

THE PARCEL AND THEN SOME: UNITY OF OWNERSHIP AND THE PARCEL AS A WHOLE

Steven J. Eagle*

ABSTRACT

The U.S. Supreme Court's "parcel as a whole" doctrine evaluates regulatory takings claims in the context of the landowner's entire holding. The doctrine is predicated upon a largely arbitrary bifurcation, whereby the jurisprudence of regulatory takings is rooted in substantive due process, although the jurisprudence of physical takings is rooted in property law. Given its lack of a foundation in property law, "parcel as a whole" is both complex and uncabined.

The open-ended nature of "parcel as a whole" is reflected in current attempts to extend it under an asserted "unity of ownership" theory. Under this formulation, separate deeded parcels may be treated as one parcel for takings purposes, even if there is no common or overlapping ownership or common commercial enterprise as traditionally defined by property, partnership, or corporate law.

This Article asserts that the proper foundation for "parcel as a whole" is the common law doctrine of "appropriation to use." It subsequently analyzes the "unity of ownership theory," as it relates to coordinated development by separate owners of contiguous parcels. Under this Georgist view, value is created by society, which, in turn, countenances government's arrogation of the benefits of neighborly cooperation.

The Article concludes that the appropriation to use principle clarifies analysis of the relevant parcel. Also, the unity of ownership theory circumvents rules for determination of ownership established in real property, partnership, and business law. It thus is inimical to property rights, and, more broadly, hinders individual flourishing by depriving people of the fruits of social cooperation.

INTRODUCTION

This Article analyzes the regulatory takings "parcel as a whole" rule, focusing on attempts to broaden the doctrine to include parcels with

* Professor of Law, George Mason University, Arlington, VA 22201 (seagle@gmu.edu). Earlier versions were presented at the California Coastal Commission's "Workshop on Single Economic Parcels," May 11, 2011, Santa Rosa, CA, and the 14th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulation, sponsored by Vermont Law School and Georgetown University Law Center, Nov. 18, 2011, Washington, D.C.

coordinated uses but with no overlap in ownership. It first traces the roots of “parcel as a whole” in the Supreme Court’s regulatory takings doctrine. It analyzes its expansion in cases involving multiple deeded parcels and multiple ownerships. Next, it suggests that the proper framework for analyzing parcel-as-a-whole case law is the doctrine of “appropriation to use.” Finally, the Article considers arguments that “parcel as a whole” should be extended, under a “unity of ownership” concept, to include tracts of land comprised of legally separate parcels, not owned by the same person, entity, or group of substantially identical persons or entities, but with coordination of land use, resulting in the parcels being more valuable to their respective owners.

The U.S. Supreme Court first enunciated the parcel-as-a-whole rule in *Penn Central Transportation Co. v. New York City*.¹ The Court stated:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole²

While *Penn Central* cited no legal precedent or other authority for its assertion that parcels are not thus divisible, the Court’s jurisprudence, going back to the nineteenth century, specifies that when the government takes part of a parcel it owes severance damages for consequent injury to the balance.³

As Chief Justice Rehnquist explained after *Penn Central*, “[t]he need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel.”⁴ Thus, the identity of the “relevant parcel” would be determined, in a given case, by applying the parcel-as-a-whole doctrine to the relevant facts.

The U.S. Court of Appeals for the Federal Circuit explained that the question of the relevant parcel

1. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978).

2. *Id.*

3. *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *United States v. Grizzard*, 219 U.S. 180 (1911). The author thanks Gideon Kanner for calling *Grizzard* to his attention.

4. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 514–15 (1987) (Rehnquist, C.J., dissenting (citing *Penn Central*, 438 U.S. at 149 n.13 (Rehnquist, J., dissenting))).

is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition with the value that remains in the property, “one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.”⁵

In determining the relevant parcel, the Federal Circuit has taken “a flexible approach, designed to account for factual nuances.”⁶

Flexibility has its price. As the Supreme Judicial Court of Massachusetts observed: “Repeated admonitions to use the ‘parcel as whole,’ however, do little to define the contours of that whole parcel in any particular case.”⁷ Putting the underlying concern more broadly, balancing tests, multifactor tests, and similar exercises are not only difficult to apply in the takings context but also suggest a lack of judicial transparency or standards.⁸

The Author concludes that the “unity of ownership” theory is a new application of an old view, sometimes associated in the United States with Henry George, that value in land is socially created.⁹ Under that approach, the value inhering in property does not really belong to the owners themselves, but rather to a broader community. Social cooperation among neighbors increases the value of their respective parcels. It also, from a Georgist perspective, makes that value attributable to a consortium of neighbors defined by their cooperation.¹⁰ Ironically, however, an aggressive application of “parcel as a whole” punishes the very cooperation that engenders social value. As an illustration, the first cases to consider “economic parcel,” referred to here collectively as the pending “Sweetwater

5. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000), *aff’d on reh’g*, 231 F.3d 1354 (Fed. Cir. 2000) (quoting *Keystone*, 480 U.S. at 497).

6. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

7. *Giovanella v. Conservation Comm’n of Ashland*, 857 N.E.2d 451, 456 (Mass. 2006).

8. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 349 (1993).

As a rhetorical device, . . . the image of the balance . . . is likely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberations too nakedly.

Like the use of complex multipart tests and similar analytic schemes, to which it is in fact a perfect complement, the rhetoric of balancing is thus a strategy of insecurity.

Id.

9. See HENRY GEORGE, *PROGRESS AND POVERTY* (1880); *infra* Part III.B.

10. See generally Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 75 (2010) (“Ultimately, lawmakers crafting and updating a scheme of private property must choose among the many types of liberty that they want to secure, based on their assessment of the common good.”).

Mesa” litigation,¹¹ result from the California Coastal Commission’s invocation of “unity of ownership” to limit *all* of the cooperating owners together to the right to build one home that otherwise would be enjoyed by *each*.¹²

In his recent opinion summarizing the factors germane to a relevant parcel analysis in *Lost Tree Village Corp. v. United States*, Judge Charles Lettow stated: “Quite simply, there are very few *per se* rules in regulatory takings cases.”¹³ This observation is accurate, and thus points to a basic problem in regulatory takings law. Concurring in the judgment in *Lucas*, Justice Kennedy observed: “There is an inherent tendency towards circularity in this synthesis, of course; for if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is.”¹⁴ More succinctly, as Judge Stephen Williams concluded, “regulation begets regulation.”¹⁵

This Article asserts the correctness of one *per se* rule; that relevant parcels should not include separate parcels without clear and convincing evidence of overlap of ownership.

I. PROPERTY RIGHTS, DEPRIVATIONS, AND TAKINGS

A. *The Nature of Property Rights, Regulation, and Eminent Domain*

Property ownership normally entails wide discretion in use, in the ability to exclude others, and in the transfer of those rights to others.¹⁶ To be sure, private property rights are limited by the obligation to respect the property rights of others, as delineated and enforced by common law nuisance.¹⁷

11. Complaint at 2, *Mulryan Props., LLLP v. Cal. Coastal Comm’n*, No. BS133269 (Cal. Super. Ct., Aug. 12, 2011) [hereinafter “*Mulryan Complaint*”]; *Ronan Props., LLLP v. Cal. Coastal Comm’n*, No. BS133270 (Cal. Super. Ct., Aug. 12, 2011); *Lunch Props. LLLP v. Cal. Coastal Comm’n*, No. BS133271 (Cal. Super. Ct., Aug. 12, 2011); *Vera Props. LLLP v. Cal. Coastal Comm’n*, No. BS133272 (Cal. Super. Ct., Aug. 12, 2011). The Superior Court consolidated the four cases for all proceedings on October 21, 2011. *Mulryan Props., LLLP v. Cal. Coastal Comm’n*, No. BS133269 (Cal. Super. Ct., Oct. 21, 2011) (order consolidating four cases).

12. *See infra* Part II.D.3.

13. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 430 n.28 (2011) (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002)).

14. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring in judgment).

15. *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring).

16. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (“Property rights in a physical thing have been described as the rights ‘to possess, use and dispose of it.’” (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945))).

17. *See generally* Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W.R. L.

Government protects the public health, safety, and welfare through an inherent attribute, the “police power.”¹⁸ However, government often may further the same purposes by appropriating private property. Thus, the State may protect the public either by arming a militia of citizens or by taking private land to build a fort at a strategic location. Over centuries, the sovereign’s right to take private property became coupled with a corresponding obligation to pay, a view firmly ensconced in the “just compensation” requirement of the Fifth Amendment’s Takings Clause.¹⁹

Perhaps the great majority of government appropriations of property in the United States are not explicitly compensated, but nevertheless are compensated in kind. Through the familiar “reciprocity of advantage,” described by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, commonplace regulatory requirements, such as wide setbacks from the sidewalk in front of homes, receive implicit compensation, in the form of the enhanced value of pleasant vistas created by the imposition of similar restrictions on neighbors.²⁰ Even quite stringent prohibitions on the operation of certain businesses to preserve the appearance of a neighborhood can sometimes be justified under this principle.²¹

This Article later will assert that, like the narrower concept of reciprocity of advantage, a broader mutuality of advantage, resulting from the social norms embodying patterns of neighborly behavior, is beneficial to owners generally. But, adherence to social norms does not convert neighbors into business partners.²²

REV. 583 (2008) (explicating common law nuisance and asserting its underutilization in environmental protection).

18. *See Lochner v. New York*, 198 U.S. 45 (1905).

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. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

Id. at 53 (citing, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887); *In re Kemmler*, 136 U.S. 436 (1890); *Crowley v. Christensen*, 137 U.S. 86 (1890)).

19. U.S. CONST. amend. V (stating that “nor shall private property be taken for public use, without just compensation”).

20. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

21. *See City of New Orleans v. Dukes*, 427 U.S. 297, 304 (1976) (upholding a law prohibiting the use of pushcart vendors in the French Quarter of New Orleans to preserve the area’s appearance).

22. *See infra* Part II.

B. From Penn Coal to Penn Central

1. *Pennsylvania Coal* and Government Going “Too Far”

The case in which the Supreme Court gave its imprimatur to comprehensive land use regulation, *Village of Euclid v. Ambler Realty Co.*,²³ was decided only four years after its seminal case on the boundary between permissible land use regulation and private property rights, *Pennsylvania Coal Co. v. Mahon*.²⁴ In *Pennsylvania Coal*, Justice Holmes famously pronounced when “regulation goes too far it will be recognized as a taking.”²⁵ In *Euclid*, which did not cite *Pennsylvania Coal*, the Court upheld comprehensive zoning against a facial challenge. It offered little explanation, beyond positing a police power analogy to the common law of nuisances, which “ordinarily will furnish a fairly helpful clew.”²⁶ Substantial deference was accorded local decisionmaking.²⁷

Two years later, in *Nectow v. City of Cambridge*, the Court noted that government’s “power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited,” and “such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, . . . or general welfare.”²⁸ The Court agreed with the findings below that the plaintiff’s property was substantially injured, while police power support was “wanting.”²⁹ Means-ends analysis indicated that the regulation came up short.

2. *Penn Central*, Ad Hoc Balancing, and Fairness

After *Nectow*, fifty years went by before the Court considered another land use case, *Penn Central Transportation Co. v. New York City*.³⁰ Justice Brennan’s opinion for the Court principally established an ad hoc, multifactor test for regulatory takings:

23. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

24. *Pa. Coal Co.*, 260 U.S. at 393.

25. *Id.* at 415.

26. *Euclid*, 272 U.S. at 387. “A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.” *Id.* at 388.

27. *Id.* at 388 (“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” (citing *Radice v. New York*, 264 U.S. 292, 294 (1924))).

28. *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (citing *Euclid*, 272 U.S. at 395).

29. *Id.* at 188–89.

30. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

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.³¹

Of the specific factors enunciated, impact on the claimant has not been of great importance.³² The character of the regulation test, which lost its immediate *raison d'être* four years after *Penn Central*,³³ has been casting about for a role.³⁴ Correspondingly, the second factor, investment-backed expectations, has assumed overwhelming importance.³⁵

In hindsight, the overbreadth of the opinion marks the first foray into this murky area of law. The opinion largely was based upon several counter-factual conclusions: Grand Central Terminal actually embodied the "investment-backed expectations" that Justice Brennan demanded, since the original design of the terminal included a strengthened framework for a twenty-story office building contemplated to be later constructed above it.³⁶ Likewise, the air rights above the terminal were both economically significant and the subject of separate ownership,³⁷ and the parcel's existing

31. *Id.* at 124 (citations omitted).

32. *See* Walcek v. United States, 49 Fed. Cl. 248 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (discussing the various factors used in assessing takings claims).

33. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (using a different test when a government action involves a physical occupation).

34. *See, e.g.,* Am. Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 51 (2001) (holding that targeted legislation that precluded the plaintiff from using a fishing vessel gave rise to takings liability); Am. Pelagic Fishing Co. v. United States, 55 Fed. Cl. 575, 595 (2003) (awarding damages for a regulatory taking), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004) (referring to government targeting of individuals); Lost Tree Vill. Corp. v. United States, 100 Fed. Cl. 412, 438–39 (2011) (noting that the permit denial "was targeted to Lost Tree," making the "character of the government action" factor favor the claimant).

35. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–39 (2005). "Primary among those [*Penn Central*] factors are '[t]he economic impact of the regulation on the claimant and, *particularly*, the extent to which the regulation has interfered with distinct investment-backed expectations.' *In addition*, the 'character of the governmental action' . . ." *Id.* (alteration in original) (emphasis added) (citation omitted); *see also* Steven J. Eagle, *The Rise and Rise of 'Investment-Backed Expectations'*, 32 URB. LAW. 437 (2000) (describing the genesis and rise in importance of investment-backed expectations analysis in takings jurisprudence).

