, as the connotation of "windfall" would have it.

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165. Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1039 n.4 (N.Y. 1997).

166. *See supra* text accompanying notes 117-23 (discussing these cases).

167. *See infra* text accompanying note 375 (discussing argument that continuation of viability of takings claim after transfer would constitute a "circularity").

168. *See Anello*, 678 N.E.2d at 871.

Second, a "rule tolerating" buyer suits would generate only fleeting gains. As soon as word spread of the abrogation of the *Clark* doctrine, everyone would understand that buyers enjoyed the same legal rights as sellers. The price of land thereafter would reflect only its highest and best use, taking into account the possibility that very restrictive zoning would be struck down by the courts. Astute buyers might have an advantage over sellers in understanding the potential advantage in challenging land use restrictions, but that should have no more legal relevance than their advantage in understanding the potential of converting farm land to housing subdivisions or in obtaining creative financing. The court's complaint about "speculation" also suggests that it objects more to land being treated as a commodity than it is concerned about maintaining a just balance between the police power and property rights. The economic effect of "speculation" is, after all, a smoother and more rapid re-pricing of assets to reflect their underlying value than otherwise would occur.

Third, concern that speculation might be a "detriment to the public fisc" should not, in those terms, be the province and duty of the judicial department.[169] The role of the court is not to enhance the public fisc and not to speculate upon whether permitting buyers to assert claims that had been owned by their sellers would hurt the public fisc.[170] It is true that alienability of land leads to more imaginative uses of land, and that state and local officials attempt to regulate new land uses for a variety of reasons. But the imposition of unduly-stringent standing requirements is not a propitious way of determining the reasonableness or constitutionality of regulations that purchasers might challenge.

> *Additionally, the rule advanced by the dissent would have the effect of unsettling property law and other land-use restrictions throughout the State. The bright-line rule articulated in* Kim *and* Gazza, *which allows for a subsequent purchaser to challenge the validity of previously enacted laws (as opposed to pursuing a compensatory takings claim), will enhance certainty and, to that extent, facilitate transferability of title.*[171]

Ceteris paribus clear rules are better. But the issue is whether a gain in administrative efficiency is an adequate substitute for loss of allocative efficiency and fairness. Unreasonable rules impose burdens on the economy by unnecessarily interfering with higher-value uses of land. Present owners are subjected to increased burdens of continually reviewing

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169. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

170. *See id.*

171. *See Anello*, 678 N.E.2d at 871.

regulatory changes. The losses suffered will fall upon a few, and have little correlation with their degree of dereliction from their newly-augmented duties.

3. The Impracticality of "as Applied" Challenges

While the court of appeals has precluded purchasers from bringing "as applied" takings challenges partly based on the assertion that sellers could adequately vindicate their constitutional claims, the facts suggest otherwise. Present United States Supreme Court doctrine makes facial challenges an impractical alternative for either seller or purchaser.[172] Thus, even those owning land at the time stringent restrictions are enacted face daunting hurdles and years of litigation before a potential sale.

a. The Facial Challenge Is an Inadequate Substitute

A powerful benefit of the facial challenge to the constitutionality of a land use regulation is that a purchaser may raise it long after the restriction is enacted.[173] However, the burden of proof is simply too high to make the facial challenge feasible.[174] The disparate treatment of facial and "as applied" challenges to land use regulations was evident in the United States Supreme Court's landmark decision in *Village of Euclid v. Ambler Realty Co.*,[175] and arose partly from the circumstances of that case. The parties framed *Euclid* as test litigation.[176] Therefore, the landowner did not request permission for a particular use of its parcel and institute suit to challenge the subsequent denial.[177] Rather, it sought a categorical invalidation of zoning, and thus sued only to enjoin enforcement of the ordinance in toto.[178]

It was in this context that Justice Sutherland, writing for the Court, refused to consider the "tedious and minute detail" of the ordinance and

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172. *See infra* Part III.B.3(a).

173. *See* Vernon Park Realty v. City of Mount Vernon, 121 N.E.2d 517 (N.Y. 1954); *see also supra* text accompanying notes 104-08; 1 ANDERSON, *supra* note 114, at § 3.34 ("A landowner may challenge constitutionality of zoning ordinance as it applies to his property . . . .").

174. *See id.*

175. 272 U.S. 365 (1926).

176. *See* Arthur V.N. Brooks, *The Office File Box—Emanations from the Battlefield*, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 3, 3-4 (Charles M. Haar & Jerold S. Kayden eds., 1989).

177. *See id.*

178. *See id.*

engage in a "piecemeal dissection" of it.[179] Instead, he considered the constitutionality of the ordinance as a whole.[180] On the other hand, he noted, where the challenge is to the infringement of a "specific right," some aspects of the ordinance "may be found to be clearly arbitrary and unreasonable."[181]

Sutherland took it as self-evident that the police power could protect the "residential public" from injurious commercial establishments.[182] He asserted that any nonresidential uses in residential areas might result in fire, contagion, or disorder.[183] He singled out the apartment house as often "a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district."[184]

> [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes *be fairly debatable*, the legislative judgment must be allowed to control.[185]

Two years later, in *Nectow v. City of Cambridge*,[186] the Court again considered a comprehensive zoning ordinance similar to that upheld in *Euclid*.[187] Justice Sutherland wrote the opinion finding for the landowner. The difference was that *Nectow* was not a facial challenge to a residential zoning classification, but a challenge to what was deemed the unreasonable and arbitrary application of that ordinance to a parcel generally surrounded by commercial and industrial uses.[188]

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179. *Village of Euclid*, 272 U.S. at 395.

180. *See id.*

181. *Id.*

182. *See id* at 389-90.

183. *See id.* at 392.

184. *Id.* at 394.

185. *Id.* at 388 (emphasis added) (citations omitted).

186. 277 U.S. 183 (1928).

187. 272 U.S. at 365.

188. *See Nectow*, 277 U.S. at 186.

In *Euclid*, the United States Supreme Court gave its imprimatur to comprehensive zoning and articulated that it would uphold a zoning ordinance so long as the validity of the classification "be fairly debatable." In *de St. Aubin v. Flacke*,[189] the New York Court of Appeals has promulgated a "beyond a reasonable doubt" standard.[190] Since most zoning ordinances follow a standard form and articulate generally accepted aspirations,[191] the likelihood that an owner bringing a facial challenge could prove that the ordinance is arbitrary and unreasonable in *all* circumstances is remote. In the course of summarizing and affirming its chary view of facial challenges from the time of *Euclid*, the United States Supreme Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*[192] declared them to present an "uphill battle."[193]

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189. 496 N.E.2d 879 (N.Y. 1986).

190. Holding that "[a] landowner who claims that land regulation has effected a taking of his property bears the heavy burden of overcoming the presumption of constitutionality that attaches to the regulation and of proving every element of his claim beyond a reasonable doubt." *Id.* at 885.

191. The Standard State Zoning Enabling Act, issued with various modifications by the United States Department of Commerce during the 1920s, has been the basis of most comprehensive zoning that followed. *See* 1 ANDERSON, *supra* note 114, at § 2.21.

192. 480 U.S. 470 (1987).

193. *See id.* at 495.

> This Court has generally been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government . . . . Rather, it has examined the taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors . . . .
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> These ad hoc, factual inquiries must be conducted with respect to specific property . . . .
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> . . . .
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> Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act . . . or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the mere enactment of the . . . Act constitutes a taking. The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land . . . .
>
> . . . .
>
> Petitioners thus face an uphill battle in making a facial attack on the Act as a taking.

Id. (citations omitted) (quotation marks omitted).

b. The "As Applied" Challenge Is Often "Unripe"

The "as applied" challenge is complex and expensive under any circumstances. However, the quartet cases also require that it often be brought prematurely.

