

HOW THE HISTORY AND PURPOSE OF THE REGULATORY TAKINGS DOCTRINE HELP TO DEFINE THE PARCEL AS A WHOLE

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INTRODUCTION

This Article explores the “parcel as a whole” rule that the U.S. Supreme Court applies in analyzing regulatory takings claims. The Article begins by reviewing the Court’s own treatment of the rule—starting with its establishment in *Penn Central Transportation Co. v. New York City*,¹ the Court’s subsequent affirmation of the rule interspersed with occasional hints of doubt, and the Court’s ultimate whole-hearted embrace of the rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.² Next, the Article examines the tests that property rights proponents have devised to weaken the rule by defining the “parcel” as narrowly as possible. This includes the approach advocated by Professor Steven J. Eagle, whose companion article appears in this issue of the *Vermont Law Review*.³ The Article then reviews lower court decisions that have generally declined to apply a narrow rule.

Finally, the Article outlines why courts should continue to reject a narrow approach, beginning with an explanation of the inconsistency between the test Professor Eagle suggests and the *Penn Central* decision itself. Then, the Article reviews why courts should continue to apply a fair and robust approach—a flexible analysis based upon fundamental fairness that includes a determination of the owner’s reasonable expectations. A robust parcel rule recognizes that regulatory takings are a judicial construct, closely akin to substantive due process, that goes far beyond anything contemplated when the Takings Clause was drafted. As such, it cannot be applied too expansively, lest we return to the excessive judicial activism of the *Lochner*⁴ era using the Takings Clause rather than the Due Process Clause. The narrow parcel approach also improperly diminishes the role of

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

2. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 342 (2002).

3. Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel As a Whole*, 36 VT. L. REV. 549 (2012).

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

the public interest in balancing private and public rights. Lastly, the narrow rules would downplay the central role of fairness and expectations in regulatory takings decisions.

Note that when applied to real property, the parcel-as-a-whole rule has three basic dimensions: horizontal, vertical, and temporal. Horizontal refers to the land surface (“metes and bounds”);⁵ vertical to air space and subsurface rights;⁶ and temporal to past and future uses of the land.⁷ This Article concludes that courts should continue to broadly define all three of these dimensions when considering the “parcel as a whole” in a regulatory takings claim.

I. THE SUPREME COURT’S DEVELOPMENT AND EXPLANATION OF THE PARCEL RULE

In *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court analyzed the doctrinal underpinnings of its regulatory takings cases.⁸ The Court started out by emphasizing that a paradigmatic taking occurs when government directly appropriates or physically invades property.⁹ The Court then explained that a regulation can amount to a taking when it is so onerous that its effect is tantamount to a direct appropriation or ouster.¹⁰ In that situation, the regulation contravenes the Takings Clause’s “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.”¹¹ The *Lingle* Court went on to explain that it analyzes regulatory takings claims by using one of four tests. Most are “governed by the standards set forth in *Penn Central Transp. Co. v. New York City*.”¹² Others come within the “two relatively narrow categories” exemplified by *Loretto v. Teleprompter Manhattan CATV Corp.*¹³ (permanent physical occupation) and *Lucas v.*

5. *Tahoe-Sierra*, 535 U.S. at 331–32.

6. *Penn Central*, 438 U.S. 104, 130 (1978) (airspace); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497–98 (1987) (subsurface rights).

7. *Tahoe-Sierra*, 535 U.S. at 331–32.

8. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

9. *Id.*

10. *Id.*

11. *Id.* (alteration in original) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (internal quotation marks omitted).

12. *Id.* at 538.

13. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

*South Carolina Coastal Council*¹⁴ (denial of all economic value).¹⁵ Finally, there is “the special context of land-use exactions.”¹⁶

Two of these tests—those used in *Penn Central* and in *Lucas*—rely to a significant extent on the economic impact of the regulation on the property in question. And in a substantial number of cases, defining what that property is (often referred to as the “denominator”),¹⁷ can determine the case’s outcome. Take, for example, the situation in which a developer plans to build a subdivision with hundreds of residential lots, and a governmental entity authorizes the development but requires the developer to set aside one lot because it is a wetland. A court is much more likely to find a taking if it defines “the property” as solely the wetland lot than if it deems “the property” to be the entire subdivision.