36. *Penn Central*, 438 U.S. at 115 n.11.

37. *Id.* at 116 (noting that Penn Central had entered into an agreement with UGP Properties,

use as a passenger railroad station was not economically viable.³⁸ However, the tactical decision was made by counsel not to emphasize these points at oral argument, and Penn Central never did seek approval of a twenty-story building.³⁹ The result of the latter failure was “that to a great extent the characterization of the law as having taken away all the air rights above the terminal really wasn’t accurate and that too was reflected in the opinion.”⁴⁰

Now, based on *Williamson County*, *Penn Central* would be regarded as unripe for decision for lack of a final determination of what development would be allowed.⁴¹ In the absence of rigorous analysis of correctly understood facts, *Penn Central* presented broad dicta on a grand scale.

Those problems with its factual bases make *Penn Central* an unlikely vehicle for a major Supreme Court holding. There are indications, moreover, that the Justices saw the case as quite routine.⁴² It is therefore

providing that it would receive \$1 million annually during construction of the office building and \$3 million annually during the ensuing fifty-year lease term).

38. See William W. Wade, *Penn Central’s Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 287 (1999). “No competent showing of Penn Central’s ‘reasonable return’ with and without the building project was proffered. The Court’s conclusion that Penn Central ‘not only . . . [profited] from the Terminal but also obtain[ed] a reasonable return on its investment’ was an un rebutted assumption by the court.” *Id.* (alteration in original) (citation omitted).

39. See Transcript, *Looking Back on Penn Central: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 306 (2004) (remarks of Daniel Gribbon, Esq., who presented oral argument for Penn Central).

I think I made a mistake . . . in not arguing the notion that air rights are a very important and discrete part of a property interest. Today I think that is well established. But at that time, 25 years ago, air rights were sort of mysterious and the court of appeals in New York had said they really don’t amount to very much. And I think had I been able to persuade the lawyers on the Court that these air rights were just as important a part of property as an acre of ground or a wing of a building the decision could possibly have been different.

Id.

40. *Id.* at 300 (remarks of Justice Brennan’s clerk, David Carpenter, who worked on the *Penn Central* opinion).

41. See *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (stating that a regulatory taking claim is “not ripe until the government entity charged with implementing the regulations [had] reached a final decision regarding the application of the regulations to the property at issue”); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348–49 (1986) (“Until a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.” (alterations in original) (quoting *Williamson Cnty.*, 473 U.S. at 186, 190 n.11) (internal quotation marks omitted)); *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) (“[O]nce . . . the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.”).

42. See Transcript, *supra* note 39, at 307–08 (informal recollections of Justice Brennan’s clerk, David Carpenter, who worked on the *Penn Central* opinion).

At the time I thought Justice Brennan was making some modest efforts to bring a little content to an area of law that was . . . then quite formalist and in disarray. . . . As I noted, other clerks had told me that the opinion better not say

perhaps an irony of history that the ad hoc test of *Penn Central*, like Footnote Four of *Carolene Products* before it,⁴³ has been instantiated as a judicial landmark.

C. Basic Takings Principles

The Supreme Court long has avoided drawing clear delineations regarding property rights and permissible government regulation. Principal vehicles for avoidance have been the imposition of a unique “ripeness” test;⁴⁴ the arbitrary bifurcation of takings law into physical and regulatory branches, with ensuing inconsistent rules;⁴⁵ and the Court’s failure to clarify its nebulous, ad hoc, substantive takings test.

D. Regulatory Takings and Substantive Due Process

In *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court summarized its takings jurisprudence. It noted “two categories of regulatory action that generally will be deemed *per se* takings.”⁴⁶ These were “permanent physical invasion[s] . . . however minor” under *Loretto*, and “regulations that completely deprive an owner of ‘all economically beneficial us[e]’” under *Lucas*.⁴⁷ Beyond that, the *Penn Central* ad hoc, multifactor, balancing test governs.⁴⁸

Although *Lingle* referred to the 1897 application of the just compensation requirement to the states in *Chicago, Burlington & Quincy*

very much before I started work on the draft and in fact after it was circulated, Justice Stewart’s clerk read it and said he was pretty sure it doesn’t say anything at all. [*Laughter*].

Id.

43. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (establishing different standards of judicial scrutiny for the general run of economic and social legislation and for legislation adversely affecting “discrete and insular minorities”). Justice Frankfurter observed: “A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine . . .” *Kovacs v. Cooper*, 336 U.S. 77, 90–91 (1949) (Frankfurter, J., concurring).

44. See Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992) (describing the *Williamson County* test as “a special ripeness doctrine applicable only to constitutional property rights claims”).

45. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (noting that the Court’s “regulatory takings jurisprudence cannot be characterized as unified,” and distinguishing physical from regulatory takings “because of the unique burden they impose”).

46. *Id.* at 538.

47. *Id.* (second alteration in original) (emphasis omitted) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

48. *Id.*; see *supra* Part I.B.2 for discussion.

Railroad Co. v. Chicago,⁴⁹ *Lingle* made no mention of its roots in substantive due process.⁵⁰ *Chicago, Burlington & Quincy Railroad Co.*, as Justice Stevens later stated, “contain[ed] no mention of either the Takings Clause or the Fifth Amendment,” but rather “applied the same kind of substantive due process” as gave rise to *Lochner*.⁵¹

In *Lingle*,⁵² Justice O’Connor later stated: “While scholars have offered various justifications for this regime, we have emphasized its role in ‘bar[ring] 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.’”⁵³ Significantly, she offered no explication of the proffered justifications, nor did she explain why the Court settled on the “fairness and justice” approach.

The clash of takings and due process approaches came to a head in *Eastern Enterprises v. Apfel*, where a federal statute augmented retired coal miners’ health and retirement benefits.⁵⁴ Justice O’Connor’s plurality opinion declared that a solution that “singles out certain employers to bear a burden that is substantial in amount, based on the employers’ conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action *implicates* fundamental principles of fairness *underlying* the Takings Clause.”⁵⁵

While Justice Kennedy agreed with the plurality that the statute was unconstitutional, he,⁵⁶ and the four dissenters, thought that the case should be decided on due process grounds and not under the Takings Clause.⁵⁷ Justice Breyer asserted that the issue of “retroactive liability—finds a

49. *Id.* at 536 (citing *Chicago, B. & Q. R. Co.*, 166 U.S. 226 (1897)).

50. See Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings Muddle*, 90 MINN. L. REV. 826 (2006) (examining the development of property protection through substantive due process).

51. *Dolan v. City of Tigard*, 512 U.S. 374, 405–06 (1994) (Stevens, J., dissenting). Chief Justice Rehnquist retorted that

there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States. Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), to reach that result.

Id. at 384 n.5 (citations omitted).

52. *Lingle*, 544 U.S. at 528.

53. *Id.* at 537 (alteration in original) (emphasis added) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

54. *E. Enters. v. Apfel*, 524 U.S. 498, 503–04 (1998) (plurality opinion).

55. *Id.* at 537 (emphasis added).

56. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

57. *Id.* at 554–56 (Breyer, J., dissenting) (deeming the Act constitutional under the Due Process Clause). Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 553.

natural home in the Due Process Clause,”⁵⁸ and that the “Takings Clause does not apply.”⁵⁹ As professor John Fee noted:

Our regulatory takings doctrine today functions more like a substantive due process right. Similar to due process cases prohibiting excessive punitive damages awards, the law of regulatory takings is commonly understood as a defense for individuals against government actions that are extreme and unreasonable as applied to the individual, rather than as a guarantee of equal treatment among members of a community.⁶⁰

Notwithstanding the Supreme Court’s affirmance of the conceptual legitimacy of such substantive due process review, “prior to” considering takings issues in *Lingle*,⁶¹ the Court’s view of the relationship of the Takings Clause and substantive due process in property deprivation cases remains unsettled.⁶²

II. “PARCEL AS A WHOLE” AND APPROPRIATION TO USE

In applying “parcel as a whole,” courts should be guided by general principles of American real property law. There, the concept that some land inherently has been made servient to other land is well-established. Such relationships often commence in inchoate form, where parts of an owner’s parcel provide services for other parts, a relationship that usually goes unnoticed until the original parcel is divided. Many cases discuss the resulting “implied easements” and “implied reservations,” which function so as to maintain these pre-severance relationships.⁶³

In addition, owners may transfer interests in their land for the benefit of other parcels through the creation of explicit easements. In particular, an

58. *Id.* at 556.

59. *Id.* at 554.

60. John E. Fee, *The Takings Clause As a Comparative Right*, 76 S. CAL. L. REV. 1003, 1004 (2003) (footnote omitted).

61. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

Instead of addressing a challenged regulation’s effect on private property, the “substantially advances” inquiry probes the regulation’s underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.

Id.

62. These views are elaborated in Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 905–07 (2007).

63. *See, e.g., Van Sandt v. Royster* 83 P.2d 698, 701–03 (Kan. 1938) (upholding in equity an easement by reservation for a sewer line benefiting an uphill owner, as implied by prior existing use).

“easement appurtenant” appropriates use rights in the servient estate for the benefit of the dominant estate.⁶⁴ Owners may bind their lands to the use of other parcels through promises that run with their interests in land, traditionally enforced as real covenants⁶⁵ or equitable servitudes.⁶⁶ The recent *Restatement (Third) of Property—Servitudes* collapses covenants, easements, and equitable servitudes into “servitudes.”⁶⁷ As the *Restatement (Third)* puts it, “servitudes are useful,” and therefore a servitude should be enforced with a minimum of fuss, unless it “violates a constitutional, statutory, or public-policy norm.”⁶⁸

While the promises embodied in a servitude inhere to the advantage of the owners of specific parcels (where the benefits are appurtenant) or to specific individuals in their personal capacities (where the benefits are “in gross”), there is no conflation of the individual parcels beyond effectuation of the servitude.

On the other hand, owners may enter into business partnerships, or acquire shares in the same corporation, and dedicate the beneficial enjoyment of property owned in their individual names to the business enterprise.⁶⁹ The important distinction is that individuals with interests in the same land are not, on that account, business partners, whereas individuals *intending* to be business partners can dedicate lands they jointly purchase or otherwise own to the partnership.⁷⁰

64. *E.g.*, *Arcidi v. Town of Rye*, 846 A.2d 535, 539 (N.H. 2004); *Russakoff v. Scruggs*, 400 S.E.2d 529, 531 (Va. 1991).

65. *See, e.g.*, RESTATEMENT OF PROPERTY § 530 (1944) (“Running of Promises Respecting the Use of Land”).

66. The seminal case is *Tulk v. Moxhay*, (1848) 41 Eng. Rep. 1143 (enforcing a real covenant in equity based on notice to and an intent to bind successors, notwithstanding a lack of “privity” needed to enforce real covenants at law).

67. *See* RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.1 (2000) (“The servitudes covered by this Restatement are easements, profits, and covenants.”).

68. *Id.* at ch. 2, Creation of Servitudes, intro. note (2000).

This Chapter’s treatment of servitude creation reflects the basic position that servitudes are useful devices that people ought to be able to use without artificial constraints. The primary function of the law is to ascertain and give effect to the intent of the parties, not to force them into arbitrary transaction forms. If they meet minimal formal requirements, their expressed intent is effective to create a servitude, unless the transaction violates a constitutional, statutory, or public-policy norm.

Id.

69. *See, e.g.*, *Zanetti v. Zanetti*, 175 P.2d 603, 604 (Cal. Dist. Ct. App. 1947).

70. *See, e.g.*, *Stone-Fox, Inc. v. Vandehey Dev. Co.*, 611 P.2d 1195, 1197 (Or. App. 1980), *rev’d on other grounds*, 626 P.2d 1365 (Or. 1981) (finding that individuals who owned the same parcel of property were business partners when they engaged in business enterprise with the property). For a discussion of the circumstances under which landowners who coordinate the development of their parcels might be treated as partners, *see infra* Part II.B.

Given that regulatory takings law focuses not on discrete interests in property, but on effects upon owners,⁷¹ it is to be expected that case inquiries would focus on owners, rather than on deeded parcels. Thus, a court would consider contiguous separately deeded parcels, owned by the same person, and used in a highly integrated way in the same business enterprise, to constitute one parcel for regulatory takings purposes.⁷²

A. Explicating the Relevant Parcel

In the seminal regulatory takings case, *Pennsylvania Coal Co. v. Mahon*, Justice Holmes focused on the “diminution in value” that might result from the prohibition of exercise of a property right.⁷³ He declared, both famously and cryptically, that “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁷⁴

In dissent, Justice Brandeis declared “[t]he rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole.”⁷⁵ Thus, from the outset, those advancing and resisting the notion of the compensability of deprivation of property rights took recourse in proportionality. “Proportionality” and “fairness” are close cousins,⁷⁶ and the Supreme Court continues to emphasize “fairness” in its regulatory takings cases, even at the cost of eschewing clear rules.⁷⁷ Given the role of “parcel as a whole” within a framework of ad hoc determinations, it is no surprise that, in grappling with

71. *See supra* Part I.D.

72. *See, e.g., Ciampitti v. United States*, 22 Cl. Ct. 310, 312–13 (1991) (holding that a real estate developer was not entitled to Fifth Amendment compensation for the denial of a permit to fill wetlands because the relevant parcel for the Court’s takings analysis included a larger tract than that affected by the permit denial).

73. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). “One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.” *Id.*

74. *Id.* at 415.

75. *Id.* at 419.

But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.

Id.

76. *See* DOUGLAS W. KMEC, *ZONING & PLANNING DESKBOOK* § 5:43 (2d ed. 2011) (“‘Justice and fairness’ seems to be a proportionality concept.”).

77. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 336 (2002) (“The concepts of ‘fairness and justice’ that underlie the Takings Clause, of course, are less than fully determinate.”).

what constitutes the relevant parcel, courts sometimes resort to examining owners' expectations.⁷⁸

1. The Relevant Parcel Inquiry

While courts have determined the relevant parcel to be larger or smaller, the baseline for “parcel as a whole” remains the deeded parcel. Each legal parcel is a separate parcel for takings analysis, unless and until the facts indicate otherwise. “To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, *the parcel in question*.”⁷⁹

In both *Palm Beach Isles*⁸⁰ and *Loveladies Harbor*,⁸¹ the Government had proposed that the original parcel be the standard and the landowner proposed that only that part of the parcel made unusable was the denominator. Thus, the Federal Circuit dealt with an apparent conceptual severance problem—the plaintiff appeared to be trying to slice up the parcel so that there was a complete taking.

However, relevant parcel analysis should be approached more neutrally, balancing the dangers of severance and agglomeration. To begin with a criminal justice analogy, prosecutions typically are resolved through plea-bargaining, and there is an incentive for the prosecutor to gain bargaining leverage by “overcharging” the criminal defendant.⁸² Proposed solutions include initial “hard screening” of cases,⁸³ and financial incentives for prosecutors whose initial charges closely match those upon which defendants are convicted at trial.⁸⁴ Similarly, localities might gain leverage over land-development applicants, in negotiation or at trial, by cultivating a

78. Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 454 n.90 (2011) (citing Keith Woffinden, Comment, *The Parcel As a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 641 n.85 (2008)).

79. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993) (emphasis added) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

80. *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000).

81. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180–81 (Fed. Cir. 1994).

82. See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (describing the prosecutorial practice of bringing overly serious charges to gain bargaining leverage over a criminal defendant).

83. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 48–58 (2002).

84. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873–75 (1995).

reputation for proposing extravagant or grandiose relevant parcels.⁸⁵ Judicial vigilance might help counteract this.

These concerns point to the need for some objective measure for determining relevant parcels.⁸⁶ Professor John Fee has suggested a test to determine whether a proposed horizontal relevant parcel has “independent economic viability.”⁸⁷ Under that standard, “a taking . . . occur[s] when any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation.”⁸⁸ The present author has proposed a “commercial unit” test, akin to the similar concept in the Uniform Commercial Code,⁸⁹ under which the claimant could choose any unit of property as the relevant parcel but would have to establish that the selection is a unit used generally in real estate transactions in the area.⁹⁰

2. Is “Parcel As a Whole” a Misguided Concept?

Dwight Merriam has suggested that the Court’s continued “creep toward subjectivity” results in takings scholars and practitioners learning largely through what B. F. Skinner came to understand as “operant conditioning, where we have so many variable inputs we cannot identify them all, but from them we receive the cues necessary to respond. We have all experienced this ourselves and we verbalize it as: ‘I just have a feeling.’”⁹¹ However, our conviction that we have become more skilled in dealing with problems through intuition often masks the fact that we have not become more skilled at all.⁹²

Some commentators have asserted that “[t]he parcel-as-a-whole notion became a bedrock takings precedent with no precedent, justification, or

85. Cf. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 353 n.9 (1986) (“Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.”).

86. See generally Keith Woffinden, Comment, *The Parcel As a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 646–51 (discussing the effectiveness of the independent economic viability test).

87. John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1557–62 (1994).

88. *Id.* at 1537.

89. See U.C.C. § 2-608(1) (2004) (“The buyer may revoke his acceptance of a . . . commercial unit whose non-conformity substantially impairs its value to him if he has accepted it.”).

90. STEVEN J. EAGLE, *REGULATORY TAKINGS*, § 7-7(e)(5) (4th ed. 2009).

91. Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 376 (2003) (citing B.F. Skinner, *Brief Survey of Operant Behavior*, B.F. SKINNER FOUND., <http://www.bf-skinner.org/BFSkinner/SurveyOperantBehavior.html> (last visited Mar. 25, 2012)).

92. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (challenging the rational model of judgment and decisionmaking and asserting that our cultivated intuitions often are wrong).

empirical underpinnings,”⁹³ creating, as it is applied in the lower courts, a “quagmire of economic confusion.”⁹⁴ Also, its “ad hoc” focus places the development of a coherent jurisprudence of regulatory takings at the “mercy of diverse and at times idiosyncratic approaches” pursued by various state and federal courts, resulting in a “Tower of Babel.”⁹⁵

Professor John Fee called the denominator problem a “conceptual black hole.”⁹⁶ He noted that substantive standards exist because they serve a societal need. In antitrust law, for instance, the definition of “relevant market” is a function of providing consumers with an adequate array of product choices.⁹⁷

By contrast, the takings denominator issue seems to exist solely because we have not found a better way to avoid the extreme result of requiring the government to compensate for all changes in the law. We might as well say that all property owners who earn more than a certain income are not entitled to compensation under the Fifth Amendment so as to make it less expensive for government to regulate. Unless some reason exists why the Takings Clause should be concerned with deterring citizens from owning too much property at once, the quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner’s property is a taking of that part. The takings denominator problem is more than a “difficult, persisting question” that the Supreme Court continues to avoid. It is a conceptual black hole. It reveals a fatal flaw in the supposition that there is a fixed right to use land for economic gain: Such a right cannot be reconciled with a stable theory of private property.⁹⁸

93. Wade, *supra* note 38, at 278.

94. William W. Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to Penn Central*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10,936, 10,938 (2011).

95. Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 310–11 (1998).

96. Fee, *supra* note 60, at 1032.

97. *Id.* In this respect, standards protecting and regulating property are like “property” itself, which is defined, delineated, and monitored when the utility of so doing exceeds the costs. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (arguing that subject to a community’s preferences for personal property ownership, property rights develop to internalize externalities when the gains of internalization outweigh the costs).

98. Fee, *supra* note 60, at 1032 (footnotes omitted).

3. Parcels, Severance, and Agglomeration

The need to determine the relevant parcel arises when a regulatory takings claimant asserts a substantial, but not total,⁹⁹ deprivation of economic use. When the takings plaintiff owns a deeded parcel of land, it is almost automatic that the issue is framed in terms of whether or not the owner has employed “conceptual severance” to enhance the takings fraction.¹⁰⁰

This mode of thought leads to neglect of the fact that government, too, could manipulate the takings fraction by increasing its denominator through the inclusion of vast areas beyond the boundaries of the deeded parcel. I have referred to this as “conceptual agglomeration.”¹⁰¹ As Judge Eric Bruggink observed in *Ciampitti*, while “a taking can appear to emerge if the property is viewed too narrowly,” it is just as true that “[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined.”¹⁰²

Both the State and the owner have reason to object to the equation of relevant parcel with deeded parcel. The Supreme Court has set forth the parameters of the debate in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.¹⁰³ On one hand, it stated that a takings claimant may not establish a complete deprivation of value through the simple expedient of “defining the property interest taken in terms of the very regulation being challenged.”¹⁰⁴ This image of an owner cutting away parts of a parcel unaffected by regulation, leaving only a heavily burdened remainder of little value, gained purchase through the phrase “conceptual severance,” which was coined by Professor Margaret Radin.¹⁰⁵ In the same symposium issue, Professor Frank Michelman used the term “entitlement chopping” to describe the same phenomenon.¹⁰⁶

This formulation suggests that the Court views the denominator of the takings fraction as the entire deeded parcel, which would minimize the resulting fraction, or some lesser amount, that would result in an increase of

99. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (establishing the total taking test).

100. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1677–78 (1988). “[E]very regulation of any portion of an owner’s ‘bundle of sticks,’ is a taking of the whole of that particular portion considered separately. Price regulations ‘take’ that particular servitude curtailing free alienability, building restrictions ‘take’ a particular negative easement curtailing control over development, and so on.” *Id.* at 1678 (footnote omitted).

101. EAGLE, *supra* note 90, § 7-7(b)(2).

102. *Ciampitti v. United States*, 22 Cl. Ct. 310, 318–19 (1991).

103. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002).

104. *Id.*

105. Radin, *supra* note 100, at 1667.

106. Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1601 (1988).

the takings fraction. If the phrase “the parcel in question” referred to the relevant parcel, it would be self-referential, since the “relevant parcel” would be both the takings fraction and the denominator of the takings fraction.

However, manipulation of “parcel as a whole” is a game that either side can play. If owners can engage in “conceptual severance,” then regulators can engage in “conceptual agglomeration.”¹⁰⁷ If an owner could obtain a 100% taking by claiming that the relevant parcel is only the right taken, the government could render the takings fraction insignificant by postulating a huge denominator.

A classic case of agglomeration is the opinion of the New York Court of Appeals in *Penn Central*, which conflated the parcel on which Grand Central Terminal was located with hotels, office buildings, and other valuable real estate that the railroad owned reaching up Park Avenue.¹⁰⁸ This analysis, not considered when the Supreme Court reviewed the case, subsequently was denounced in *Lucas v. South Carolina Coastal Council* as “an extreme—and, we think, unsupportable—view of the relevant calculus.”¹⁰⁹

Since *Penn Central* was decided in 1978, there has been substantial commentary on the meaning of “parcel as a whole.” Among the more helpful analyses are Dwight Merriam’s *Rules for the Relevant Parcel*,¹¹⁰ and the recent summary of existing law by Court of Federal Claims Judge Charles Lettow in *Lost Tree Village Corp. v. United States*.¹¹¹ As Judge Lettow noted, as a threshold question, “the court must determine how to define the relevant parcel On this question, there is no bright-line rule; rather, the court takes ‘a flexible approach, designed to account for factual nuances.’”¹¹²

The idea that the rule under which one evaluates the facts is not a fixed one, but varies with the facts themselves, is a piece with the “ad hocery”¹¹³

107. EAGLE, *supra* note 90, § 7-7(b)(2).

108. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1276–77 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978) (including in the takings fraction denominator the total value of the taking claimant’s other holdings in the vicinity).

109. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992) (citing *Penn Central*, 366 N.E.2d at 1276–77).

110. Merriam, *supra* note 91 at 414; *see also* Charles R. Wise, *The Changing Doctrine of Regulatory Taking and the Executive Branch: Will Takings Impact Analysis Enhance or Damage the Federal Government’s Ability to Regulate?*, 44 ADMIN. L. REV. 403, 423–24 (1992); Woffinden, *supra* note 86, at 641 n.85 (citing illustrative cases).

111. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 427–30 (2011).

112. *Id.* at 427 (quoting *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994)) (citing *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000)).

113. *See* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L.

that makes it so difficult for lawyers to predict with any confidence what *Penn Central* means.¹¹⁴ A more reliable standard would be based on a concept actually used in property law: appropriation to use.

B. The Aggregation of Lands and Landowners

Judge Charles Lettow of the Court of Federal Claims recently presented a comprehensive roadmap of the relevant parcel inquiry in *Lost Tree Village Corp. v. United States*.¹¹⁵ The key factors he noted were “the owner’s actual and projected use of the property”¹¹⁶ and whether or not the government is engaged in “aggregating separate parcels owned by legally separate entities.”¹¹⁷

In the analogous situation of the federal income tax, these concepts might be described in terms of attribution of receipts to one business of the taxpayer or another,¹¹⁸ and the attribution of assets owned by one entity to another.¹¹⁹ The corresponding relevant parcel issues are the appropriation of lands to the use of other lands, so as to unify them for takings purposes, and the appropriation of land deeded in certain individuals or entities to the benefit of other individuals or entities.

The *aggregation of parcels* is permissible, but the *aggregation of people or entities* is not. Separately deeded parcels might be used together, so that their aggregation is appropriate in determining the holdings of their mutual owner. However, aggregating the characteristics of a parcel belonging only to *A*, a parcel belonging only to *B*, and a parcel belonging only to *C*, is no more helpful for takings purposes than would be aggregating all of the parcels belonging to residents of a certain township or county.

On the other hand, if *A*, *B*, and *C* are members of the *ABC* Partnership, or the sole shareholders of the *XYZ* Corporation, the result might be

REV. 1697, 1700 (1988) (noting the confusion caused by ad hoc factual inquiries in the current takings jurisprudence).

114. See Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 687 (2005).

115. *Lost Tree Vill.*, 100 Fed. Cl. at 427–30.

116. *Id.* at 427 (quoting *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)).

117. *Id.* at 436.

118. See, e.g., *DHL Corp. & Subsidiaries v. Comm’r*, 285 F.3d 1210, 1217 (9th Cir. 2002) (noting that 26 U.S.C. § 482 “gives the Commissioner authority to allocate income between two or more businesses ‘owned or controlled directly or indirectly by the same interests . . . if he determines that such . . . allocation is necessary in order to prevent evasion of taxes’” (alteration in original) (quoting 26 U.S.C. § 482 (2006))).

119. See, e.g., 26 U.S.C. § 318 (2006) (creating “constructive” stock ownership through the reattribution of stock owned by others on the basis of various relationships).

different. If the substance of the arrangement was that *A*, *B*, and *C* had acted upon their *intent* to appropriate their respective lands to the partnership or corporation, we could attribute ownership of the parcels to the entity, which would be their sole owner.

However, it is easy to misapply attribution through the use of bootstrapping. For example, assume that *A*, *B*, and *C* each decides to develop his or her land in a way that harmonizes, rather than clashes, with the actual or projected development of the others' contiguous parcels. This might result from neighborliness, from a desire to raise the value of each owner's own land, or, quite possibly, from both motivations. It might be tempting to say that each is acting to increase the aggregate value of the three parcels, and therefore they have formed an implicit partnership, to which ownership is imputed for takings purposes. But neither the common law of property nor the law of business associations countenances this result.¹²⁰ The implicit partnership is simply the reification of the abstract concept that cooperating individuals must share a common enterprise.