Unlike other types of claims that might arise from a fleeting association of the parties, an "as applied" takings claim inevitably arises from months or years of negotiation between owners and developers and planning agencies and local legislators. The proof of whether an owner's single proposal has been unreasonably denied in the context of the location of the parcel and the character of community conditions and development requires elaborate and expensive expert testimony. Much more onerously, under the numerous prongs and subprongs of the *Williamson County* ripeness doctrine developed by the United States Supreme Court, the owner must demonstrate that it has come up with several different sets of proposals and has seen each of these through various types of review and appeals.[194]

The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[195] However, the *Williamson County* doctrine is "a special ripeness doctrine applicable only to constitutional property rights claims."[196]

The doctrine arose somewhat piecemeal during the past two decades, as the United States Supreme Court refused to decide at least six important cases on the merits because of ripeness considerations.[197] Four of these cases,[198] decided in the early and mid-1980s, resulted from a California

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194. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

195. Abbott Lab. v. Gardner, 387 U.S. 136, 148 (1967).

196. Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992). The doctrine has inspired a substantial literature. *See, e.g.*, Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995).

197. *See infra* text accompanying notes 198-202.

198. *See* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 172; San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

doctrine[199] limiting relief where regulations would constitute a taking to injunctive relief rather than just compensation.[200] The two other cases concerned rent control,[201] and whether egregious administrative delay constituted a violation of due process.[202] Under *Williamson County*, the owner must satisfy two prongs: that there has been a "final decision" by planning officials, and that the landowner has sought compensation through state procedures.[203] Among the many complications is that the plan the owner wants might not be considered sufficiently "meaningful,"[204] that a variance must be requested and denied,[205] and that a court might abstain from hearing the merits out of comity through the *Burford* abstention doctrine.[206] All but this last point are adaptable as ripeness requirements in state courts, as well.

The ripeness requirement has been seized upon by local officials, who have realized that they can avoid the reversal of a land use decision by the simple expedient of never quite making it and by always insisting that the owner make just one more modification in a proposal.[207] In some states, "finality" has been a vehicle for precluding landowners' claims not only from federal courts, but also from state courts as well.[208] The finality

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199. *See* Agins v. City of Tiburon, 598 P.2d 25, 28 (Cal. 1979) (holding that landowners challenging the constitutionality of zoning ordinances may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid," and limiting remedies to mandamus and declaratory judgment).

200. *See MacDonald, Sommer & Frates*, 477 U.S. at 340; *Williamson County Reg'l Planning Comm'n*, 473 U.S. at 172; *San Diego Gas & Elec. Co.*, 450 U.S. at 621; *Agins*, 447 U.S. at 255.

201. *See* Pennell v. City of San Jose, 485 U.S. 1 (1988) (upholding disputed regulations). For discussion of this opinion, see *infra* text accompanying notes 254-58.

202. *See* PFZ Properties, Inc. v. Rodriguez, 739 F. Supp. 67 (D.P.R. 1990) *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992) (whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983).

203. *See Williamson County Reg'l Planning Comm'n*, 473 U.S. at 172.

204. *See id.*

205. *See id.*

206. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943); *see also* Pomponio v. Fauquier County Bd. of Supervisors, 21 F.3d 1319, 1325 (4th Cir. 1994).

207. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 & n.22 (1981) (Brennan, J., dissenting) (warning of imposition of unreasonable delays and of advice given at meeting of municipal law officers that "if all else fails, merely amend the regulation and start over again").

208. *See, e.g.*, Rossco Holdings, Inc. v. State, 260 Cal. Rptr. 736 (Ct. App. 1989).

concept of *Williamson County* has been adopted by the New York Court of Appeals in *Church of St. Paul and St. Andrew v. Barwick*.[209]

c. Special Ripeness Problems in the Quartet Cases

The quartet cases are apt to exacerbate the difficulties that owners have in establishing ripeness. Their preclusion of "as applied" takings challenges by subsequent owners will mean that the challenges will have to be brought by the owner at the time the restriction is implemented, even if that is years prior to the development of the parcel or its surrounding area. Even if the existing owner is thus given "ample incentive"[210] to litigate, he will not have the ability to develop the detailed and exacting type of final proposal that the *Williamson County* doctrine contemplates. Given that he is but a proxy for an actual developer whose purchase is perhaps years down the road, the current owner can present only general arguments at best.

A potentially important (albeit unintended) consequence of the quartet approach is that it might permit subsequent purchasers to avoid its preclusion of "applied challenges" by taking their cases directly to federal court. The United States Supreme Court had established in *Williamson County* that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[211] Two years later it expressed in another context its belief that state court proceedings are adequate "in the absence of unambiguous authority to the contrary."[212]

The Supreme Court's ripeness doctrine implicitly is predicated on the notion that the owner who is about to undertake development should negotiate on their specifics and make administrative challenges to the denial of specifics. It cannot be that the owner of raw land who contemplates selling to a developer in a decade or two is in any position to undertake that burden. When the developer does purchase years later and submits a development proposal that is denied, it may be that the quartet cases withhold from that owner "an adequate procedure for seeking just compensation," and that the owner therefore is entitled to direct access to the federal courts.

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209. 496 N.E.2d 183 (N.Y. 1986).

210. Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (1997).

211. *Williamson County*, 473 U.S. at 195.

212. Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 15 (1987).

C. *Property and Legislation in the Quartet Cases: A Constitutional Analysis*

The previous discussion has focused largely on practical aspects of the New York Court of Appeals' position that landowners may not challenge preexisting regulatory enactments. We now turn to the court's contention that the new owner should lose as a matter of constitutional law. He does not possess the relevant property rights and he could not have formed a reasonable expectation of being able to use his land in the proscribed manner.

1. A Summary of Constitutional Principles

In its takings quartet opinions, the court of appeals shows a proclivity to leave unclear the distinction between holding and dicta. In addition, one case, *Basile v. Town of Southampton*,[213] probably should have been omitted, leaving the court a more compact takings trio. The court there had conceded that the owner had been subject to a valid private covenant to the same effect as the disputed regulation.[214]

In *Gazza,* the court held that the right of development did not inhere in the owner's title.[215] It nevertheless went on to discuss the trial court's alternative analysis and applied a "reasonable expectations" approach as well.[216] Likewise, Judge Ciparick's brief opinion in *Anello* was based on both inherement and reasonable expectations.[217] Judge Ciparick's more fulsome opinion in *Kim* is the most important of the quartet, since only in that case does the locality's physical intrusion make a "reasonable expectations" argument constitutionally insufficient.[218] And it is in *Kim* that the court elaborates on the inherement approach and its "background

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213. 678 N.E.2d 489 (N.Y. 1997), *cert. denied*, 118 S. Ct. 264 (1997).

214. *See supra* text accompanying notes 27-34.

215. *See* Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1040 (N.Y. 1977) ("[P]etitioner cannot base a taking claim upon an interest he never owned.").

216. *Id.* at 1043 (concluding petitioner's low purchase price reflected the "limitations on the property" then in effect, and that "his 'reasonable' expectations were not affected when the property remained restricted"). Judge Wesley concurred on this second ground alone.

217. *See* Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997).

218. *See* Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997), *cert. denied*, 118 S. Ct. 50 (1997).

principles" predicate.[219] Here, too, whether the court's historical analysis is holding or dictum is not clear.[220]

Prior to launching a more detailed analysis, it is useful to set forth a brief introduction to the underlying legal issues. Writing for the United States Supreme Court in 1922, Justice Holmes declared in *Pennsylvania Coal Co. v. Mahon*,[221] that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[222] The Court's general test for whether there is a regulatory taking was established in 1978 in a case that marks the apogee of land use regulation, *Penn Central Transportation Co. v. City of New York*.[223] In that cause célèbre,[224] the New York Court of Appeals held that the City Landmarks Preservation Commission's denial of permission to build a fifty-story office building over Grand Central Terminal, a beaux-arts masterpiece, did not constitute a taking.[225] The United States Supreme Court affirmed, in an opinion by Justice Brennan, who asserted that the Court's regulatory takings jurisprudence had not been based on fixed rules:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[226]

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219. *See id.*

220. *See infra* text accompanying notes 304-08.