The U.S. Supreme Court first expressly addressed this issue in *Penn Central* itself. *Penn Central Transportation Co.*, which owned Grand Central Terminal, asserted that New York City prohibited it from building an office structure above the Terminal and thereby took “a valuable property interest,” namely, *Penn Central*’s “‘air rights’ above the Terminal.”¹⁸ The Court, however, rejected that argument, famously explaining:

“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 . . . on the nature and extent of the interference with rights in the parcel as a whole¹⁹

Since *Penn Central*, the Court has emphatically embraced this parcel-as-a-whole rule, although along the way it had hinted twice that it might have wanted to revisit the requirement. The Court reiterated the rule in *Keystone Bituminous Coal Ass’n v. DeBenedictis*, where coal operators

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

15. *Lingle*, 544 U.S. at 538.

16. *Id.*

17. The courts have come to use the term “denominator” to describe the property that will be considered the whole parcel. The term comes from Professor Frank Michelman’s seminal takings article, which describes the court’s task of analyzing a regulation’s economic impact on property as being based, in part, on looking at a fraction, with the numerator being the value with the regulation’s restrictions and the denominator being the value absent those restrictions. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

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

19. *Id.*

asserted that the Court should only look at the coal that could not be mined in determining whether a state law requiring them to leave a certain amount of coal in the ground to support surface structures amounted to a taking.²⁰ The Court rejected that argument. Pointing to *Penn Central's* parcel-as-a-whole principle, the Court determined that the parcel consisted of all of the operators' coal, not just the portion that could not be mined.²¹

But five years after *Keystone*, Justice Scalia authored a six-Justice majority opinion in *Lucas v. South Carolina Coastal Council*, which included a footnote expressing "uncertainty" concerning the denominator question.²² However, the Court explained that "we avoid this difficulty in the present case" because the owner's property interest was not in dispute.²³

Then, just one year after the majority's expression of uncertainty in *Lucas*, a unanimous Court expressly endorsed the parcel-as-a-whole concept in *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*.²⁴ Concrete Pipe asserted that a taking occurred when federal law required the company to pay a certain "withdrawal liability" to a pension trust when it withdrew its funds from that trust.²⁵ The company argued that the Court should look solely at the company's required payment in determining whether or not the law imposed a taking.²⁶ The Court rejected that argument, explaining that it needed to look at the economic impact on the entire company—and maybe even on its parent company—in its analysis.²⁷ In a unanimous portion of the decision, the Court reiterated the need to look at the entire property, not just the regulated portion:

[A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. 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.²⁸

20. *Keystone*, 480 U.S. at 498.

21. *Id.* at 497–98.

22. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992).

23. *Id.*

24. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993).

25. *Id.* at 605 (internal quotation marks omitted).

26. *Id.* at 643.

27. *Id.* at 645.

28. *Id.* at 644 (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)).

Subsequently, in 1997, Justice Scalia (who as previously noted seemed to express uncertainty in *Lucas*) wrote a concurring opinion in *Suitum v. Tahoe Regional Planning Agency* affirming the parcel-as-a-whole concept and suggesting that it applied, at a minimum, to contiguous properties.²⁹ The concurrence disagreed with the majority's implication that a property owner's entitlement to valuable transferable development rights (TDRs) might be relevant in determining whether a land use restriction imposed a taking.³⁰ Justice Scalia distinguished *Penn Central*, which endorsed the consideration of TDRs in determining whether a regulation imposed a taking, arguing that while Ms. Suitum would be selling development rights on the open market to third parties, Penn Central could use the rights on its own nearby properties.³¹ Significantly for our purposes, Justice Scalia considered those nearby properties to be part of the whole parcel: "The relevant land, it could be said, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole, had not been diminished."³²

In *Palazzolo v. Rhode Island*, however, a majority of the Court—including Justice Scalia—once again signaled, in dicta, its openness towards revisiting these parcel-as-a-whole holdings.³³ Specifically, citing *Lucas* and two law review articles, the Court stated that it has "at times expressed discomfort with the logic of [the parcel-as-a-whole] rule."³⁴ However, the Court did not address the issue because the petitioner failed to press it below and did not raise it in his petition for certiorari.³⁵

Finally, in 2002, the Court put to rest its passing questions in *Lucas* and *Palazzolo* by basing its decision front and center on the parcel-as-a-whole rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.³⁶ The *Tahoe-Sierra* Court held that a regional planning agency's temporary moratorium on development did not impose a categorical taking under *Lucas* because the properties in question retained value as a result of their potential for use in the future.³⁷ The Court based its holding on the parcel-as-a-whole rule, explaining that the rule not only has a

29. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 749 (1997).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001).