Existing case law has not included within a relevant parcel those property interests where there is *no* relationship between interests in land (although there might be common ownership) or where there is *no* common ownership (although there might be coordination of land uses).¹²¹ The possible aggregation of parcels and attribution of ownership are both considered in the ultimate relevant parcel determination. However, fidelity to law and analytic clarity requires that each factor first be evaluated separately. The next subparts of this Article consider the aggregation of lands, and the aggregation of entities, respectively.

C. Interrelationships of Land: The Owner's Actual and Projected Use

In *Loveladies Harbor, Inc. v. United States*, the Federal Circuit stated that, in determining the relevant parcel, "[o]ur precedent displays a flexible approach, designed to account for factual nuances."¹²² In *Forest Properties, Inc. v. United States*, it added that its precedent "requires courts to focus on the economic expectations of the claimant with regard to the property."¹²³ In the Court of Federal Claims' recent summary of factors pertaining to

120. See *infra* notes 160–165 and accompanying text.

121. The term "interests in land" is used in this Article in a generic sense, so as to distinguish "rights" from ownership of those rights. The word "parcel" is less cumbersome than "interests in land" but suggests that the relevant parcel must be comprised of one or more units, each consisting of a deeded parcel.

122. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

123. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500–01 (1987)).

relevant parcel analysis in *Lost Tree Village Corp. v. United States*, it distilled a number of factors that bear on the inquiry, including:

- (1) the degree of contiguity between property interests,
- (2) the dates of acquisition of property interests,
- (3) the extent to which a parcel has been treated as a single income-producing unit,
- (4) the extent to which a common development scheme applied to the parcel, and
- (5) the extent to which the regulated lands enhance the value of the remaining lands.¹²⁴

The court also stated that a sixth factor, “the extent [to which] any earlier development had reached completion and closure’ was also a relevant consideration in the relevant-parcel analysis.”¹²⁵ In a paragraph, *Palm Beach Isles* neatly encapsulates many of the relevant factors:

The regulatory imposition that infected the development plans for the 50.7 acres was unrelated to PBIA’s plans for and disposition of the 261 acres of beachfront upland on the east side of the road. The development of that property was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed on the lake side of the spit. Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified. The trial court’s conclusion to the contrary was error.¹²⁶

124. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 428 (2011) (citing *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), *aff’d on reh’g*, 231 F.3d 1354 (Fed. Cir. 2000)).

125. *Id.* (alteration in original) (quoting *Lost Tree Vill. Corp. v. United States*, 92 Fed. Cl. 711, 718 (2010) (denying summary judgment on the relevant parcel)).

126. *Palm Beach Isles*, 208 F.3d at 1381.

1. Degree of Contiguity

While their approaches might differ,

most courts entertain at least a strong presumption that all contiguous land held by a single owner is to be treated as a single unified parcel.¹²⁷ It may be necessary to consider an owner's property as an undivided whole to avoid extreme results under the deprivation-of-all-use standard. To engage in such "conceptual agglomeration" . . . however, is to violate the concept of property as a set of fungible entitlements. Large landowners are disadvantaged in their constitutional rights compared to small landowners for no apparent constitutional reason other than to find some limit to the regulatory takings doctrine. Paradoxically, this encourages one to increase the rights inherent in a bundle of private property by subdividing it among owners. Under the parcel-as-a-whole rule, a bundle of rights does not equal the sum of its component parts.¹²⁸

Similarly, in *Giovanella v. Conservation Commission of Ashland*, the court declared: "[t]he intuitive starting point for determining the boundary of the property under a takings clause analysis is to consider as one unit all contiguous property held by the same owner at the time the taking occurred."¹²⁹ The relevant parcel can include contiguous parcels,¹³⁰ non-contiguous parcels appropriated to the same use,¹³¹ subsurface mineral and water rights,¹³² and air rights.¹³³

Importantly, as the Court of Federal Claims declared in *Broadwater Farms Joint Venture v. United States*, "[t]here may be no 'rigid rule that the parcel as a whole must include *all* land originally owned by plaintiffs.' It is

127. Fee, *supra* note 60, at 1031 (citing, e.g., *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Forest Props.*, 177 F.3d at 1365).

128. *Id.* (footnote omitted) (quoting STEVEN J. EAGLE, REGULATORY TAKINGS § 11-7(b)(2) (2d ed. 2001)).

129. *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 457 (Mass. 2006) (citing, e.g., *Forest Props.*, 177 F.3d at 1365; *Am. Sav. & Loan Ass'n v. County of Marin*, 658 F.2d 364, 372 (9th Cir. 1981); *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991)).

130. *See Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 74 (1997) (finding that contiguous parcels with a common owner should be deemed one parcel for takings analysis), *aff'd*, 177 F.3d 1360 (Fed. Cir. 1999).

131. *See Ciampitti*, 22 Cl. Ct. 310 (considering various parcels purchased at different times by one purchaser for the purpose of real estate sale and development).

132. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (finding subsurface mineral rights to be part of the "parcel as a whole").

133. *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (finding the air rights to be one part of the "parcel as a whole").

a determination that relies on the particular facts of the case.”¹³⁴ The court excluded from the relevant parcel land disposed of in an earlier sale, which was commercially reasonable and not an attempt to circumvent the Clean Water Act, application of which gave rise to the asserted taking.¹³⁵

2. Dates of Acquisition

The acquisition of parcels in close temporal proximity to other events is a factor in determining the significance of the acquisitions for relevant parcel purposes. Thus, in *Cane Tennessee, Inc. v. United States*, the Court of Federal Claims said that it “simply does not see evidence” justifying the aggregation of parcels.¹³⁶ “One of the facts that indicates that these interests are distinct is the fact that the . . . interests were acquired by plaintiffs nearly two decades apart.”¹³⁷ Conversely, in *Forest Properties*, “this Court believes that . . . a mere five-month separation in time is more indicative of the unity of the two parcels than the separation of the parcels.”¹³⁸

In *Kalway v. City of Berkeley*, the immediacy of the transfer of a parcel to a spouse seemed dispositive.¹³⁹ The court noted that the Kalways

do not challenge the City’s assertions that public health and safety concerns mandate in favor of merger or that, but for the last-minute deed to Mrs. Kalway . . . the City had clear authority to merge the parcels. The Kalways agree that Mr. Kalway deeded the . . . [p]arcel to Mrs. Kalway in order to prevent the City from merging the parcels, after learning, informally, of the City’s intentions.¹⁴⁰

Since the deed had no independent significance other than to thwart operation of the Subdivision Map Act authorizing the merger, the problem was essentially one of form over substance.

134. *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 240 (1996) (emphasis added) (quoting *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 392 (1988)), *vacated and remanded on other grounds*, 121 F.3d 727 (Fed. Cir. 1997) (unpublished table decision); see *infra* Part II.C.4. for additional discussion.

135. *Id.*

136. *Cane Tenn., Inc. v. United States*, 60 Fed. Cl. 694, 700 (2004).

137. *Id.* at 700–01.

138. *Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 74 (1997), *aff’d*, 177 F.3d 1360 (Fed. Cir. 1999).

139. *Kalway v. City of Berkeley*, 60 Cal. Rptr. 3d 477 (Cal. Ct. App. 2007).

140. *Id.* at 481.

3. Single Income-Producing Unit

Whether the owner appropriates various parcels to a common economic scheme is important. As *Forest Properties* stated, “where [the] developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel.”¹⁴¹ In *Ciampitti v. United States*, the Court of Federal Claims declared that non-contiguous parcels may be treated as the relevant parcel where the owner so treated them “for purposes of purchase and financing,” in one consolidated operation.¹⁴²

In *District Intown Properties L.P. v. District of Columbia*, the owner of separately deeded lots was denied a permit for development of townhouses.¹⁴³ For more than twenty-five years, the lots constituted the lawn of an apartment building that had been designated a historic landmark. The court noted these facts, adding “[t]he lots [including the one on which the building was located] are spatially and functionally contiguous. . . . The intentional act of subdivision is the only evidence produced by District Intown that it has treated the lots as distinct units.”¹⁴⁴ In essence, at the time of the landmark designation, the servient lawn parcels were implicitly appropriated to the use of the building parcel.

On the other hand, in *Cane Tennessee*, the Court of Federal Claims concluded from an examination of the facts that

[t]he only evidence that the court can discern that the property interests owned by the Wyatts, on the one hand, and the Wyatt Trusts, on the other hand, were ever viewed by plaintiffs ‘as a single economic unit,’ is the joint filing of this lawsuit which occurred, of course, after the events claimed to constitute takings in this case.¹⁴⁵

4. Completion and Closure

In *Lost Tree*, Judge Lettow observed that the United States objected to consideration in a relevant parcel analysis of the extent to which any earlier development had reached completion and closure.¹⁴⁶

141. *Forest Props.*, 177 F.3d at 1365 (citing, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 500–01 (1987); *Naegle Outdoor Adver. v. City of Durham*, 844 F.2d 172, 176 (4th Cir. 1988); *K & K Constr., Inc. v. Dep’t of Natural Resources*, 575 N.W.2d 531, 535–37 (1998)).

142. *Ciampitti v. United States*, 22 Cl. Ct. 310, 319–20 (1991).

143. *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 876 (D.C. Cir. 1999).

144. *Id.* at 880.

145. *Cane Tenn., Inc. v. United States*, 60 Fed. Cl. 694, 700 (2004) (quoting *Forest Props.*, 177 F.3d at 1365).

146. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412 (2011).

Although the government concedes that temporality may be considered in relation to the imposition of the regulatory scheme, it claims that temporal considerations related to progression of development may not inform the court's analysis, and that severing a parcel on temporal grounds runs afoul of the Supreme Court's opinion in *Tahoe-Sierra*.¹⁴⁷

The claimant, on the other hand, pointed to *Loveladies Harbor* and *Palm Beach Isles* as cases where the Federal Circuit had excluded from the relevant parcel lands that earlier had been sold by the respective claimants,¹⁴⁸ and asserted that “temporal considerations require exclusion from the relevant parcel in this case of all property that Lost Tree sold before” its attempted development.¹⁴⁹ The court concluded: “Neither Lost Tree nor the government accurately capture the import of the cases upon which they rely.”¹⁵⁰

Judge Lettow stated that “*Tahoe-Sierra* addressed temporality in a related, but analytically distinguishable, context.”¹⁵¹ While the Supreme Court rejected the argument that a thirty-two month moratorium on development in *Tahoe-Sierra* constituted a total taking under *Lucas*, it explicitly refused to adopt a per se rule, saying instead that “the answer depends upon the particular circumstances of the case.”¹⁵² In *Loveladies Harbor* and *Palm Beach Isles*, he explained, the Federal Circuit found that the circumstances justified not including parcels previously disposed of within the relevant parcel.¹⁵³

A more conceptual explanation is that a “relevant parcel” does not exist in inchoate form. Unlike a preexisting deeded parcel, a “relevant parcel” comes into being only as of the time of the government's action that the landowner deems a taking, typically the moment of a development permit denial. It is only then that all of the facts and circumstances that must be

147. *Id.* at 428.

148. *Id.* at 428–30 (discussing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380–81 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000)).

149. *Id.* at 428 (internal quotation marks omitted).

150. *Id.*

151. *Id.* at 429.

152. *Id.* (quoting *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002)).

153. *Id.* In *Walcek v. United States*, the Court of Federal Claims concluded that *Palm Beach Isles* “heavily relied on the fact” that the sale had occurred “long before the development in question was proposed.” 49 Fed. Cl. 248, 260 (2001), *aff'd*, 303 F.3d 1349 (Fed. Cir. 2002) (citing *Palm Beach Isles*, 208 F.3d at 1380–81).

taken into account in the determination of what parcel is “relevant” are present.¹⁵⁴

D. Interrelationships of People: Rules for Aggregation of Ownerships

This subpart addresses substantive principles regarding aggregation of ownership. The problem of harmonizing these principles with an independent theory of “unity of ownership” is discussed in a subsequent treatment.¹⁵⁵ At the outset, it is useful to distinguish “indirect ownership” from “attributed” or “imputed” ownership. An individual may hold property in his or her own name (direct ownership) or in the name of an agent (indirect ownership). If beneficial ownership inures in another entity, it still is possible to say that the individual owns the property “constructive[ly],” through “attribution.”¹⁵⁶

1. The Integrity of Corporate and Partnership Entities

In *Dole Food Co. v. Patrickson*, the U.S. Supreme Court declared:

A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of his ownership of shares, does not own the corporation’s assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest. A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary¹⁵⁷

The Court added that “[t]he veil separating corporations and their shareholders may be pierced in some circumstances The doctrine of piercing the corporate veil, however, is the *rare exception*, applied in the case of fraud or certain other exceptional circumstances”¹⁵⁸ Likewise, a California court of appeal, quoting the state supreme court, recently concluded that “[t]he corporate alter ego theory, which is generally used to

154. The development of the relevant facts culminates in their classification. See JEAN-PAUL SARTRE, *EXISTENTIALISM AND HUMAN EMOTIONS* 13 (Bernard Frechtman trans., Carol Publ’g Grp. ed. 1998) (1957) (“[E]xistence precedes essence.”).

155. See *infra* Part III.

156. See, e.g., BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS & SHAREHOLDERS*, ¶ 9.02[1] (7th ed. 2006) (discussing stock attribution rules under 26 U.S.C. § 318).

157. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474–75 (2003) (citations omitted).