221. 260 U.S. 393, 415 (1922).

222. *See id.* at 415.

223. 438 U.S. 104 (1978). While favorable to the government, *Penn Central* did explicitly uphold the concept of regulatory takings: "As is implicit in our opinion, we do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel." *Id.* at 123 n.25.

224. *See* STEVEN J. EAGLE, REGULATORY TAKINGS § 6-4(b) (1996) (describing heavily politicized background of case).

225. *See* Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977).

226. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citations omitted).

The *Penn Central* three-factor balancing test of character of the regulation, economic impact on owners, and the extent of interference with distinct investment-backed expectations[227] had been employed by the Court during the twenty years following its adoption, except when trumped by one of the Court's two categorical rules. The first of these rules is found in *Loretto v. Teleprompter Manhattan CATV Corp.*,[228] where Justice Marshall concluded for the Court "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[229] Thus, even a minor physical occupation that might have been deemed insufficient under *Penn Central* is compensable under the Takings Clause.

The second categorical rule is found in *Lucas v. South Carolina Coastal Council*,[230] a case in which a developer had paid $975,000 for two beachfront lots, the use of which was limited by a subsequent beachfront management act to small wooden sundecks.[231]

Writing for the Court, Justice Scalia found an exception to the *Penn Central* ad hoc balancing test in *Agins v. City of Tiburon*,[232] where the Court had "found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land."[233]

> [A]ffirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed

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227. *See id.*

228. 458 U.S. 419 (1982), *rev'g* 423 N.E.2d 320 (N.Y. 1981) (reviewing a New York statute permitting cable company to install wires and small hook-up box on plaintiff's apartment building without her consent). The opinion reversed the decision of the New York Court of Appeals, which had upheld the statute under police power, given the educational and community benefits of cable TV, and because there was neither an excessive economic impact on Mrs. Loretto nor deprivation of reasonable investment-backed expectations.

229. *Loretto*, 458 U.S. at 426.

230. 505 U.S. 1003 (1992).

231. *See id.* at 1009 n.2.

232. 447 U.S. 255, 260 (1980) (The Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land.") (citations omitted).

233. *Lucas*, 505 U.S. at 1015.

> into some form of public service under the guise of mitigating serious public harm.[234]

Interestingly, not one of the justices apparently believed that there was a complete deprivation of value in *Lucas*, although the Council had acquiesced in that characterization in the state trial court and it had become the law of the case.[235] However, the ultimate disposition of the lots justified Justice Scalia's public choice insight in a way that he hardly could have envisioned.[236]

The takings quartet cases involve an exception to the *Lucas* "deprivation of all economically beneficial or productive use" test:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[237]

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234. *Lucas*, at 1018 (noting, inter alia, that "[a]s Justice Brennan explained: 'From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.'" (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

235. *See* EAGLE, *supra* note 224, at § 7-6(b). It should be noted that it seemed implausible to some that the deprivation test would remain at 100%. *See* Steven J. Eagle & William H. Mellor III, *Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights*, 29 CAL. W. L. REV. 209, 235 (1992); *see also* Loveladies Harbor v. United States, 28 F.3d 1171, 1175 (Fed. Cir. 1994) (99% diminution sufficient).

236. On remand, the Council was forced to acquire the lots from Lucas. It was reported that the Council had turned down an offer of $315,000 for one of the lots from a neighbor who promised to keep it undeveloped to protect his view. It subsequently sold both lots to a developer for use in the same way as Lucas had intended for $785,000. "[W]hen its own money was on the table, the state was unwilling to forgo $77,500 to preserve one of the lots whose previous value of $600,000 to the owner it had denied was a compensable loss." WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 61 (1995).

237. *Lucas*, 505 U.S. at 1029.

The concepts of "investment-backed expectations" in *Penn Central* and background principles resulting in limitations inhering in the title in *Lucas* are at the heart of the court of appeals' holdings in the takings quartet cases.

At the outset it is necessary to keep in mind that these are discrete and separate concepts. In *Store Safe Redlands Assoc. v. United States*,[238] the United States Court of Federal Claims concluded that:

> The initial inquiry by the court—whether plaintiff has a property interest—is not determined by examining whether plaintiff has "reasonable investment-backed expectations." Such an inquiry is only relevant when assessing whether government regulation has effected a taking by regulation of an acknowledged and existing property interest. At this point it is not relevant to the antecedent inquiry which the court must address: does plaintiff possess a property interest and, if so, what is the proper scope of that interest?[239]

The Court of Appeals has been less careful in drawing these distinctions in the takings quartet cases.

2. The Quartet's Assertion that Preexisting Enactments Inhere in Title

The takings quartet cases, particularly *Kim*, squarely present the issue of when the very existence of private property rights is vitiated by legislation.[240]

As the quartet opinions recognize, a "threshold inquiry into an owner's title is generally necessary to the proper analysis of a takings case."[241] Where the owner of a parcel has never owned the right to a particular use, a governmental deprivation of that use would not constitute a taking even if it reduced or even eliminated the market value of the parcel.[242]

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238. 35 Fed. Cl. 726 (1996).

239. *Id.* at 734 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

240. *See* Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997), *cert. denied*, 118 S. Ct. 50 (1997).

241. *Id.* at 314.

242. *See id.*

a. The Rewriting of *Lucas*

The essence of the court of appeals position is presented within one paragraph of *Kim*:

> Given the theoretical basis of the logically antecedent inquiry—namely, "the State's power over . . . the 'bundle of rights' that [property owners] acquire when they obtain title"—we can discern no sound reason to isolate the inquiry to some arbitrary earlier time in the evolution of the common law. It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title. To accept this proposition 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.[243]

While this statement is powerful rhetoric, it does not withstand close reading. First, artful editing at the beginning of the first quotation from *Lucas* excises context.[244] While the court of appeals suggests that the antecedent inquiry centers around state powers over property, another basis for the inquiry is rooted in the traditional respect for private property among our people. The emphasized words immediately precede the court of appeals' quotation:

> Where the State seeks to sustain 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 interests were not part of his title to begin with. 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 State's power over, the "bundle of rights" that they acquire when they obtain title to property.[245]

Likewise, there is no call to "isolate the inquiry to some arbitrary earlier time." The Court cites to no authorities or commentators who suggest that developments beyond some arbitrary date be studiously

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243. *Id.* at 315 (citations omitted) (alteration in original).

244. *See Lucas*, 505 U.S. at 1027.

245. *Id.* (emphasis added).

ignored. No one suggests that common law be used exclusively and that statutes be ignored. Nor, to my knowledge, has anyone gainsaid the general principle that statutory law may "trump" common law. These are all straw men. The issue in *Lucas* and the quartet cases is not statutory analysis, but the interpretation of important constitutional principles.

The Supreme Court's *Lucas* opinion continued:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[246]

The Supreme Court *could* have rewritten its first sentence, as the New York Court of Appeals would have it. It would then have added the emphasized words in requiring that the newly legislated restriction "must inhere in the *present owner's* title itself." Likewise, it would have deleted the emphasized words in referring to "restrictions that *background principles of* the State's law of property and nuisance already place upon land ownership." The second sentence would be deleted in its entirety.