34. *Id.* The Court's statement that "at times" it expressed discomfort is curious, as it only cites a single time that it arguably questioned the rule and this author is not aware of any other cases in which the Court had raised any doubts about the rule.

35. *Id.*

36. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002).

37. *Id.* at 332.

“geographic” (“metes and bounds”) dimension but also a “temporal” dimension (period of time covered by the ownership interest in property).³⁸ Courts must look to the entirety of those interests in evaluating the effect of a challenged regulation.³⁹ Justice Thomas, joined only by Justice Scalia, underscored the Court’s affirmation of the parcel-as-a-whole rule in his dissenting opinion, objecting to the majority’s reliance on that “questionable” rule.⁴⁰

II. EFFORTS BY PROPERTY RIGHTS ADVOCATES TO ELIMINATE OR WEAKEN THE PARCEL RULE

As the Court evolved in its treatment of the parcel-as-a-whole rule, property rights-oriented academicians have sought to eliminate, or at least to constrict, the rule. Most notably, seven years after *Penn Central* was decided, Professor Richard Epstein issued his seminal book *Takings: Private Property and the Power of Eminent Domain*. Professor Epstein argued that courts should analyze takings claims by using an analysis that sharply diverges from *Penn Central*’s weighing of factors approach and, more significantly for our purposes, *Penn Central*’s use of the parcel-as-a-whole concept.⁴¹ Instead, he asserted that when government diminishes “the rights of the owner in any fashion” there is a prima facie taking “no matter how small the alteration.”⁴² Thus, applying Professor Epstein’s approach to our hypothetical, where a regulation prohibits the development of one acre, it would not matter whether that acre is the entire project area or only a small fraction of that area. Rather than giving credence to this far-reaching suggestion,⁴³ however, as previously noted the Court reiterated its parcel-as-a-whole rule in subsequent decisions, culminating in *Tahoe-Sierra*—a decision that Professor Epstein criticized as having “dire consequences.”⁴⁴

38. *Id.* at 331–32.

39. *Id.* at 332.

40. *Id.* at 355. (Thomas, J., dissenting).

41. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 57 (1985).

42. *Id.*

43. Professor Epstein explains that his interpretation of “the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, progressive taxation.” *Id.* at x.

44. See Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUP. CT. REV. 5, 10 (2002) (referring to *Tahoe-Sierra* as having “[a]n outcome that misguided,” and the product of a Court that “sees little if any real downside to regulation,” an attitude with “dire consequences”); see also *id.* at 22–23 (arguing for the elimination of the parcel-as-a-whole rule).

Although the Court has affirmed the parcel-as-a-whole rule, the question nevertheless remains: How should courts determine what that parcel is? Some property rights advocates have pressed for as narrow a definition of the whole parcel as possible. Professor John Fee, for example, argues for an “independent economic viability” standard.⁴⁵ “Under this standard, a taking has occurred 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.”⁴⁶ Professor Stephen J. Eagle advocates a similar but even narrower “commercial unit” standard.⁴⁷ Under his approach, the parcel is any property interest “traded in a market in the community in which it is located.”⁴⁸ As will be seen, however, to date these narrow parcel definitions have not gained much traction.

III. MOST LOWER COURTS HAVE REFUSED TO DEFINE THE PARCEL NARROWLY

The parcel question probably receives the most attention in the U.S. Court of Federal Claims and its appellate court, the U.S. Court of Appeals for the Federal Circuit. These courts see a large volume of takings cases due to the general requirement that litigants must file actions in the Court of Federal Claims when they seek more than \$10,000 against the federal government.⁴⁹ Rather than using narrow definitions, the federal circuit courts have essentially followed the flexible but guided approach that *Penn Central* set forth for takings analyses in general. *Penn Central* explained that the takings determination “depends largely ‘upon the particular circumstances [in that] case.’”⁵⁰ The decision then went on to provide some guidance by describing three factors that are particularly significant: (1) “[t]he economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment-backed

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

46. *Id.* at 1537.

47. Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 941.