158. *Id.* at 475 (emphasis added).

prevent a fraud and impute liability, lies ‘only in *narrowly defined circumstances* and only when the ends of justice so require.’”¹⁵⁹

In the case of partnerships, one of the most important tests is intent.¹⁶⁰ The Uniform Partnership Act provides that “the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.”¹⁶¹ The Act distinguishes between the sharing of “gross returns,” which does not create a partnership,¹⁶² but that a person “who receives a share of the profits” is deemed to be a partner.¹⁶³ The Act also provides that a partner is “not a co-owner of partnership property,”¹⁶⁴ which “reflects the adoption of the entity theory” of partnership.¹⁶⁵

Where parcels have different legal owners, ownership may be attributed to other entities *only* under corporate law standards and with a showing of “clear and convincing proof.”¹⁶⁶ “The presumption [that a deed determines ownership] can be overcome only by evidence of an agreement or understanding between the parties that the title reflected in the [d]eed is not what the parties intended.”¹⁶⁷ This same presumption has been extended to corporations and limited liability companies.¹⁶⁸ “The presumption is based ‘on promoting the public policy . . . in favor of the stability of titles to property.’”¹⁶⁹

159. *Grotenhuis v. County of Santa Barbara*, 105 Cal. Rptr. 3d 918, 924 (Cal. Ct. App. 2010) (emphasis added) (quoting *Mesler v. Bragg Mgmt. Co.*, 702 P.2d 601, 607 (Cal. 1985)).

The essence of the alter ego doctrine is that justice be done. “What the formula comes down to, once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that liability is imposed to reach an equitable result.” Thus the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require.

Mesler, 702 P.2d at 607 (quoting ELVIN REMUS LATTY, *SUBSIDIARIES AND AFFILIATED CORPORATIONS* 191 (1936)).

160. *See Giles v. Vette*, 263 U.S. 553, 559–60 (1924) (noting that there was no partnership due to lack of intent of the parties).

161. UNIFORM PARTNERSHIP ACT § 202(a) (1997).

162. *Id.* § 202(c)(2).

163. *Id.* § 202(c)(3).

164. *Id.* § 501.

165. *Id.* § 501 cmt.

166. *See, e.g.*, CAL. EVID. CODE § 662 (West 2012) (“The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.”).

167. *In re Marriage of Fossum*, 121 Cal. Rptr. 3d 195, 202 (Cal. Ct. App. 2011) (quoting *In re Marriage of Brooks*, 86 Cal. Rptr. 3d 624, 635 (Cal. Ct. App. 2008)).

168. *See, e.g.*, *Fashion Valley Mall, L.L.C. v. County of San Diego*, 98 Cal. Rptr. 3d 327, (Cal. Ct. App. 2009) (considering a corporate entity’s beneficial interest in a property as an indication of ownership).

169. *In re Marriage of Brooks*, 86 Cal. Rptr. 3d at 631 (citations omitted) (explaining the codification of a presumption in Evidence Code § 662).

In *Cane Tennessee*, the Federal Circuit stated:

Another significant fact is that the Wyatts and the Wyatt Trusts are manifestly separate legal entities. The instruments establishing the Trusts confer upon the trustee (now trustees) numerous rights and powers associated with legal title. . . .

Trust beneficiaries of an express trust possess an equitable right to the corpus of the trust, but do not have legal ownership of the trust property.”¹⁷⁰

In *Lost Tree*, the government urged that the economic impact of the permit denial be calculated by aggregating the claimant’s profits from its own development venture with those of eight asserted “affiliated companies.”¹⁷¹ The government’s forensic accountant aggregated ownership “based on [its] explicit instruction.”¹⁷² The Court of Federal Claims stated that the accountant

opined that the instruction was supported in his mind by his familiarity “with the fact of how real estate development companies tend to set up affiliated entities to do various aspects of the development and marketing,” and “the logic of the fact that these other entities were carrying out some of the development and selling activity on behalf of the option land.”¹⁷³

He “contended that the decision to aggregate was based also on the common control of each of these entities based on ownership by a member of the Ecclestone or Stone family.”¹⁷⁴ The court noted “the artificiality of such aggregation,” since it did not take into account profits to be derived from other landowners in the area.¹⁷⁵ It added:

The Federal Circuit has held that if a “developer treats legally separate parcels as a single economic unit, [then] together they may constitute the relevant parcel.” This is hardly the same, however, as aggregating separate parcels *owned by legally separate entities* (none of whom are plaintiffs to this suit) to determine the economic impact of an alleged taking under the third factor of *Penn Central*. Unsurprisingly, the government has

170. *Cane Tenn., Inc. v. United States*, 60 Fed. Cl. 694, 701 (2004) (citations omitted).

171. *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 435 (2011).

172. *Id.*

173. *Id.* (citations omitted).

174. *Id.* at 436.

175. *Id.*

cited no precedent holding that profits realized by separate legal entities should be aggregated with those realized by the actual takings claimant to determine the economic impact of a taking. In short, the court rejects any aggregation of Lost Tree with other companies in which Mrs. Stone or her daughters have or have had an ownership interest.¹⁷⁶

2. Appropriation to a Joint Business Venture

In *Chapman v. Hughes*, the California Supreme Court stated:

The syndicate agreement did, in our judgment, constitute a partnership It created an association of three persons for the purpose of carrying on together the business of selling the lands, and dividing the profits of that business between them. . . . This was sufficient to constitute the relation that of partnership. Whether the parties knew that they were partners or not, they certainly intended and contracted to do all that in law is necessary to create a partnership. . . . The respective parcels of land embraced in the syndicate were contributed by the respective partners, and thereby became partnership property. This was not affected by the agreement that each partner should retain his title; they held the legal title in trust for the partnership use.¹⁷⁷

The property of the partners thus became the property of the partnership. This did not countermand the partnership agreement, or modify the partners' intent. Rather, it enforced that intent.

Similarly, in *Zanetti v. Zanetti*, the court of appeal relied on the fact that “[i]t is not disputed . . . that all of the expenses in connection with the development and obtaining of the patents in controversy were *paid out of the common partnership account*” as evidence that separately titled property had contributed to an oral partnership.¹⁷⁸

In *Kalway v. City of Berkeley*, a California court of appeal noted that “the evidence fully supports the City’s determination that irrespective of the grant deed, the [two lots] were in substance under common ownership.”¹⁷⁹ However, as noted earlier,¹⁸⁰ this broad language was used not in the context of a probing inquiry but rather where the parties to the transfer

176. *Id.* (alteration in original) (emphasis added) (quoting *Forest Props, Inc. v. United States*, 177 F.3d 1360, 1365 (1999)).

177. *Chapman v. Hughes*, 37 P. 1048, 1048 (Cal. 1894) (citations omitted).

178. *Zanetti v. Zanetti*, 175 P.2d 603, 605 (Cal. Dist. Ct. App. 1947) (emphasis added).

179. *Kalway v. City of Berkeley*, 60 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2007).

180. *See supra* notes 139–140 and accompanying text.

admitted that its only purpose was to avoid an administrative action otherwise in accordance with law. There was no claim that the transaction had substance.

3. Conflating Takings, Property, and Business Law

The “unity of ownership” theory asserted by the California Coastal Commission¹⁸¹ stands in contravention of important principles of property law, and the law of corporations and partnerships. Most fundamentally for property law purposes, “the party asserting that title is other than as stated in the deed . . . has the burden of proving that fact by clear and convincing evidence.”¹⁸² The sanctity of deeds as establishing ownership is the key to an individual’s security in his or her real property and in other property subject to conveyance by written instrument. Conveyancing, mortgages, and title insurance are among the areas of law based on this premise, one so fundamental as to be mostly unarticulated.

While the Sweetwater Mesa litigants were all permit applicants before the Coastal Commission,¹⁸³ the “unity of ownership” theory just as easily could affect landowners who are not engaging in any development activity. If *A* were the owner of undeveloped property, and his friends and neighbors *B* and *C* were harmonizing the appearance of homes they were planning for their separate parcels, they might include in their plans the development of roads or utility lines that conceivably might benefit *A* in the future. It would “not [be] pure fantasy,” as the *Simpson* trial judge put it,¹⁸⁴ that an agency could draw a connection making *A*’s land part of a “unitary parcel” with *B*’s and *C*’s land. The result of such an act—or even the plausibility of such an act—would be the creation of a legal encumbrance or practical cloud on *A*’s title as to render *A*’s land unbuildable, unmortgageable, and unsalable.

If “clear and convincing proof” that ownership differs from parcel deeds can be produced, aggregation of ownerships could be achieved without need for any special “unity” theory created for regulatory takings purposes. Existing partnership law suffices.¹⁸⁵ Corporate law contains similar requirements, and the U.S. Supreme Court stated that piercing corporate veils is the “rare exception.”¹⁸⁶ The Supreme Court of California

181. See *infra* Part III.

182. *In re* Marriage of Brooks, 86 Cal. Rptr. 3d 624, 635 (Cal. Ct. App. 2008) (citing *In re* Marriage of Weaver, 273 Cal. Rptr. 696 (Cal. Ct. App. 1990)).

183. See *infra* Part III.C.

184. See *infra* note 255 and accompanying text.

185. See *Chapman v. Hughes*, 37 P. 1048, 1048 (Cal. 1894).

186. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

declared that “the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require.”¹⁸⁷

Under a “unity of ownership” standard, the Coastal Commission would never have to demonstrate “unity” under a preponderance of the evidence standard, much less under the legally requisite clear and convincing evidence standard. Rather, it could shelter under precedent that the determination of the relevant parcel utilizes “a flexible approach, designed to account for factual nuances.”¹⁸⁸

Those nuances, however, relate to the interpretation and significance of facts determined under the standards of corporate and partnership law, and not to ad hoc redeterminations that throw into one hopper aspects of disregarding deeds and piercing corporate veils with other “relevant parcel” factors. The reattribution of ownership should be rare, and limited to cases where the activities of various landowners satisfy the traditional tests for partnership and corporate ownership.

III. THE “UNITY OF OWNERSHIP” THEORY

Separately deeded parcels treated as one functional economic unit by their owner can be aggregated as the “parcel as a whole” for takings purposes.¹⁸⁹ Likewise, the owners of separate parcels can appropriate them to a corporation or partnership, in which case that entity is the parcels’ single owner.¹⁹⁰

However, the “unity of ownership theory” asserted by the California Coastal Commission would allow causal inferences to be drawn from the cooperation of neighbors and thus permit ownership of their parcels to be attributed to an imputed partnership for takings purposes. Thereafter, under the Commission’s practice, the owners of each of these parcels could not build a single home, as otherwise permitted by law. All of the owners, together, would be entitled to build a total of one home.

This theory constitutes an extension of the parcel-as-a-whole doctrine that is unprecedented in American regulatory takings law. It also is a peculiar inversion of Justice Holmes’s formulation of “reciprocity of

187. *Mesler v. Bragg Mgmt. Co.*, 702 P.2d 601, 607 (Cal. 1985).

188. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

189. *See, e.g., Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (considering upland and lake bottom parcels as a single income-producing unit); *Dist. Intown Props. Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 876 (D.C. Cir. 1999) (considering the property purchased in a single transaction and later subdivided for development as townhouses); *see discussion supra* Part II.

190. *See discussion supra* Part II.B.

advantage,” since the result of cooperation would be a vast diminution of the property rights of the cooperators.

A. Reciprocity of Advantage

1. Reciprocal Behavior in Nature

The beneficial nature of reciprocal behavior has its wellsprings deep in the history of relationships among creatures that are disposed to live in societies.

Both theoretical and empirical scholarship demonstrates that cooperation can evolve through several independent but overlapping processes. The one most relevant for our immediate purpose concerns the mutually beneficial effects of reciprocity: if you share with me today in exchange for my sharing with you yesterday, we are both better off than if neither of us shares. In social animals, reciprocity can involve such things as alerting other group members when food has been discovered, sharing food over time, and supporting a comrade in action against others.¹⁹¹

2. Reciprocity of Advantage in American Law

The phrase “reciprocity of advantage” was first used by Justice Holmes in *Jackson v. Rosenbaum Co.*,¹⁹² although Supreme Court antecedents can be traced to 1885.¹⁹³

The principle . . . is, to make an improvement common to all concerned, at the common expense of all. And to effect this object, the acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use.¹⁹⁴

191. Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1647 (2007) (citations omitted).

192. *Jackson v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) (upholding a Pennsylvania statute codifying the common law right of an adjacent landowner to build a party wall on the property line and, in the course of so doing, to remove the plaintiff’s old and unsafe wall).

193. *Wurts v. Horgland*, 114 U.S. 606 (1885) (sustaining a New Jersey law permitting the assessment of neighborhood property owners for the drainage of marshes and lowlands). *Wurts* quoted approvingly an 1866 New Jersey chancery case on the same subject, *Coster v. Tide Water Co.*, 18 N.J. Eq. 54 (1866), *aff’d*, 18 N.J. Eq. 518 (1866).

194. *Wurts*, 114 U.S. at 612 (quoting *Coster*, 18 N.J. Eq. at 70).

Two months after *Jackson v. Rosenbaum Co.*, Holmes used the phrase again in *Pennsylvania Coal*,¹⁹⁵ where “average reciprocity of advantage” became a legal landmark. Professor Michelman’s seminal article rearticulated the concept:

Efficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems we are pleased to believe that we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed “evenly” enough so that everyone will be a net gainer.¹⁹⁶

As Professor Carol Rose observed, since regulations conferring a reciprocity of advantage were non-redistributive, they did not require compensation.¹⁹⁷ She added: “Holmes’ lifelong distaste for redistributive schemes, or for any scheme that would, as he put it, ‘prevent civilization from killing its weaker members,’ also supports an antiredistributive reading.”¹⁹⁸

There are two aspects of “reciprocity of advantage” here worth noting. First, as Professor Michelman noted, mandates that invoke the concept of reciprocity are efficiency motivated, so that they increase the aggregate utility of those affected.¹⁹⁹ Moreover, only a fraction of instances of reciprocity arise through government mandates. The reciprocal restrictions within the residential community governed by a homeowners’ association are a common example of the willingness of owners to burden themselves in exchange for the agreement of neighbors to similar constraints. Second, “reciprocity,” in connection with voluntary agreements need not be something that we might hypothesize happening, as did Michelman, “over time.”²⁰⁰ Rather, we have ample evidence that each cooperating owner derives an immediate expectation of benefit from that owner’s agreement to the scheme.

195. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

196. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1225 (1967).

197. See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 581 (1984).

198. *Id.* at 581 n.106 (quoting Letter to Harold J. Laski (May 24, 1919), in 1 THE HOLMES-LASKI LETTERS 207 (Mark DeWolfe Howe ed., 1953) (citing E. WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 768 (1962))).

199. Michelman, *supra* note 196, at 1225.

200. *Id.*

The broad benefit ultimately redounding to society from such salutary agreements is reflected in the change from the original *Restatement of Property* approach, which generally limits real covenants enforceable at law to those in which the parties have a grantor–grantee relationship,²⁰¹ to the *Restatement (Third)* approach, which broadly makes such agreements enforceable unless they are unreasonable.²⁰²

3. Reciprocal Behavior in Human Society Leads to Mutual Benefit

Reciprocity of advantage, for a variety of purposes that certainly includes takings law, is far broader than the benefit that one burdened party would receive from burdens similarly imposed on others by a government agency. Rather, individuals can, and do, obtain mutual benefits through choosing to act in a neighborly fashion.

In his seminal book *The Origins of Cooperation*, Professor Robert Axelrod explicated the importance of “tit-for-tat” strategies in human interactions.²⁰³ Those who commence their dealings with others in a spirit of cooperation, but who withhold cooperation in subsequent rounds with those who do not reciprocate, do better than those who adopt a hostile attitude from the beginning, or who start cooperatively and turn the other cheek in response to non-cooperative responses.²⁰⁴ Professor Robert Sugden, whose general theme is how self-enforcing conventions can evolve spontaneously out of the interactions of self-interested individuals, goes one step further, discussing the “brave reciprocator” who takes risks at the start.²⁰⁵ Commenting on this, Professor Rose notes “the importance of friendship—or something like it, some generosity that assures trustworthiness—to overcome the deal-killing, relationship-killing poison of mistrust and short-term self-seeking.”²⁰⁶ In an earlier article, *Reciprocity: The Supply of Public Goods Through Voluntary Contributions*, Sugden disputed that goods and services could be financed only by charging consumers or raising taxes.²⁰⁷ He suggested a third way, based on voluntary

201. RESTATEMENT OF PROPERTY § 534 (1944).

202. RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES, ch. 1, intro. note (2000) (indicating general emphasis on reasonable terms and flexibility regarding servitudes); *id.* § 2.4 (eliminating privity requirement); *id.* § 3.2 (eliminating “touch and concern” requirement).

203. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 189–90 (1984).

204. *Id.* at 13–14.

205. ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE* 119–25 (1986).

206. Carol Rose, *Game Stories*, 22 *YALE J.L. & HUMAN.* 369, 389–90 (2010) (citing Carol M. Rose, *Giving, Trading, Thieving and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 *FLA. L. REV.* 295, 310–11 (1992)).

207. Robert Sugden, *Reciprocity: The Supply of Public Goods Through Voluntary Contributions*, 94 *ECON. J.* 772, 772 (1984).

contributions.²⁰⁸ Sugden's "theory of the voluntary sector" was "based on the assumption that most people believe free riding to be morally wrong."²⁰⁹

According to Sugden, a "principle of unconditional commitment" would require every member of a group to contribute to creating public goods that would benefit only members of the group, even if the individual knew that no one else would contribute, and the others would free ride on his or her contribution.²¹⁰ "Perhaps you believe (as I do not) that you *are* morally obliged to contribute in these circumstances. Even if you believe this, you will surely recognise a psychological barrier against contributing: it seems *unfair* that you alone should bear the costs of the public good."²¹¹

But suppose instead that everyone else in your group *is* contributing towards a public good from which you benefit: everyone else has paid his union subscription; everyone else is taking his litter home from the beach; everyone else is contributing towards the cost of the office Christmas party to which you intend to go. Now, surely, there is a much stronger moral argument that you ought to contribute, even if it is still not in your self-interest to do so. You also have to reckon with the sense of grievance that the others will almost certainly feel if you refuse to contribute, and with the possibility that they will find ways of punishing you if you do.²¹²

4. Neighborly Cooperation

Probably most instances of mutually reinforcing reciprocal behavior are not formally structured but exist in small settings, such as residential neighborhoods. In the United States, however, relationships among neighbors are not yet a "recognized category of real property law."²¹³ Individuals work to better their community, likely in the hope, or with the expectation, that they will strengthen neighborliness as a social norm.²¹⁴ The benefits of such cooperation are diffuse and come to fruition "over

208. *Id.*

209. *Id.*

210. *Id.* at 774.

211. *Id.*

212. *Id.* at 775.

213. See James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 40 GA. J. INT'L & COMP. L. (forthcoming 2012) (citing JACQUELINE P. HAND & JAMES CHARLES SMITH, NEIGHBORING PROPERTY OWNERS (1988); JAMES CHARLES SMITH, NEIGHBORING PROPERTY OWNERS (2010)) (noting special characteristics of relations among neighbor and limited recognition of "the law of neighbors" abroad).

214. See generally ERIC A. POSNER, LAW AND SOCIAL NORMS (2002).

time.”²¹⁵ Such overtures by neighbors—sometimes instantiated in formal agreements and sometimes not, sometimes symmetrical in time or type of contribution, and sometimes not—could well be described as “mutuality of advantage.” To be sure, the neighborly behavior just noted cannot be termed purely altruistic. Again, there is at least the tacit understanding that social norms imply some generalized obligation of reciprocity.²¹⁶

The overall effect of such cooperation is the enhancement of social capital. In the absence of laws or formal property rights, a “tragedy of the commons” often will arise, and overuse and abuse will despoil the area.²¹⁷ However, the social small neighborhood constitutes a setting where abuse can be reduced or eliminated through informal monitoring and social sanctions.²¹⁸

While private ownership of discrete parcels serves to internalize costs and benefits associated with ownership, many of the benefits and detriments of residential parcels depend on the condition of nearby parcels and the behavior of their owners. Thus, as Professor Stewart Sterk observed, parcel boundaries “are generally efficient only if one assumes a societal norm that, broadly described, [favors] . . . limited cooperation and interdependence between neighboring landowners.”²¹⁹

Classic examples of cooperation are easements, such as for a common driveway; covenants, such as locating disamenities away from neighbors; joint maintenance of common facilities, such as roads and drains; harmonious development; and social activities designed to facilitate cooperation. All of these activities involve mutual reciprocity, each gains from the neighborliness of others. But none of this converts the neighbors into business partners.

215. Michelman, *supra* note 196, at 1225.

216. See Robinson et al., *supra* note 191, at 1647–48.

217. Garret B. Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). It is unfortunate that Hardin coined the phrase “tragedy of the commons” when he was not writing about a “commons” at all but rather an open access regime where any and all could enter and exploit resources at will. The term “commons” denotes “ownership in common,” such as the private beach club or homeowners’ association swimming pool. See also Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 *U.C. DAVIS L. REV.* 813, 817 n.12 (2003) (noting that resources may be open access to group members but are private property to outsiders).

218. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 167–83 (1991) (describing mechanisms by which close-knit communities enforce social norms); ELINOR OSTROM, *GOVERNING THE COMMONS* 59 (1990) (arguing that informal monitoring combined with relatively meager sanctions has been successful in protecting the common resources in small communities).

219. Stewart E. Sterk, *Neighbors in American Land Law*, 87 *COLUM. L. REV.* 55, 58–59 (1987).

5. Conflating Social Cooperation with Business Enterprise

In addition to its inconsistency with existing property and business law,²²⁰ the “unity of ownership” theory will have perverse effects on social cooperation. Likely outcomes will include: (1) refusal to cooperate; (2) premature development, as individuals race to acquire development rights on a parcel that might be conflated with others, in which event the other owners subsequently will not be permitted to develop; and (3) expensive precautions, such as suits against neighbors to enjoin development and attempts to procure title-insurance-policy riders insuring against preclusion of development.

Civil society—the rich tapestry of social interaction in which we live our lives with family, neighbors, friends, and kindred spirits in social, religious, fraternal, and community groups—would fall within the domain of the law. This intrusion of law into the civic and social realm would have vast effects on the size and scope of the State, with a corresponding restriction of individual liberty.

B. Unity of Ownership and Corporatizing the Neighborhood

1. The Single Tax on Land

In his influential *Progress and Poverty*, Henry George asserted that government should be supported by a “single tax” on the entire rental value of land.²²¹ The value of improvements would not be included in order to encourage productive uses and discourage speculation.²²² As Professor William Fischel noted, George selected landowners as his *bête noire*, rather than capitalists, because the amount of capital was elastic and the amount of land fixed, so that taxation might discourage the creation of the former, but

220. See *supra* Parts II.D.1. & II.D.3.

221. GEORGE, *supra* note 9, at 377–78.

222. *Id.* at 393.

Everywhere that land had attained a value, taxation, instead of operating, as now, as a fine upon improvement, would operate to force improvement. Whoever planted an orchard, or sowed a field, or built a house, or erected a manufactory, no matter how costly, would have no more to pay in taxes than if he kept so much land idle.

Id.

not the latter.²²³ Also, “George saw capital as the embodiment of past labor. For this reason it could not be the source of excessive economic power.”²²⁴

The great merits of the single tax are that it cannot be escaped and that it does not distort economic activity. “An exaction, so long as it does not vary with the nature of the development proposed, is a form of tax on land value, and hence has the potential to be unusually efficient.”²²⁵

Its demerits are that accurate administration is complex²²⁶ and, more fundamentally, that George was wrong about inordinate returns accruing to landowners. Modern economic theory “rebut[s] the Georgist . . . argument that land will get all of the fruits of economic progress. The marginalist approach contends that each factor of production—land, labor, or capital—will receive the value of its *marginal* product in a competitive economy.”²²⁷

2. The Single Tax as Justifying Confiscation

Precisely because he viewed them as unmerited recipients of the fruits of economic progress, “George explicitly rejected the idea that landowners should be compensated for what amounted to confiscation of land by taxation. . . . Private ownership of land was in his eyes akin to a plague.”²²⁸ Their obtaining too much wealth was the key.²²⁹

The New York Court of Appeals decision in *Penn Central Transportation Co. v. City of New York* was, at its heart, an application of the Georgist confiscatory single tax on landowners. Writing for the court, Chief Judge Charles Breitel stated:

The first [issue] is the extent to which government, when regulating private property, must assure what is described as a reasonable return on *that ingredient of property value created not so much by the efforts of the property owner, but instead by the*

223. WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 15 (1985).

224. *Id.*

225. Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1732 (1988).

226. *Id.* at 1733 (noting that the administrative costs of calculating the annual tax might be “daunting”). In fairness, administration of the *Penn Central* “economic impact” test has proven very difficult as well. See also William W. Wade, *Penn Central’s Ad Hocery Yields Inconsistent Takings Decisions*, 42 URB. LAW. 549, 549–50 (2010).

227. FISCHER, *supra* note 223, at 16.

228. *Id.* at 18.

229. See Sterk, *supra* note 225, at 1732 n.8. “George’s single tax proposal did not result from a quest for efficient taxation, but from a concern that as production increased, landowners would reap an undue share of increased social wealth. The single tax was to be a mechanism to confiscate the ‘unearned’ profits of landowners.” *Id.* (citing GEORGE, *supra* note 9, at 347–57).

*accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings.*²³⁰

Explicating the matter more fully, Breitel continued:

It may be true that no property has economic value in the absence of the society around it, but how much more true it is of a railroad terminal, set amid a metropolitan population, and entirely dependent on a heavy traffic of travelers to make it an economically feasible operation. . . .

Of course it may be argued that had Grand Central Terminal never been built, the area would not have developed as it has. Thus, the argument runs, construction of the terminal triggered growth of the area, and created much of the terminal property's current value. Indeed, the argument has some validity. But, in reality, it is of little moment which comes first, the terminal or the travelers. . . . Neither factor alone accounts for the increase in the property's value; both, in tandem, have contributed to the increase.²³¹

The court stressed the role of public investment:

Of primary significance, however, is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property. . . . Absent this heavy public governmental investment in the terminal, the railroads, and connecting transportation, it is indisputable that the terminal property would be worth but a fraction of its current economic value.²³²

The opinion summarized:

A fair return is to be accorded the owner, but society is to receive its due for its share in the making of a once great railroad. The historical, cultural, and architectural resource that remains was neither created solely by the private owner nor solely *by the society in which it was permitted to evolve.*²³³

230. Penn. Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1272–73 (N.Y. 1977) (emphasis added), *aff'd*, 438 U.S. 104 (1978).

231. *Id.* at 1275.

232. *Id.* at 1275–76.

233. *Id.* at 1276 (emphasis added).

In *Penn Central*, Chief Judge Breitel likely got the story inverted. While he asserted that “it is of little moment which comes first, the terminal or the travelers,”²³⁴ Breitel later acknowledged that, “when Grand Central Terminal was built, New York’s 42nd Street was still ‘almost a semi-rural area’ and ‘[t]he moment you put Grand Central there everything started to burgeon.’”²³⁵

Furthermore, Breitel’s reference to Penn Central as a “once great railroad”²³⁶ presaged the private passenger railroad industry’s impending demise. In *Penn Central*, the railroad made a tactical error in conceding that, as the Court subsequently put it, “appellants may continue . . . not only to profit from the Terminal but also to obtain a ‘reasonable return’ on its investment.”²³⁷ As economist William Wade observed, “[g]iven that the Penn Central ceased to exist as a railroad in 1976 and was being operated as Conrail under federal bankruptcy protection, Justice Brennan’s ‘reasonable return’ conclusion is difficult to understand.”²³⁸

The New York Court of Appeals, in asserting its small-bore version of the Georgist notion that economic value is imparted to a parcel by the surrounding society, accepted a type of “unity of ownership” argument. Thus, it held in *Penn Central* that “some of the income” from the railroad’s “heavy real estate holdings in the Grand Central area” should be “imputed to the terminal.”²³⁹ Justice Scalia’s opinion for the Court in *Lucas* addressed this point:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, where the state court examined the diminution in a particular

234. *Id.* at 1275.