Under this revisionist view of *Lucas*, a court would have only to ask whether (1) the restriction was in place prior to the purchase by the current owner, and (2) the restriction formed a part of the state's property law as shaped by recent statutes, if applicable. There would be no disconcerting reference to limiting statutes that might affect the background principles to replications of private nuisance, public nuisance (i.e., aggregate private nuisance) and narrowly defined "other circumstances."[247]

It is true that an expansive view of the legislature's power to rearrange societal claims under the rubric of the police power might produce enlightened legislation that is beneficial to most people. However, as Justice Homes observed in *Pennsylvania Coal*: "We are in danger of forgetting that a strong public desire to improve the public condition is not

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246. *Id.* at 1029.

247. *See id.* at 1029 n.16 ("The principal 'otherwise' that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others.") (citations omitted).

enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[248]

b. *Lucas* "Background Principles" and Public Choice

Justice Scalia wrote the inherement passage discussed above in the manner in which he did precisely to restrict the ability of legislators to circumvent it through facile reclassification. He explained: "The transition from our early focus on control of 'noxious' uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[249] Given that a rule might be described as preventing harm to the ecology or as establishing an ecological preserve, Justice Scalia continued, it would be "pointless" to base the outcome on terminology.[250] If a legislative recital of "harm" or "benefit" were to be determinative, therefore, the justification would amount to no more than "a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations."[251]

In large measure Justice Scalia's view is based upon his understanding of how interest groups operate, which is the subject of public choice theory.[252] "[M]arket forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups."[253]

In 1988, the Supreme Court considered the constitutionality of a rent control ordinance in *Pennell v. City of San Jose*.[254] It provided, inter alia, that a hearing officer would determine a "reasonable" rent through use of the six "objective" factors relating to the rental market or "the landlord's costs of providing an adequate rental unit."[255] In addition, "[i]f, on

248. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

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

250. *Id.* at 1024 n.11.

251. *Id.* at 1025-26 n.12.

252. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

253. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986).

254. 485 U.S. 1 (1988).

255. *Id.* at 9.

balance, the Hearing Officer determines that the proposed increase constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that [a portion] be disallowed."[256] A landlord challenged the ordinance as violative on its face of the Fourteenth Amendment Due Process and Equal Protection Clauses, and the Fifth Amendment Takings Clause as applied through the Fourteenth Amendment.

Justice Scalia agreed with the majority that there was no facial violation of due process or equal protection, but dissented from the Court's conclusion that the takings claim was premature.[257] Continuing to the merits, he declared:

> We have repeatedly observed that the purpose of [the Takings Clause] 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."
>
> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. . . .
>
> . . . .
>
> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes.[258]

The New York Court of Appeals has recognized that land use regulation might be special interest legislation in its recent decision in

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256. *Id.* at 5-6.

257. *See id.* at 15 (Scalia, J., dissenting).

258. *Id.* at 19-22 (Scalia, J., dissenting) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

Manocherian v. Lenox Hill Hospital.[259] Through a legislative exception to New York City's rent stabilization laws, the hospital was able to commandeer much of a private apartment building for use as employee housing. Judge Bellacosa, writing for the court, declared that the statute "perpetuate[d] a small, privileged housing stock . . . [and] suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest."[260]

The *Lucas* "background principles" language serves to deter such special-interest legislation by requiring that legislative findings of "harms" to be alleviated do not in fact disguise "benefits" to be conferred. The test is designed to require sufficient continuity with the law as it has evolved. This does not mean reliance on the common law only—but it does imply that legislative change, except in true emergencies, must have the common law flavor of incremental development with no sudden shunting aside of established precedents and rights.

c. *Lucas* "Background Principles" and Preexisting Legislation

The extent to which preexisting statutory limitations should constitute "background principles" which inhere in the title of subsequent owners has been subject to little litigation thus far. Two state decisions have adopted the Court of Appeals' view that preexisting legislation constitute "background principles," *Grant v. South Carolina Coastal Council*,[261] and *Hunziker v. State*.[262] Neither analyzed the issue and in neither case was it apparently determinative. Opposing the court of appeals' view is *K & K Construction, Inc. v. Department of Natural Resources*,[263] and the United States Supreme Court's analysis in *Nollan v. California Coastal Commission*,[264] on which it relies. *K & K* held that "[t]he passage of the [act] cannot be understood as depriving [plaintiff] of just compensation merely because the [act] was in effect when the quit-claim deed was executed."[265] In *Nollan*, Justice Scalia observed:

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259. 643 N.E.2d 479 (N.Y. 1994) (striking statute requiring landlords to provide renewal leases to nonprivate hospitals based on primary residency status of hospital's employee-subtenant, rather than on primary residency status of tenant of record).

260. *Id.* at 480.

261. 461 S.E.2d 388 (S.C. 1995).

262. 519 N.W.2d 367 (Iowa 1994).

263. 551 N.W.2d 413 (Mich. Ct. App. 1996).

264. 483 U.S. 825 (1987) (establishing the principle that there must be a sufficient nexus between governmental police powers and the regulations promulgated thereto).

265. *K & K Constr., Inc.*, 551 N.W.2d at 417-18.

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission 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.[266]

The New York Court of Appeals addressed this language in a footnote in *Kim*, which acknowledged the *Nollan* language, but deemed it "readily harmonized with the 'logically antecedent inquiry'" approach in *Lucas*.[267] It cited "generally" for this proposition an article by Professor Mandelker that reviewed cases pertaining to actual knowledge and investment-backed expectations, as opposed to inherement as such.[268] The court continued by observing:

> [T]he property interest allegedly taken in *Nollan* was not subject to any preexisting restriction; rather, the case centered on a State agency's policy of conditioning the grant of building permits on the property owner's surrender of a public easement over the beachfront property. Because plaintiffs' predecessors in interest had neither applied for nor been granted the conditioned permit, the government's interest in the easement was, at the time of plaintiffs' acquisition of the property, a mere "unilateral *claim* of entitlement," not an enforceable property interest. There was simply no existing title restriction which a purchaser took subject to in that case.[269]

The notion that the Nollans purchased land subject to a "unilateral claim" does not seem convincing. California law required the Nollans to obtain a permit from the Coastal Commission prior to building.[270] They submitted a request and were informed that the Commission staff would recommend approval subject to the condition that they allow an easement, which the Nollans protested.[271] Their protest was overruled by the

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266. *Nollan*, 483 U.S. at 833-34 n.2.

267. *See* Kim v. City of New York, 681 N.E.2d 312, 316 n.3 (N.Y. 1997).

268. *See id.* (citing Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 119, 135-38 (David L. Callies ed., 1996)).

269. *Id.*

270. *See Nollan*, 483 U.S. at 828.

271. *See id.*

Commission, which granted the permit subject to the easement.[272] In short, California law required public access to the shore, and the agency charged with enforcing the law issued a final ruling consistent with its standard interpretation of the statute, which has been the basis for similar rulings in the past.[273] The Supreme Court in *Nollan* treated this sequence of events as a taking.[274] Even though the New York Court of Appeals might have preferred a more specific statute and less agency discretion, the Nollans' sellers could not rebuild without Commission permission and neither could the Nollans. In fact, the New York Court of Appeals itself generally has granted *Chevron*[275] deference to administrative agency decisions.[276] Under the United States Supreme Court's recent decision in *Dolan v. City of Tigard*,[277] increased attention will be given administrative determinations and their relation to statutes.[278]

To the extent that the court of appeals wishes to define the "corpus juris" of the state to include statutory law but exclude settled agency policies,[279] it might not have the last word. As noted earlier, the Takings Clause is not dependent upon neat labels, but is "self executing."[280]

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272. *See id.* at 828-29 (citing CAL. PUB. RES. CODE §§ 30106, 30212, 30600 (West 1986)).

273. *See id.*

274. *See id.* at 841-42.

275. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984).