48. *Id.*

49. 28 U.S.C. § 1491(a) (2006) (Court of Federal Claims jurisdiction for monetary claims under federal law); *id.* § 1346(a)(2) (concurrent jurisdiction in district court for cases not exceeding \$10,000).

50. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (alteration in original) (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952)).

expectations”; and (3) “the character of the governmental action.”⁵¹ Most lower courts similarly take an ad hoc approach in defining the denominator, while giving it some form by applying a set of factors that they have developed.

The Court of Federal Claims has thus explained that it determines the denominator by applying “a flexible approach, designed to account for factual nuances.”⁵² Like *Penn Central*, however, the federal circuit courts put some structure on their case-by-case approach by looking at specific factors. The Court of Federal Claims thus looks at issues such as “the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the [regulated] lands enhance the value of remaining lands, and no doubt many others.”⁵³

The decisions in the Federal Circuit tend to place special weight on the reasonable investment-backed “economic expectations of the claimant.”⁵⁴ Under this inquiry, the “treated as a single unit” factor takes on special significance. Thus, where a developer uses parcels as part of “a single integrated project,” they will be deemed one parcel or unit even if they are capable of being developed independently and are acquired at different times by different transactions.⁵⁵ Moreover, single-unit treatment will trump a lack of contiguity.⁵⁶ On the other hand, the Federal Circuit has viewed two parcels as separate when the owner never treated them as a single unit, they are separated by a road, and the owner sold the first one before the

51. *Id.*

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

53. *Cane Tenn., Inc. v. United States*, 60 Fed. Cl. 694, 700 (2004) (alteration in original) (citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (1991)). In *Lost Tree Village Corp. v. United States*, the court listed the following factors:

- (1) the degree of contiguity,
- (2) the dates of acquisition,
- (3) the extent to which a common development scheme applied to the parcel,
- (4) the extent to which the parcel has been treated as a single economic unit,
- (5) the extent to which the regulated lands enhance the value of the remaining lands, and
- (6) the extent any earlier development had reached completion and closure.

92 Fed. Cl. 711, 717–18 (2010) (citing, e.g., *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *Loveladies Harbor*, 28 F.3d at 1181). The court subsequently conceded in a post-trial opinion that it had added the sixth (closure) factor, and that it “engendered considerable debate between the parties.” *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 428 (2011).

54. *Forest Props.*, 177 F.3d at 1365.

55. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (quoting *Forest Props.*, 177 F.3d at 1365); see also *Norman v. United States*, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (“Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel.” (quoting *Forest Props.*, 177 F.3d at 1365)).

56. *Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991).

regulatory statute was enacted.⁵⁷ This question of timing is important for determining whether an owner's sale of a parcel reflected "strategic behavior."⁵⁸ Thus, transfers made before regulations were anticipated or adopted would weigh against aggregating parcels,⁵⁹ although that weight would be overcome by evidence that the parcels were part of a master plan.⁶⁰

While most decisions concerning the denominator question are within the Federal Circuit, other courts have addressed the issue as well. They generally appear to follow the Federal Circuit's approach. For example, the U.S. Court of Appeals for the District of Columbia fully embraces the Federal Circuit's view.⁶¹ The highest courts of Pennsylvania,⁶² Michigan,⁶³ Ohio,⁶⁴ Wisconsin,⁶⁵ New Hampshire,⁶⁶ and Idaho⁶⁷ also follow the Federal Circuit's approach without deviation. The Supreme Judicial Court of Massachusetts uses the Federal Circuit's factors but has created a "rebuttable presumption" that "contiguous commonly-owned property" is the denominator.⁶⁸ At least one state's supreme court—Colorado's—appears to conclusively presume that contiguous, commonly owned property counts as a single parcel.⁶⁹

Finally, decisions in another state—California—have evolved. Over two decades ago, a California appellate court indicated that the denominator question turns in part on whether the unit in question is "economically viable apart from the larger parcel."⁷⁰ To a significant degree, Professor Fee based his previously discussed "independent commercial viability" test on that decision.⁷¹ A subsequent appellate decision, however, determined that fourteen separate residential lots should be considered together, even

57. *Palm Beach Isles*, 208 F.3d at 1380.

58. *Loveladies Harbor*, 28 F.3d at 1181 (noting the government's concern that limiting the denominator to the parcel for which the owner seeks a permit "would encourage strategic behavior on the part of developers—'conveying away the non-wetlands portions of their parcels prior to applying to the Corps for a permit to fill the remaining wetlands'").