235. Kanner, *supra* note 114, at 752. Kanner added that, “in his extrajudicial expressions,” Breitel “employed disparaging phrases such as ‘so-called property rights’ of the ‘so-called owner,’ and ‘so-called private interests.’” *Id.* at 696 n.72 (quoting Seminar, *Transferable Development Rights*, 1977 NAT’L CONF. OF STATE LEGISLATURES & N.J. LAW REVISION & LEGISLATIVE SERV. COMM’N 1, 86, 113, 129 (1977) (emphasis added by Kanner)).

236. *Penn Central*, 366 N.E.2d at 1276.

237. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978).

238. Wade, *supra* note 38, at 284 n.47.

239. *Penn Central*, 366 N.E.2d at 1276.

parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.)²⁴⁰

The California Coastal Commission's assertion that cooperation among five separate owners results in their being able to build a total of one house, instead of the five to which they otherwise would be entitled, follows the Georgist punitive pattern.

3. Harmonizing Takings Jurisprudence with the Law of Substantive Rights

The Federal Circuit stated, in *Colvin Cattle Co. v. United States*, that “under our regulatory takings analysis the threshold inquiry is ‘whether the claimant has established a “property interest” for purposes of the Fifth Amendment.’”²⁴¹ The existence of a property right is a question separate from, and antecedent to, the question of whether that right had been taken. The U.S. Supreme Court stated in *Lucas v. South Carolina Coastal Council* that property rights are anchored by “background principles of the State's law of property and nuisance”²⁴² However, discerning whether asserted rights inhere in property ownership can be a difficult question.

The Supreme Court declared, in *Board of Regents of State Colleges v. Roth*, that

[p]roperty interests, of course, 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—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.²⁴³

A fundamental issue that must be considered when addressing the “unity of ownership” theory is whether ownership rights in various parcels are to be determined as “created and their dimensions are defined”

240. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1006–07 n.7 (1992) (citations omitted).

241. *Colvin Cattle Co. v. United States*, 468 F.3d 803, 806 (Fed. Cir. 2006) (quoting *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002)) (citing *M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995)).

242. *Lucas*, 505 U.S. at 1029 (noting that complete deprivations of economic use are categorical takings unless they “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”). The concept of “background principles” sometimes is turned around and used as a takings defense. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322–23 (2005) (discussing *Lucas's* effect on the categorical defense of background principles as a takings defense).

243. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

according to established “state law,” as noted in *Roth*.²⁴⁴ Alternatively, should agencies and courts recognize and define property rights differently for relevant parcel purposes, devising their own “common law” from regulatory takings cases? *Erie Railroad Co. v. Tompkins* broadly suggests not.²⁴⁵

4. No Case Law Supports Unity of Ownership

In the Staff Report urging adoption of the “unity of ownership” theory that preceded the pending Sweetwater Mesa litigation,²⁴⁶ the Coastal Commission candidly concedes “there are no reported cases that factually parallel the underlying Sweetwater matter.”²⁴⁷ It seeks support, however, in *Martter v. Byers*, which stated that “courts have not yet laid down any very certain or satisfactory definition of a joint adventure, nor have they established any very fixed or certain boundaries thereof.”²⁴⁸ The Report quoted *Martter* as adding that “courts have been content to determine merely whether the given or conceded facts in the particular case constituted the relationship of joint adventurers.”²⁴⁹ “Therefore,” the Report concluded, “it is not fatal that there is no direct, factually identical precedent to guide our analysis in finding a partnership comprised of the Sweetwater LLLPs.”²⁵⁰

Martter itself illustrates the problem with the Commission’s conclusion. The court recognized that the existence of a partnership was largely a question of intent but went on to look at the ownership of the specific assets.²⁵¹ Evidence of ownership relates first to individual parcels. Only after the ownership of those parcels is determined should a court consider ownership together with other “relevant parcel” factors, in light of

244. *Id.*

245. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71, 79 (1938). *Erie* abrogated the doctrine of *Swift v. Tyson*, 41 U.S. 1 (1842), which held that

federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be.

Erie, 304 U.S. at 71.

246. *See infra* Part III.C.

247. CAL. COASTAL COMM’N, STAFF REPORT: REGULAR CALENDAR 82 (2010) [hereinafter STAFF REPORT], available at <http://documents.coastal.ca.gov/reports/2011/2/Th8a-s-2-2011.pdf>.

248. *Id.* (quoting *Martter v. Byers*, 171 P.2d 101, 106 (Cal. Dist. Ct. App. 1946)).

249. *Id.* (quoting *Martter*, 171 P.2d at 106).

250. *Id.*

251. In *Martter*, the court noted that the “facts in the present case show sufficient elements of a joint adventure to sustain the court’s finding. The assets of the particular project were owned jointly even under defendant’s interpretation.” *Martter*, 171 P.2d at 106 (emphasis added).

the facts presented. “Relevant parcel,” in turn, is the denominator of the “takings fraction” that informs, but does not determine, whether a compensable taking has occurred.

Only one case, the Idaho Supreme Court’s decision in *City of Coeur d’Alene v. Simpson*, even suggests the viability of the “unity of ownership” theory.²⁵² There, the original owners of two parcels formed a corporation, named their adult sons as sole shareholders, and quitclaimed the waterward parcel to the corporation.²⁵³ They retained the upland tract.²⁵⁴ The trial court stated:

We cannot say, however, that the transfer and fact of separate ownership by themselves necessarily end the inquiry. Indeed, the City has questioned the purpose of the transfer and we believe the circumstances of the transfer may be entirely relevant to the denominator inquiry. To explain: a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis. It is *not pure fantasy* to imagine a scenario wherein halfway through a takings suit, Landowner agrees with Company to transfer a parcel of Beachacre—which appears, as the waterward parcel does here, to be separate from Landowner’s other parcel—with a *wink-and-a-nod agreement* to transfer back after the suit or to jointly manage, use, and develop the property.²⁵⁵

The state supreme court, quoting *Ciampitti*, declared that “[i]n defining the proper denominator parcel, the task is to ‘identify the parcel as realistically and fairly as possible’ in light of the regulatory scheme and factual circumstances.”²⁵⁶ It then considered the trial judge’s finding that the transfer to the corporation was made for estate planning purposes, “presumably to benefit the family, including the Simpsons as owners of the upland parcel. There is nothing in the record to indicate that the transfer of record title ownership has in any way changed the Simpsons’ continued use of the beachfront parcel.”²⁵⁷

252. *City of Coeur d’Alene v. Simpson*, 136 P.3d 310 (Idaho 2006).

253. *Id.* at 314.

254. *Id.*

255. *Id.* at 320 (emphasis added).

256. *Id.* at 319 (quoting *Ciampitti v. United States*, 22 Cl. Ct. 310, 319 (1991)).

257. *Id.*

In reviewing these conclusions, the Supreme Court of Idaho summarized this trial court finding as stating “the transfer to Beach Brothers had, essentially, no effect.”²⁵⁸ However, it found that:

The [trial] court’s statement, that the transfer was to “family members,” is not quite accurate. Similarly, the court’s statement, that the property “is in fact owned and operated as a conceptual and practical unit” is also at least partially inaccurate. The record does support a finding that the Simpsons still use the property. However, it is undisputed that the parcel was deeded to, and legal ownership remains solely in, Beach Brothers, Inc., a corporation recognized under the laws of Idaho and therefore separate from its shareholders, and, more importantly, separate from Jack and Virginia Simpson. The district court’s focus seemed to be on the Simpsons’ historical and continued use of the waterward parcel and the upland parcel. But as mentioned above, Jack and Virginia Simpson no longer hold any interest in the waterward parcel. Beach Brothers has no interest in the upland parcel. The Simpsons’ names will not be on a check from the City if a taking is found.

....

On the record as it currently exists, the Simpsons deeded a separate parcel of property to a wholly separate entity. There is no allegation or evidence of an illegal split, and the only stated purposes for the transaction were estate planning and to avoid potential personal liability claims. We therefore believe that the record does not support the district court’s conclusion that the denominator parcel consists of both the upland and waterward parcels. It was not proper, on the record before us, to summarily disregard the separate ownership of the parcels and define Beach Brothers’ constitutional rights in property based on a parcel in which that company has no interest and to which it is not legally connected.²⁵⁹

If the government’s assertions in *Simpson* are correct, the “sale” from the Simpsons to Beach Brothers was one of form, not of substance. The sale should be disregarded as a sham, as was the “sale” in *Kalway v. City of Berkeley*.²⁶⁰ However, it was uncontroverted that the Kalways’ “last minute” deed had no purpose other than to thwart a pending administrative action.²⁶¹

258. *Id.*

259. *Id.* at 319–20 (citations omitted).

260. *Kalway v. City of Berkeley*, 60 Cal. Rptr. 3d 477, 486 (Cal. Ct. App. 2007) (voiding the deed ostensibly transferring title from Mr. Kalway to Mrs. Kalway).

261. *See supra* notes 139–140 and accompanying text.

Simpson, on the other hand, illustrates the need for caution in the aggregation of legally distinct ownership interests. *Whenever* there are dealings among individuals with family relationships, unrelated business transactions, or social friendships, it is “not pure fantasy,” as the trial court had it, that a “wink-and-a-nod agreement” could render an ostensible contract nugatory.²⁶²

Going one step further, just as it would not be “pure fantasy” to imagine an existing agreement as nugatory, it would not be “pure fantasy” to imagine a non-existing agreement as extant. Based on conjecture, an agency could conclude that cooperating neighbors might surreptitiously be partners. Without a clear doctrinal framework and in the absence of clear evidence, it might adduce that their parcels belonged to a wink-and-a-nod entity. Such inferences might be the genesis of the Sweetwater Mesa permit denials, and the ensuing litigation.

C. Sweetwater Mesa Litigation

1. The Coastal Commission’s Task

Just as state agencies and regulatory commissions operate in the context of broader principles of justice, property rights, too, are established in the context of adherence to the rule of law, a concept applicable in many contexts far beyond land use regulation and takings. This Article asserts that Footnote 7 of *Lucas*, which refers to an owner’s “reasonable expectations”²⁶³ and “background principles of the State’s law of property and nuisance”²⁶⁴ support the broader concept that “background principles” encompasses the rule of law. This includes respect for judicial recognition of separately deeded parcels, ownership entities such as partnerships, unless there is clear need to the contrary.

State agencies are charged with furthering the specific goals for which they were established, within the context of fundamental elements of state law and policy. In the case of the California Coastal Commission, for instance, the California Coastal Act²⁶⁵ provides that the agency advance enumerated environmental goals,²⁶⁶ and that the Act shall be “liberally construed to accomplish its purposes and objectives.”²⁶⁷ However, the Act

262. *Simpson*, 136 P.3d at 320 (Idaho 2006).

263. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

264. *Id.* at 1029.

265. CAL. PUB. RES. CODE, §§ 30000–30900 (West 2007).

266. *Id.* § 30001.5 (declaring that “basic goals” for the coastal zone include protecting public access and recreation, sensitive habitats and marine resources, and scenic and visual resources).

267. *Id.* § 30009.

also states that it “is not intended . . . as authorizing the commission . . . to grant or deny a permit in a matter which will *take or damage private property* for public use, *without the payment of just compensation* therefor.”²⁶⁸ Almost identical language appears in the California State Constitution.²⁶⁹

Since protecting private property is a fundamental state goal, permit applications must not be denied in order to obtain the benefits of purchase, or to condemn the property without paying for it.²⁷⁰ The Coastal Commission sometimes uses the term “takings override” to describe its preclusion from fulfilling its mission because of takings concerns.²⁷¹ But adherence to state (and federal) constitutional norms, such as protecting private property, is an integral part of its mission. The Commission must take into account its particular environmental goals²⁷² and the fundamental goal to protect property rights *in harmony* and with a *fair reading*.

2. General Description

The California Coastal Commission used the “unity of ownership” theory in a Staff Report²⁷³ to deny development applications for single-family residences north of Sweetwater Mesa Road, Santa Monica Mountains, Los Angeles County (collectively, “Sweetwater Mesa”).²⁷⁴ The matter has received popular attention since the person alleged by the Commission to have “indicia of sole ownership is David Evans,”²⁷⁵ nicknamed “The Edge” in connection with his band, U2.²⁷⁶

268. *Id.* § 30010 (emphasis added).

269. CAL. CONST., art. I, § 19(a) (“Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”).

270. *See, e.g.,* *Arastra Ltd. P’ship v. City of Palo Alto*, 401 F. Supp. 962, 981 (N.D. Cal. 1976), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976). “Open spaces are rapidly disappearing, a sad fact in this all too crowded world. But, however laudable the motive to preserve scenic beauties, the City must act, not by subterfuge, but by law.” *Id.* at 981.

271. *See* ALEX HELPERIN, CAL. COASTAL COMM’N, SINGLE ECONOMIC PARCELS 20 (2011), available at <http://www.coastal.ca.gov/legal/Th10a-3-2011-ppt-single-parcel.pdf>; *see also* DAN CARL & KATIE MORANGE, CAL. COASTAL COMM’N, MONTEREY COUNTY LCP MAJOR AMENDMENT NUMBER 2-07 PART 2 (DOUD PROPERTY REZONE) 31 (2008), available at <http://documents.coastal.ca.gov/reports/2008/11/W11d-11-2008.pdf>.