276. *See* Goodwin v. Perales, 669 N.E.2d 234, 238 (N.Y. 1996) ("Of course, as this Court has repeatedly stated, an 'agency's interpretation of the statutes it administers generally should be upheld if not unreasonable or irrational.'") (quoting Rodriguez v. Perales, 657 N.E.2d 247, 250 (N.Y. 1995)); *see also In re* Gruber, 674 N.E.2d 1354, 1358 (N.Y. 1996) ("By defining the specific classes of employment that the Law is designed to cover and by directing the manner in which the definitional provisions are to be applied, the Legislature has withdrawn that policy-laden determination from the agency."). *Cf. Chevron*, 467 U.S. at 843-44.

277. 512 U.S. 374 (1994) (providing that administrative exactions must be in rough proportionality to the individual landowner's contribution to their need).

278. *See* Parking Ass'n v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 115 S. Ct. 2268 (1995). In his fiery dissent from denial of certiorari, Justice Thomas declared: "A city council can take property just as well as a planning commission can." *Parking Ass'n*, 115 S. Ct. at 2268-69 (Thomas, J., dissenting).

279. *See* Kim v. City of New York, 681 N.E.2d 312, 315-16 (N.Y. 1997).

280. United States v. Clarke, 445 U.S. 253, 257 (1980).

d. "Taking" the Purchasers Cause of Action

The New York Real Property Law now provides: "A grant or 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 . . . ."[281]

This principle was enunciated by the court of appeals over a century ago,[282] cited approvingly in the interim,[283] and is now national black letter law.[284] It is difficult to imagine how this rule could not be a "background principle" of New York law.

Yet the approach adopted by the court of appeals in the takings quartet truncates the right to engage uses prohibited by preexisting enactments, so that the owner at the time of the enactment owns the right to the use only until the time of sale. The quartet provides that the grantee has no property right and hence no right to sue for an "as applied" taking.[285] Certainly any retention of a cause of action by the grantor would be derogation of his grant, and the court of appeals has refused to say if the seller could have transferred the right separately.[286] The court of appeals has not (at least prior to the quartet) attempted to truncate use rights in the hands of their present owners. Any attempt to treat new land use laws as having that effect seems highly problematic.[287]

While the court of appeals may deprive an owner subject to a preexisting regulation of the right to challenge an "as applied" taking

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281. N.Y. REAL PROP. LAW § 245 (McKinney 1997).

282. *See* Blackman v. Striker, 37 N.E. 484, 485 (N.Y. 1894) ("The deed must be held to convey all the interest in the lands which the grantor had, unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant.").

283. *See* Yunich v. Albany Exch. Sav. Bank, 65 N.Y.S.2d 679, 681 (Sup. Ct. 1946) (quoting *Blackman* as "settled law"); *see also* Race v. Meyer, 640 N.Y.S.2d 664, 666 (App. Div. 1966) (quoting present statute).

284. *See* 9 THOMPSON, *supra* note 48, § 82.13(c)(2) (citing cases: "[T]he entire estate or interest of the grantor passes to the grantee, unless there is specific language to the contrary.").

285. *See* Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997); *see also supra* text accompanying notes 143-44.

286. *See Anello*, 678 N.E.2d at 872 n.2.

287. *See generally* Texaco, Inc. v. Short, 454 U.S. 516 (1982) (upholding Indiana statute under which a mineral lease which is not used for a period of 20 years will automatically lapse unless the mineral owner files a statement of claim in the local county recorder's office under narrow conditions).

under state law,[288] the taking of a takings claim is, under United States Supreme Court precedent, itself a taking.[289]

e. Permanent Physical Occupation

While the other quartet cases involve the regulation of building on wetlands and slopes, only *Kim* involves a permanent physical occupation.[290] The city covered 2400 square feet of petitioners' lands with fill dirt up to a depth of five feet.[291]

In *Loretto v. Teleprompter Manhattan CATV Corp.*,[292] the New York Court of Appeals reviewed a statute permitting the installation of cable TV equipment on the outside of apartment buildings without the consent of the owner and without compensation. The court rejected the owner's claim that the placement of a connector box on her roof and cables on the front of her building constituted a taking:

> Neither the physical invasion of the landlord's property by the attachment of such facilities nor the fact that at the time the facilities are attached to a building no tenant of that building is a CATV subscriber invalidate the legislative exercise of the police power, in view of the minimal nature of the invasion and the absence of any reasonable expectation on the part of the landlord that the space thus utilized (or invaded) would ever be income productive.[293]

The United States Supreme Court rejected this analysis and reversed.[294] Justice Marshall, writing for the Court, found that the "physical intrusion" by government was a property restriction of an "unusually serious character."

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288. Recall Justice Jackson's observation of his own court of last resort: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

289. *See* Dames & Moore v. Regan, 453 U.S. 654, 688-89 (1981) (upholding federal seizure of contract claims against the government of Iran and relegating claimant to suit for compensation under the Tucker Act, 28 U.S.C. § 1491 (1976)); *see also* United States v. Sperry Corp., 493 U.S. 52 (1989) (implicitly upholding right to compensation for federal seizure of contract claims, but denying right to compensation for expenses incurred during Iran-U.S. Claims Tribunal process).

290. *See Kim*, 681 N.E.2d at 314.

291. *See id.* at 313.

292. 423 N.E.2d 320 (N.Y. 1981), *rev'd*, 458 U.S. 419 (1982).

293. *Id.* at 336.

294. *See Loretto*, 458 U.S. at 419.

> Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.[295]

Thus *Loretto* establishes a categorical rule: Permanent physical occupations are not subject to the Court's *Penn Central* balancing test regardless of how minimal the area occupied or how important the occupation to the public welfare.[296] In *Nollan v. California Coastal Commission*, the Court subsequently reiterated its earlier juxtaposition: The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," and a permanent physical occupation excludes the owner.[297]

Unsurprisingly, the plaintiffs in *Kim* contended that the dumping of considerable fill on their land constituted a "permanent physical occupation" and hence a compensable taking under *Loretto*.[298] However, the New York Court of Appeals refused to characterize the case as physical or regulatory,[299] but instead declared:

> If this case involved simply the City's dumping of side fill on 2,400 square feet of plaintiffs' property, we might well agree with plaintiffs . . . . However, that is not this case. We conclude instead that, by virtue of the common-law and City Charter obligation of lateral support to a public roadway, plaintiffs' title never encompassed the property interest they claim has been taken.[300]

Even assuming that the court is correct regarding the common-law and the City Charter, this is not a complete response to the physical takings claim. The court of appeals opinion did not purport to deprive the plaintiffs the 2400 square feet in question. Rather, it found that they "still own the entire parcel, including the portion abutting the roadway, subject

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295. *Id.* at 426.

296. *See id.* at 432 ("[*Penn Central*] does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.").

297. *Nollan*, 483 U.S. at 831 (quoting *Loretto*, 458 U.S. at 433).

298. *Kim*, 681 N.E.2d at 314.

299. *See id.* at 314-15.

300. *Id.* at 314.

to the obligation to maintain lateral support to the roadway's legal grade."[301]

Perhaps the court of appeals is asserting that the placement of fill was the only reasonable way to effectuate the City's right of support, so that the obligation of support was coextensive with an implied obligation to accept the fill. Perhaps the court is asserting that the City placed the fill in lieu of enforcing its right under the Charter to have the plaintiffs provide lateral support at their own expense.[302] This reading would allow that there might have been a taking, but would assert that there was compensation in kind. Perhaps the court believes that the plaintiffs are estopped from raising their takings claim with respect to the fill, since they did not respond to the City's letter regarding lateral support.[303]

The court of appeals' failure to tie down this loose end is troublesome, especially given the serious nature of physical invasions.

f. Historical Approach Under *Kim*

While the leitmotif of the takings quartet is that the landowners did not acquire use rights because preexisting statutory prohibitions inhered in their titles, only in *Kim* does the court of appeals attempt to weave a more fulsome picture of background principles:

> 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 this case, we find applicable rules in the common law and in New York City's Charter.[304]

The court's historical analysis seems particularly unconvincing. An uncontroverted starting point is that while owners normally have the duty to provide lateral support to the lands of their neighbors in their natural state only, the duty with respect to public roads includes support of the pavement and vehicles.[305] However, the court added that it "need not

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301. *Id.* at 319.