59. *Id.*

60. *Deltona Corp. v. United States*, 657 F.2d 1184, 1188, 1192 (Fed. Cl. 1981).

61. *Dist. Intown Props. Ltd. P'ship v. Dist. of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999).

62. *Machipongo Land & Coal Co. v. Pennsylvania*, 799 A.2d 768–69 (Pa. 2002).

63. *K & K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531, 536–37 (Mich. 1998).

64. *State ex rel. R.T.G., Inc., v. Ohio*, 780 N.E.2d 998, 1007, 1009 (Ohio 2002).

65. *Zealy v. Waukesha*, 548 N.W.2d 528, 533 (Wis. 1996).

66. See *Quirk v. Town of New Boston*, 663 A.2d 1328, 1332–33 (N.H. 1995), where the court's opinion suggests that it is following the Federal Circuit approach.

67. *City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 324 (Idaho 2006).

68. *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006).

69. *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs*, 38 P.3d 59, 68 (Colo. 2001).

70. *Twain Harte Assocs. v. County of Tuolumne*, 265 Cal. Rptr. 737, 745 (Cal. Ct. App. 1990).

71. Fee, *supra* note 45, at 1548.

though each was presumably independently economically viable.⁷² And more recently, the California Supreme Court implicitly rejected an independent economic viability test when it held that the parcel for takings purposes consisted of both a leased-out billboard and the underlying land on which the billboard was constructed.⁷³

Moreover, a number of state courts have shared the Court of Federal Claims' concern⁷⁴ about litigants engaging in strategic behavior to evade the parcel-as-a-whole rule—a concern that cuts against adopting a narrow parcel approach. For example, in the previously noted California Supreme Court billboard case, the court reviewed a company's claim that city-owned palm trees reduced the visibility of its billboards, amounting to a taking.⁷⁵ The company held lease agreements with the owner of the underlying properties that allowed the company to maintain its signs on the properties.⁷⁶ The company asserted that the court should only look at the impact of the palm trees on its lease agreements, not on the underlying land.⁷⁷ However, the court held that the property as a whole included the underlying land.⁷⁸ In support of its conclusion, the court relied both generally on the parcel-as-a-whole rule, and specifically on the Michigan Supreme Court's concern that focusing on leases could lead to strategic behavior.⁷⁹ It quoted the Michigan court, which explained:

[W]e do not believe that a property owner, confronted with an imminent property regulation, can nullify . . . a legitimate exercise of the police power by leasing narrow parcels or interests in his property so that the regulation could be characterized as a taking only because of its disproportionate effect on the narrow parcel or interest leased.⁸⁰

The Idaho Supreme Court has likewise explained that courts should not allow parties to engage in strategic behavior in order to undermine the parcel-as-a-whole rule. The court held that, in a case where the owner of two parcels transferred one to a corporation wholly owned by his sons, the two parcels should nevertheless be deemed to have a single owner if “the transfer was made for the purpose of influencing the denominator

72. *City of San Francisco v. Golden Gate Heights Invs.*, 18 Cal. Rptr. 2d 467, 469 (Cal. Ct. App. 1993).

73. *Regency Outdoor Adver., Inc. v. City of Los Angeles*, 139 P.3d 119 (Cal. 2006).

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

75. *Regency Outdoor Adver.*, 139 P.3d at 124.

76. *Id.* at 122.

77. *Id.*

78. *Id.* at 128.

79. *Id.*

80. *Id.* (quoting *Adams Outdoor Adver. v. City of E. Lansing*, 614 N.W.2d 634, 639 (Mich. 2000)).

analysis.”⁸¹ The court explained that this approach was needed because “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.”⁸²

Although courts have generally declined to follow the narrow approach promoted by Professors Fee and Eagle, at least one prominent property rights group—the Pacific Legal Foundation—continues to advocate for its use.⁸³ The rest of this Article discusses four main reasons why courts should continue to avoid these constrictive tests. First, they are contrary to Supreme Court precedent. Second, they take a clause that was probably never intended to address regulations and expand its reach, much as the Court did with the closely related concept of substantive due process during the *Lochner*⁸⁴ era. Third, they tend to take the public interest out of the takings calculus. Fourth, they devalue the critical role of fairness and expectations in regulatory takings decisions.