272. *See* CAL. PUB. RES. CODE, §§ 30200–30265.5 (West 2007).

273. STAFF REPORT, *supra* note 247.

274. S. CENT. COAST DIST. STAFF, CAL. COASTAL COMM’N, AGENDA ITEMS 13C-H (2011), available at <http://www.coastal.ca.gov/meetings/mtg-mm11-6.html> (denying development applications by the Sweetwater Mesa properties).

275. STAFF REPORT, *supra* note 247, at 72.

276. *See, e.g.,* Martha Groves & Tony Barboza, *Coastal Commission Rejects U2 Guitarist’s Malibu Development Plan*, L.A. TIMES, June 17, 2011, <http://articles.latimes.com/2011/jun/17/local/la->

The Commission's Staff Report, issued in 2010, described the proposed homes as ranging from 7,220 square feet to 12,785 square feet, with an additional application for a maintenance road and fire department staging areas.²⁷⁷ It described the area as comprising 156 acres of undeveloped ridgeline mountain terrain, a mile inland from the Pacific Coast Highway and the coast, and the ridgeline as a "prominent landscape feature along a significant stretch of the Malibu coast."²⁷⁸

The Staff Report also described the land as "blanketed by various natural rock outcroppings and primarily undisturbed native chaparral habitat that is part of a large contiguous area of undisturbed native vegetation."²⁷⁹ The Mulryan complaint noted the California Coastal Act definition of "environmentally sensitive habitat area" as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in the ecosystem and which could be easily disturbed or degraded by human activity."²⁸⁰ It asserted that the "Commission has applied this designation to a vast area of the Santa Monica Mountains consisting of some of the most common forms of vegetation in Southern California."²⁸¹

The Staff Report disputed that the five homes for which permits were sought by the various parcel owners would be independently owned²⁸² and stated that "[d]ue to the related nature of the six coastal development permit . . . applications, all of the proposed development will be addressed in one staff report."²⁸³

3. The Sweetwater Mesa Complaints

The Sweetwater Mesa owners filed suit.²⁸⁴ Their complaints are similar and the Mulryan complaint, discussed here as representative, alleges that Mulryan Properties LLLP owns one legally developable parcel, that it had

me-edge-malibu-project-20110617; *see also*, STAFF REPORT, *supra* note 247, at 73–74 nn.15–19 (citing John Harlow, *U2's Edge Rattles Malibu Peace*, THE TIMES (UK), Mar. 28, 2009; Naoki Schwartz, *The Edge's Green Pitch for Malibu Riles Residents*, ASSOC. PRESS, May 1, 2009).

277. STAFF REPORT, *supra* note 247, at 1.

278. *Id.* at 52.

279. *Id.*

280. Mulryan Complaint, *supra* note 11, at 4 (quoting CAL. PUB. RES. CODE § 30107.5 (West 2007)).

281. *Id.*

282. STAFF REPORT, *supra* note 247, at 1 ("[E]ach [parcel's applicant] claims to be owned by a different LLLP.").

283. *Id.*

284. *See* Mulryan Complaint, *supra* note 11; *Mulryan Props., LLLP v. Cal. Coastal Comm'n*, No. BS133269 (Cal. Super. Ct. Oct. 21, 2011) (order consolidating all Sweetwater Mesa complaints into one proceeding).

applied for a development permit to build a single-family home, that four adjacent landowners had applied for development permits for their respective parcels, and that the Commission's staff required all of the landowners to process their applications together.²⁸⁵ Three paragraphs of the complaint summarize Mulryan's contentions:

3. On June 16, 2011, the Commission denied Mulryan's applications on the theory that Mulryan does not own the Mulryan Property and that, instead, the Mulryan Property is either (i) effectively owned by another individual who does not hold title to the Mulryan Property and does not own Mulryan, or (ii) owned by an implied partnership consisting of other landowners who do not hold title to the Mulryan Property and do not own Mulryan. The Commission refers to this new and legally unprecedented theory as "unity of ownership."

4. Under the Commission's "unity of ownership" theory, Mulryan and its neighboring landowners are permitted to submit applications for new coastal development permits for no more than two or three homes, whose locations would not depend on existing lot boundaries. Mulryan would be required to apply for a permit to build a home on land it does not own. Even if Mulryan applies for a permit on the Mulryan Property, the Commission's decision states that the Commission may deny the application and conclude that no development may occur on the Mulryan Property.

5. Under the United States and California Constitutions, the Commission may not deny Mulryan economically viable use of the Mulryan Property, without paying Mulryan just compensation for the taking. The Commission's unprecedented "unity of ownership" theory is an attempt to evade these constitutional mandates. Under California law, the owner of legal title of property holds full beneficial title to that property, which may be rebutted only by clear and convincing proof. The Commission's decision is based on sheer speculation, argument and unsubstantiated opinion which is not substantial evidence, let alone clear and convincing evidence.²⁸⁶

285. Mulryan Complaint, *supra* note 11, at 1–2.

286. *Id.* at 2.

The Mulryan complaint requested as relief a writ of mandate, ordering the Commission to set its denial aside.²⁸⁷

4. Unified Development Scheme

The Coastal Commission's Staff Report asserts that "[t]he proposed five-house project is a coordinated development scheme" and notes that the various applicants "are all seeking LEED Gold certification."²⁸⁸ The Report adds that, on a website and in a video released to the media, David Evans "represents that he is in a partnership to develop the five homes and that he has presented an orchestrated development plan. The website is evidence, taken alone, that these five homes are part of a unified development scheme."²⁸⁹

The Mulryan complaint does not discuss coordination among the various parcel owners. Assuming that ownership of the respective parcels is independent in other respects, however, their cooperation does not mean that they are partners.²⁹⁰

5. The "Unity of Ownership" Issue

The California Coastal Commission's Staff Report noted that, as a "threshold matter, . . . it is necessary to define the property interest against which the taking claim will be measured."²⁹¹

The issue is complicated in cases where a landowner owns or controls multiple, adjacent or contiguous parcels all of which are related to the proposed development. In these circumstances, courts will analyze whether the lots are sufficiently related so that they can be aggregated as a single parcel for purposes of the takings analysis.²⁹²

As the Federal Circuit Court of Appeals put it, when a developer "treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel."²⁹³ This principle is therefore sometimes referred to as the "single economic parcel" principle. The primary issue in the Sweetwater Mesa litigation is whether there *is* "a landowner" of the

287. *Id.* at 6.

288. STAFF REPORT, *supra* note 247, at 78–79.

289. *Id.* at 79.

290. *See* discussion *supra* Part III.A.5.

291. STAFF REPORT, *supra* note 247, at 72.

292. *Id.*

293. *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

various parcels or whether each is owned by the entity to which it was deeded. The Staff Report's discussion on this issue, under the heading "Unity of Ownership,"²⁹⁴ asserts that the history and ownership structure of the parcels, and coordination in their development, together

provide some evidence that all of the parcels are actually owned by David Evans. If not, there is substantial evidence that at least some combination of them is owned by a single entity that is an implied partnership among some combination of the LLLPs, with David Evans functioning as the managing general partner.²⁹⁵

It adds:

Here, there is significant evidence indicating that David Evans is the owner of all five parcels, notwithstanding the fact that title is held in five distinct limited liability limited partnerships (LLLPs), or perhaps as LLCs. Ex parte communication and several news reports indicate that David Evans bought all five parcels in 2005 (albeit through the five LLCs that were the predecessors of the current LLLP applicants).²⁹⁶

A recurrent theme in the Staff Report is mention of David Evans's familial, business, and social relationships with others stated to be involved with the Sweetwater Mesa parcels.²⁹⁷ However, the Report does not distinguish between social and business relationships or provide details.

6. The Issue of Profit

The Commission's Staff Report heavily relied on *Chapman v. Hughes*,²⁹⁸ a leading California partnership case. "The court reasoned that the parties created a partnership because the agreement 'created an association of three persons for the purpose of carrying on together the business of selling the lands, and *dividing the profits of that business among [sic] them.*'"²⁹⁹ After discussing the coordination in development and alleged intertwining of

294. STAFF REPORT, *supra* note 247, at 80.

295. *Id.*

296. *Id.* at 81.

297. *See, e.g., id.* at 76 ("David Evans, General Partner for Vera Properties, LLLP, had a close familial or business relationship with the principals of each LLLP, and even now, he retains a familial, business or social relationship with the successor general partners."); *id.* at 77 ("Evans and Delaney [developed] both a business and social relationship.").

298. *Chapman v. Hughes*, 37 P. 1048 (Cal. 1894).

299. STAFF REPORT, *supra* note 247, at 83 (emphasis added) (quoting *Chapman*, 37 P. at 1048).

ownership involving the Sweetwater Mesa parcels, the Staff Report turned to the question of profits. Citing to a “news-gossip” website, it averred:

Finally, the partners are engaging in the venture for a profit. As noted above, the partners intend to sell three of the five homes to, at least, pay for the entire project. Further, even if they did not build homes on the parcels, Evans, apparently in total control of the project, has had intentions to profit from merely owning the project parcels.³⁰⁰

The Report did not attempt to discuss any actual agreement to split hypothesized or anticipated profits with respect to all five homes. In fairness, that would have required knowledge of an actual contractual agreement among the parties. Such an agreement also would have had to specify numerous details about upkeep and improvements on each parcel, etc. Alluding to earlier references to the alleged complex structuring of the Sweetwater Mesa parcels, the Report observed: “The Commission, however, may not base its . . . takings decision solely on this point. Rather, it can view this circumstantial evidence in light of the surrounding evidence provided throughout this report.”³⁰¹

The Report’s discussion of ownership concluded:

In conclusion, whether the lots are, in reality, all controlled by David Evans, or whether there is a true partnership among distinct property owners, Mr. Evans’ ownership or the joint venture’s ownership of at least some of the parcels must be taken into account for purposes of identifying the relevant unit of analysis for the necessary takings review. Under the Coastal Act, “any person . . . wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit.” Public Resources Code, section 21066 defines person as “any person . . . partnership, business . . . limited liability company. . . .” Finding that the Sweetwater Mesa project’s partners have been conducting business as a joint venture, then, the “person”, under the Coastal Act, that is performing or undertaking this development may be this partnership. For the reasons indicated above, the commission considers Mr. Evans or the joint venture as the unified owner of at least three of the parcels.³⁰²

300. *Id.* at 89 (citing Gemma O’Doherty, *The Edge Tells Malibu Nimbys: I’m Going to Build My Dream Home—With Or Without You*, INDEP. WOMAN (Apr. 25, 2009), <http://www.independent.ie/entertainment/news-gossip/the-edge-tells-malibu-nimbys-im-going-to-build-my-dream-home--with-or-without-you-1719749.html>).

301. *Id.* at 90.

302. *Id.* at 92 (citation omitted) (quoting CAL. PUB. RES. CODE §§ 30600, 21066 (West 2007)).

7. Comments on Sweetwater Mesa

This Article does not focus on the heavily fact-bound Sweetwater Mesa litigation as such. The landowners contend that ownerships of the various parcels are completely separate, and the Coastal Commission claims they are not.³⁰³ The California state courts will have to determine whether “a *landowner* owns or controls multiple, adjacent or contiguous parcels,”³⁰⁴ and, if so, whether “the lots are *sufficiently* related so that they can be aggregated as a single parcel for purposes of the takings analysis.”³⁰⁵

It would be insufficient, however, for the Coastal Commission to demonstrate that the complex ownership structure of each parcel and an asserted friendship among the ostensible principals give rise to the proper attribution of all ownership in any parcel to a given individual. But, that would leave the parcels without overlapping ownership. Rather, the Commission would have to demonstrate that the ownership of the individual parcels could be attributed to a common entity, one that was established to conduct a business from which the separate parcel owners would derive a share of the profits.³⁰⁶

303. *See supra* Parts III.C.3 and III.C.5.

304. STAFF REPORT, *supra* note 247, at 78 (emphasis added). For a general analysis of aggregation of parcels, see *supra* Part II.B.

305. *Id.* (emphasis added).

306. *See generally supra* Part II.D.

CONCLUSION

The “unity of ownership” theory presents difficult questions that are at the intersection of takings law and more general legal principles. For better or worse, *Penn Central* and its progeny dictate an ad hoc, totality of the circumstances balancing in making regulatory takings determinations. On the other hand, real estate law more generally, and the law of business associations, have different rules and interpretative practices, many of which are more hard-edged.

Regulatory takings determinations, for the most part, involve characterizations about the severity of constraints on how owners may use their property. They do *not* purport to define what those rights are. A “unity of ownership” principal, on the other hand, would *create* constructive entities, such as a “Sweetwater Mesa Partnership,” and then attribute rights belonging to the record owners of deeded parcels to those entities. It is one thing for a prospective landowner to ask, “how much development will the government allow on my parcel?” It is quite something different for the prospective owner to inquire, “will my status as a corporation, or as a shareholder, or partner, or owner of a separate parcel of land be recognized?”

In Sweetwater Mesa, the apparent basis for the Coastal Commission’s permit denials was the view that a complex array of limited partnership and similar ventures obscured the fact that David Evans, or Evans and some of his friends, wanted to create a sizeable development in a protected area. But there is nothing in the “unity of ownership” theory that prevents the theory’s use in many other situations in which a transaction or agreement among different owners of assets might be imputed, and where a prosecutor, regulator, or private plaintiff might succeed through asserting conflation of ownership.³⁰⁷

The discretion traditionally allowed land use regulators under *Penn Central* implicitly is premised on regulatory takings law being relatively self-contained. Were it seriously to intrude on important areas of property and business law where stability of rights is at a premium, the scope of regulatory discretion in the land use area inevitably would be affected.

307. See discussion *supra* Part II.D.