302. *See generally id.*

303. However, the plaintiffs responded by quickly filing their lawsuit. *See id.*

304. *Id.* at 315-16 (citations omitted).

305. *See id.* at 316-17.

define the precise contours of the common-law duty[,]" since the New York City Charter represented its "specific, contemporary formulation."[306] The charter provision is as follows:

> The owner of any property at his own cost, shall . . . fill any sunken lot or lots comprising part or all of such property or cut down any raised lot or lots comprising part or all of such property whenever the transportation department shall so order pursuant to standards and policies of the transportation department . . . . In the event that the owner fails to comply with the provisions of this section, the transportation department may provide for the doing of same at the expense of the owner in the manner to be provided by local law.[307]

Here, the court added, the Charter obligation was in place when plaintiffs purchased their land, and the revised city map showing that the legal grade of their street had been raised 4.4 feet already had been filed in the Borough President's office. Therefore, when the city moved to rebuild the road at its legal grade, the plaintiffs' obligation to provide lateral support to the rebuilt road inhered in their title, thus rebutting any takings claim the plaintiffs might otherwise have by dint of the city dumping side fill on their parcel.[308]

Judge Ciparick, writing for the court, cited *Village of Haverstraw v. Eckerson*[309] for the proposition that the duty of lateral support owed to a public roadway "will be somewhat broader" than that owed a neighboring landowner.[310] His opinion also cited other authority to the effect that support of public roads is an important community obligation.[311] However, as Judge Smith explained in his dissenting opinion in *Kim* (in which Judge Wesley joined), no evidence was presented to indicate that the City Charter would "require a private property owner to shore up this or any other public roadway" when the legal grade of the street was changed.[312] Judge Smith also stated that the word "sunken" in the statute

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306. *Id.* at 317.

307. *Id.* (quoting N.Y. City Charter ch. 71, § 2904[2]).

308. *See id.* at 318.

309. 84 N.E. 578 (N.Y. 1908).

310. *Id.* at 580; *see also Kim*, 681 N.E.2d at 316.

311. Judge Ciparick also cited 1 RASCH, NEW YORK LAW AND PRACTICE OF REAL PROPERTY § 20:23 616 (2d ed.): "[T]he fee owner of land abutting on a highway is under an obligation to preserve the lateral support to a public highway[.]" *Kim*, 681 N.E.2d at 316.

312. *Id.* at 322-23 (Smith, J., dissenting).

"implies that something has happened to the lot in question."[313] The majority retorted that "the more general meaning" of the term is "situated or lying on a lower level."[314] This definition, it added, is best "considered in light of the broad common-law obligation of lateral support to a public roadway" and "best serves the statutory purpose of supporting the roadway and protecting it."[315]

What is most distressing about this exchange is that the majority seemingly made no effort to examine the context of the obligation of lateral support. When roads are built at the existing surface level, the duty to provide lateral support for pavement and traffic should not be onerous. It is when the adjoining owner wrongfully excavates that a danger to roadways and motorists is created. In other words, although framed in the affirmative, the duty of support essentially is a negative one: owners should avoid actions that might damage the roads. The dissent cites several cases to this effect, and notes, importantly, that *Haverstraw* itself is such a case.[316]

The duty of landowners prior to *Kim* thus was quite limited. The duty afterwards is of a different magnitude and indeterminate. The court finds that covering 2400 square feet with fill dirt was not a permanent physical taking under the Supreme Court's holding in *Loretto*, since "[i]t is undisputed that the side fill was necessary to support the street and prevent erosion."[317]

Assume instead that the city had desired that College Point Boulevard should be made an elevated highway, and had filed an amended map to that effect. The reasoning in *Kim* would require that the plaintiffs accept massive support pillars and steelwork well within their property line to support (both figuratively and literally) the legislative goal. The only difference, in the court's lexicography, would be that the Kims' lot would be "sunken" by twenty feet rather than by five. Such an absurd possibility should lead to a reconsideration of the nature of the fundamental issue under contention.

Judge Smith's dissent would treat the abutting owners' duty as a negative in character, derived from the need to delineate their rights from those of the state, and thus manifesting private law principles. Judge Ciparick's opinion for the court treats the duty as essentially positive, "serv[ing] the statutory purpose of supporting the roadway and protecting

313. *Id.* at 323 (Smith, J., dissenting).

314. *Id.* at 317.

315. *Id.*

316. *See id.* at 324-25 (Smith, J., dissenting).

317. *Id.* at 313.

it,"[318] and thus manifesting public law principles.[319] This debate recalls a similar exchange in what is perhaps the court's most celebrated case, *Palsgraf v. Long Island Railroad*.[320] Judge Andrews' dissent in *Palsgraf* emphasized that "due care is a duty imposed on each of us to protect the public from unnecessary danger."[321] Chief Judge (later Justice) Cardozo, writing for the 4-3 majority, emphasized the relational quality of negligence[322] and that the plaintiff had to sue "in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another."[323] *Palsgraf* followed by one year the court's decision in *International Products Co. v. Erie Railroad Co.*,[324] in which it held that "the relationship of the parties . . . must be such that . . . the one has the right to rely upon the other . . . , and the other . . . owes a duty [of] care."[325]

Two months after its quartet holdings, the court of appeals quoted *Palsgraf* in reiterating that "[t]he duty of a landowner or other tort defendant . . . is not limitless. It is an elementary tenet of New York law that '[t]he risk reasonably to be perceived defines the duty to be obeyed.'"[326] In a subsequent 1997 case,[327] it noted: "Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty."[328] The court affirmed that, "under appropriate circumstances, common morality, logic and social policy could permit a *limited* extension of the duty of

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318. *Id.* at 317.

319. *See supra* text accompanying notes 72-81 (discussing the relationship between private and public law); *see also* Michael I. Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U. L.J. 623 (1991).

320. 162 N.E. 99 (1928) (negligence of a railway employee injured a remote plaintiff through chain of improbable events).

321. *Id.* at 102 (Andrews, J., dissenting).

322. *See* WEINRIB, *supra* note 72, at 159-64 (discussing *Palsgraf*).

323. *Palsgraf*, 162 N.E. at 100.

324. 155 N.E. 662 (N.Y. 1927).

325. *Id.* at 664.

326. Di Ponzio v. Riordan, 679 N.E.2d 616, 617-18 (N.Y. 1997) (holding gas station not liable for injuries caused one motorist by a car rolling backwards from another pump) (quoting *Palsgraf*, 162 N.E. at 100).

327. Tenuto v. Lederle Laboratories, 687 N.E.2d 1300 (N.Y. 1997) (overruling dismissal of complaint by parent alleging vaccination of an infant caused exposure to virulent polio viruses).

328. *Id.* at 1302.

care."[329] The court's broad effectuation of the public policy of supporting roads in *Kim* is a decided departure from the narrow analyses of duty in the context of the relationship between the parties that marked the jurisprudence of Cardozo and of subsequent tort cases.

g. A Reasoned Approach to "Background Principles"

The Manichean view espoused by the court of appeals is not a helpful way to approach the Supreme Court's concept of "background principles." The court is correct when it asserts that "[i]t would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law."[330] But that is not the mandate of *Lucas*. The Supreme Court's opinion in *Lucas* provided for continued evolution of the common law through "objectively reasonable application of relevant precedents . . . ."[331] It also permits legislation to deal with "changed circumstances."[332]

In New York, background principles of property law also include a wariness about extending the affirmative obligations of landowners, as exemplified by *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*,[333] and *Eagle Enterprises v. Gross*.[334] Similar principles have governed the affirmative burdens of real estate brokers.[335] Likewise, New

329. *Id.* (citing Eiseman v. State, 511 N.E.2d 1128, 1135 (N.Y. 1987) (extending duty of physician to the parent of patient) (emphasis added)).

330. *Id.* at 315.

331. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ("We stress 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 n.18 (Kennedy, J., concurring) (emphasis in original).

332. *Id.* at 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so).") (citation omitted).

333. 15 N.E.2d 793 (N.Y. 1938) (upholding on specific facts affirmative covenant to pay for maintenance of common areas of a residential tract).

334. 349 N.E.2d 816 (N.Y. 1976) (striking landowner's affirmative obligation to pay for unwanted water supplied by utility).

335. *See* Longley-Jones Assocs. v. Ircon Realty Co., 493 N.E.2d 930 (N.Y. 1986) (holding purchaser of property conveyed "subject to" lease providing that owner would pay brokerage commissions in the event lease was extended or renewed did not undertake contractual obligation for commissions without affirmative assumption).

York law has frowned on obligating purchasers to engage in overly complex and expensive title searches.[336]

In *Lucas* the United States Supreme Court was presented with an inherent conflict of interest arising from the power of the legislature to adjust property rights on account of the public health, safety, and welfare, and its obligation to pay "just compensation" when taking private property. It tried to solve this dilemma by tying the police power to what might be called the "sea anchor" of background principles of law.[337]

h. A Contract Clause Analogy

A problem very similar to the conflict between the state's role in defining "property" and its obligation to pay just compensation for takings arises in connection with contracts. There the legislature's power to adjust contract rights is at odds with its obligation to pay debts as contracted for. The Framers conceived a similar response. Just as the Takings Clause of the Fifth Amendment requires just compensation, so does the Contract Clause[338] forbid states from impairing solemn agreements.[339]

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336. *See* Witter v. Taggart, 577 N.E.2d 338 (N.Y. 1991); Buffalo Academy of the Sacred Heart v. Boehm Bros., 196 N.E. 42 (N.Y. 1935) (refusing to accord constructive notice to encumbrances on title found in deeds to other parcels sold by remote common grantor).

337. Literally, a "sea anchor" is a conical-shaped canvas bag that keeps the boat head facing raging seas. *See* Richard J. Nikas, *Where the Street Meets the Sea: A Nautical Glossary for Maritime Lawyers*, 9 U.S.F. MAR. L.J. 245, 270 (1996). A good example of the legal metaphor is Richard Lowell Nygaard, *Freewill, Determinism, Penology, and the Human Genome: Where's a New Liebniz When We Really Need Him?*, 3 U. CHI. L. SCH. ROUNDTABLE 417 (1996): "Common law is jurisprudentially bound by precedent, which extends behind us like a giant sea anchor on the end of an ever-lengthening line. Statutory law is changeable only by legislatures who seemingly sail with the winds of popular opinion." *Id.* at 421. Like the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by squalls of legislative passion.

338. U.S. CONST. art. I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

339. *See, e.g.*, West River Bridge Co. v. Dix, 47 U.S. 507 (1848).

> The plaintiffs' grant and franchise was a contract of the State for one hundred years, and by this act of 1839 . . . that contract is not only impaired, but utterly destroyed; and this a State can no more do under the power of eminent domain, than under the law-making power, or any other power of sovereignty. . . . [T]he prohibition of the Constitution is general, and contains no exception for this exercise of this power of eminent domain as to contracts.

Id. at 517.

After the Supreme Court upheld depression-era foreclosure moratoria in *Home Building & Loan Ass'n v. Blaisdell*,[340] the Contracts Clause long received little attention.[341] After forty years, however, there has been a partial "revitalization" of the Clause in *United States Trust Co. v. New Jersey*.[342] The Court noted that "[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."[343] It invoked a "dual standard of review,"[344] which asserted the need for more judicial oversight when "the State's self-interest is at stake."[345] The Court then analyzed whether the impairment was nevertheless constitutional as a reasonable and necessary means of serving an important public purpose.

Similarly, in *Allied Structural Steel Co. v. Spannaus*,[346] a Minnesota law effectively imposed vesting of company-contributed pension benefits in spite of an explicit provision in Allied's pension agreement giving it the right to terminate the plan at any time.[347] The Court struck this as imposing on the contracting party "a completely unexpected liability in potentially disabling amounts."[348]

While in some respects the United States Supreme Court has retreated from *Allied Structural Steel*, those cases did not involve public contracts and have no direct effect on *Trust Co.*[349]

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340. 290 U.S. 398 (1934).

341. *See* Chicago Bd. of Realtors v. City of Chicago, 819 F.2d 732, 743 (7th Cir. 1987) (Posner, J., concurring) (The Court "has rewritten the contract clause, by inserting the word 'unreasonably' before 'impairing' and by adopting a radically undemanding definition of 'reasonableness.'"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 619 (2d ed. 1988) (The Court "seemed to adopt the view that contract rights had no special constitutional status.").

342. 431 U.S. 1 (1977) (invalidating repeal of covenant assuring Port Authority of New York and New Jersey bondholders that pledged revenues would not be diverted to takeover unprofitable passenger railroad systems); *see generally* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 720-21 (1984); Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414, 1414-19 (1984).

343. *United States Trust Co.*, 431 U.S. at 25 n.23 (quoting Murray v. Charleston, 96 U.S. 432, 445 (1877)).

344. *Id.* at 26, n.25.

345. *Id.* at 26.

346. 438 U.S. 234 (1978).

347. *See id.*

348. *Id.* at 247.

349. *See, e.g.*, State of Nevada Employees Ass'n v. Keating, 903 F.2d 1223, 1226 (9th Cir. 1990) (referring to increased deference accorded states regarding impairment of private contracts in Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983), and Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)).

3. The Quartet's Assertion That Owners Had No "Reasonable Expectations" that Would Trump the State's Police Power Under *Penn Central*

As noted earlier,[350] in cases not implicating one of the two categorical rules (i.e., a complete deprivation of economic value or a permanent physical occupation), whether there is a regulatory taking still is decided through use of the ad hoc balancing test from *Penn Central Transportation Co. v. City of New York*.[351] The three factors singled out for analysis are the "economic impact of the regulation on the claimant," the "character of the governmental action" and "the extent to which the regulation has interfered with distinct investment-backed expectations."[352] Given the New York Court of Appeals' position throughout the takings quartet that purchasers after the enactment of a land use limitation had no property right to the precluded use, it unsurprisingly also asserted that the post-enactment purchasers had no "investment-backed expectations" in those uses either.[353]

The meaning of the phrase "investment-backed expectations" is not entirely clear, since it apparently does not slight the property rights of a donee nor does it attempt to define appropriate or permissible types of investment.[354] As I have discussed previously,[355] the phrase seems to have originated in Professor Michelman's contention that Holmes' "goes too

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350. *See supra* text accompanying notes 227-31.

351. 438 U.S. 104, 124 (1978); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

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

353. *See* Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 872 (N.Y. 1997) (To allow petitioner's title to be "defined without regard to the steep-slope restriction" would eventually be to permit "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."); Basile v. Town of Southampton, 678 N.E.2d 489, 491 (N.Y. 1997) ("[A]ny property interest that might serve as the foundation for . . . a claim was not owned by claimant here who took title after the redefinition of the relevant property interests."); Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1043 (N.Y.1997) (Plaintiff's "'reasonable' expectations were not affected when the property remained restricted.").

354. *See* Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993) ("Neither [Justice Scalia] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' (which are, after all, not mere gloss, but actual constitutional text).").

355. *See supra* text accompanying notes 221-26.

far" language in *Pennsylvania Coal*[356] implicitly posed the issue in terms of "some distinctly perceived, sharply crystallized, investment-backed expectation."[357] It became Justice Brennan's "distinct investment-backed expectations" in *Penn Central*. Then-Justice Rehnquist used the phrase "reasonable investment-backed expectations" in *Kaiser Aetna v. United States*.[358] Later it became "reasonable expectations" in Justice Brennan's dissent in *Nollan*;[359] a metamorphosis sealed in a footnote in Justice Scalia's majority opinion in *Lucas*.[360]

The New York Court of Appeals declared in *Anello* that:

> If petitioner's title was defined without regard to the steep-slope restriction, then her investment-backed expectations would include the possibility of winning a compensatory takings lawsuit as a result of the Village's enforcement of the ordinance. However, the success of her compensatory takings lawsuit would depend largely on the extent to which the ordinance interferes with her investment-backed expectations, which would in turn depend on the possible success of the compensatory takings claim, and so on. This 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.[361]

In *Gazza*, the court of appeals held that a "'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'"[362] It cited *Penn Central* for the proposition that "[e]xpectations may also be examined in light of the level of interference with permissible uses of the land by the subject regulation."[363]

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356. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* EAGLE, *supra* note 224, at § 6-4(c)(2)(iii).

357. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165,1233 (1967).

358. 444 U.S. 164, 175 (1979).

359. Nollan v. California Coastal Comm'n, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting).

360. *Lucas*, 505 U.S. at 1017 n.7.

361. *Anello*, 678 N.E.2d. at 872.

362. *Gazza*, 679 N.E.2d. at 1042 (citations omitted).

363. *Id.*

As Professor Mandelker observes in his article cited in *Kim*[364] on the issue of inherement, "Supreme Court decisions have not been coherent in their treatment of investment-backed expectations in takings cases."[365] The Court had held that property owners' expectations were subject to foreseeable regulations in *Connolly v. Pension Benefit Guaranty Corp.*[366] However, the *Lucas* case subsequently suggested that owners had a lesser degree of protection regarding expectations in such personal property cases.[367] Similarly, the Court in *Ruckelshaus v. Monsanto Co.*[368] had upheld governmental disclosure of trade secrets where a statute requiring such disclosure predated the plaintiff's submission of a registration application including them. Justice Scalia's opinion in *Nollan v. California Coastal Commission*[369] distinguished *Monsanto* as a case involving a property owner who gave up secrecy in return for "the right to [the] valuable Government benefit" of registration. "But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"[370]

In a work slightly predating that cited in *Kim*, Professor Mandelker focused more narrowly on the concept of "investment-backed expectations."[371] He reviewed *Connolly* and *Monsanto*, and Justice

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364. Kim v. City of New York, 681 N.E.2d 312, 316 n.3 (1997) (citing Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 119, 135-38 (David L. Callies ed. 1996); *see also supra* text accompanying note 266.

365. Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS*, 127 (David Callies ed. 1996).

366. *See Connolly*, 475 U.S. 211 (1986) (holding that employers had "more than sufficient notice" that withdrawal from pension plan "might trigger additional financial obligations"). *Id.* at 227.

367. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992). The Court noted: "[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Id.* at 1027-28.

368. 467 U.S. 986 (1984) (upholding disclosure of information in application for registration of pesticides).

369. 483 U.S. 825 (1987).

370. *Id.* at 833 n.2.

371. *See* Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, *in* 1994 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN ch.7, 7-1 to 7-16 (1995).

Scalia's *Nollan* Footnote 2, in which he declared: "So long as the Commission 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."[372] Mandelker added: "Despite the *Nollan* footnote, the vast majority of courts continue to hold that actual or constructive notice of a land use regulation defeats investment-backed claims. These cases do not cite or discuss the *Nollan* footnote."[373]

The "inevitable circularity" of which the court of appeals complains is not alleviated by its position. For the court to deny the landowner's right as against the statute because the statute was *a priori* constitutional is not essentially different from denying the constitutionality of the statute because it took the owner's property right which was *a priori* valid. What is needed is a more objective yardstick against which both the statute and the claim might be measured.

The answer may be contained in a footnote in *Lucas* addressed to the "denominator problem" of ascertaining the quantum of ownership against which the "numerator" of deprivation should be judged:

> 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.[374]

If the use right asserted is consistent with "background principles" of property law, and if the statute would be a sufficiently great departure from those principles so as not to inhere in the owner's title under *Lucas*, then a purchaser subsequent to the enactment of the statute should have the reasonable investment-backed expectation that his or her right will prevail. This is not to say, however, that the landowner necessarily would win under the *Penn Central* balancing test after other factors are taken into account.

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372. *Nollan* 483 U.S. at 833 n.2.

373. Mandelker, *supra* note 371, at 7-11 to 7-12 (citing cases).

374. *Lucas*, 505 U.S. at 1017 n.7 (1992); *see also* Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1014-15 (1997).

D. *The Environment, Private Property, and Public Policy*

Two of the quartet cases, *Gazza* and *Basile*, involved wetland restrictions. The court of appeals stressed the importance of wetlands regulations, noting in *Gazza* that "'tidal wetlands constitute one of the most vital and productive areas of our natural world, and that their protection and preservation are essential.'"[375] The steep-slope ordinance in *Anello* also was enacted partly to "protect environmentally sensitive lands."[376]

It is vital to understand, however, that the takings quartet cases are not about protecting the environment. As the United States Court of Appeals for the Federal Circuit recently observed in its well-known opinion in *Loveladies Harbor, Inc. v. United States*:[377]

> What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. The importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas, whether privately or publicly held, through appropriate regulatory mechanisms is not here being questioned . . . .
>
> . . . .
>
> The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large.[378]

Implicit in the takings quartet cases is the assumption that the overarching power of the state, as expressed either through categorical legislation or through judicial lawmaking in cases like *Boomer v. Atlantic Cement Co.*,[379] is required to deal with environmental problems. Yet this

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375. *Gazza*, 679 N.E.2d at 1038 (quoting the Legislature's policy findings for the Tidal Wetlands Act, L. 1973, ch. 790, § 1).

376. *Anello*, 678 N.E.2d at 870 (quoting Dobbs Ferry Village Code § 300-35.D).

377. 28 F.3d 1171 (Fed. Cir. 1994).

378. *Id.* at 1175.

379. 257 N.E.2d 870 (N.Y. 1970); *see supra* text accompanying notes 77-81.

might not be the case and we may be the worse off for the fact that common law remedies remain "the path not taken."[380]

> The common law is not perfect . . . . But mistakes made by individual judges, subject to review by independent courts of appeal, are much more likely to be corrected, and less devastating in impact, than are mistakes by congressional mandates and national regulatory standards. Like markets, which evolve constantly to take advantage of new knowledge, technology, and desires of consumers, the common law is dynamic in its protection of individual rights. The environment is more likely to be protected by individuals seeking to protect their rights than when such matters are determined by obsolete technologically driven standards determined by legislators and regulators.[381]

To the extent that the New York Court of Appeals recalls the common law's inherent attributes of justice and flexibility, it is less apt to allow ad hoc legislation to subsume the protection of individual rights that the United States Supreme Court's "background principles"[382] language in *Lucas* was designed to protect. Only through harmonization of property rights and the police power might the court establish a jurisprudence able to discern the exigencies of the time and yet remain true to the rule of law.

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380. Roger E. Meiners & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, *in* TAKING THE ENVIRONMENT SERIOUSLY: WHAT DO WE MEAN? 73, 88 (Roger E. Meiners & Bruce Yandle eds., 1994) (arguing that common law protections against water pollution "may have provided more strict and, hence, more ecologically sound pollution control" than the enacted legislation restricting property rights).

381. *Id.* at 95.

382. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992). *See supra* text accompanying notes 259-76 (discussing *Lucas* background principles).