IV. THE FEE/EAGLE TESTS ARE INCONSISTENT WITH THE SUPREME COURT’S EXPLANATIONS OF THE PARCEL RULE

As previously noted, Professor Fee suggests that the denominator should be any “horizontally definable parcel” that has “independent economic viability,”⁸⁵ and Professor Eagle would define the whole parcel as any property interest “traded in a market in the community in which it is located.”⁸⁶ Yet these suggested tests run counter to Supreme Court decisions.

Most notably, *Penn Central* itself rejected Professor Eagle’s commercially marketable approach.⁸⁷ That seminal case involved the request of Penn Central Transportation Co., which at the time owned Grand Central Terminal, to build an office tower over the Terminal.⁸⁸ However, the New York City commission that administered the City’s landmark-preservation law denied Penn Central’s proposal to build either a fifty-five

81. *City of Coeur D’Alene v. Simpson*, 136 P.3d 310, 324 (Idaho 2006).

82. *Id.* at 320.

83. Brief for Pacific Legal Found. et al. as Amici Curiae Supporting Plaintiffs at 20, *Lost Tree Vill. Corp. v. United States*, 92 Fed. Cl. 711 (2010) (No. 08-117L), available at <http://www.pacificlegal.org/document.doc?id=549>.

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

85. Fee, *supra* note 45, at 1537–38 (internal quotation marks omitted).

86. Eagle, *supra* note 47, at 941.

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

88. *Id.* at 116.

or a fifty-three story office building.⁸⁹ Penn Central then sued, asserting that the City took its property because “the airspace above the Terminal is a valuable property interest” and the preservation law prevented “any gainful use of [its] ‘air rights’ above the Terminal.”⁹⁰ The Court, however, refused to limit its analysis to that interest, because “the submission that appellants may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.”⁹¹ Thus, *Penn Central* expressly held that airspace cannot be segmented from the underlying property for takings purposes. Yet that is precisely what Professor Eagle advocates. As previously noted, he asserts that the parcel is any property interest “traded in a market in the community in which it is located.”⁹² Airspace in New York City squarely meets that definition. It is a property interest,⁹³ and it is commercially marketable in New York City.⁹⁴

Professor Fee, in contrast, concedes that “[u]nder clear Supreme Court precedent, a property owner would have no authority to divide property rights into uses, easements, servitudes, or the like,” and that “under the authority of *Penn Central* and *Keystone*, courts must consider all air, surface, and subsurface rights of a particular parcel as a single bundle of property rights.”⁹⁵ He tries to avoid a clash with these Supreme Court decisions by limiting his “independent economic viability” test to the definition of the “horizontal” parcel (i.e., the amount of land), but not to the definition of the “vertical” parcel (i.e., air rights, subsurface rights) or to whether any of the property’s “functional” attributes can be segmented (i.e., the right to sell property).⁹⁶ It is not at all clear, however, why his “independent economic viability” test should be so limited, except to avoid the obvious conflict with *Penn Central* and other Supreme Court decisions. Even Professor Eagle has therefore criticized the limitation as lacking any basis.⁹⁷

89. *Id.* at 116–17.

90. *Id.* at 130.

91. *Id.*

92. Eagle, *supra* note 47, at 941.

93. See, e.g., *City of Cedar Rapids v. Ins. Co. of N. Am.*, 562 N.W.2d 156 (Iowa 1997) (considering a hotel’s leased airspace over a city arena); Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1236 (2009) (stating that the common law recognizes airspace as real property); cf. Eagle, *supra* note 47, at 942 (stating that “sales of air rights above similar commercial parcels are illustrative” of a market for the rights).

94. See Roderick M. Hills, Jr. & David Schleicher, *Reassessing the State and Local Government Toolkit: The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 266 (2010).

95. Fee, *supra* note 45, at 1558.

96. *Id.*

97. See Eagle, *supra* note 47, at 943. Professor Eagle argues that Professor Fee’s approach “includes the artificial constraint that the property be ‘horizontal.’ There is no substantial reason why

Professor Fee's only explanation for treating horizontal parcels differently is based upon his unsupported assumption that vertical and functional aspects of a parcel can never be severed, even if they are separately owned and the separate ownership is unrelated to strategic behavior. He thus argues: "That a different rule would apply for horizontal divisions of land, however, is not surprising—for there, the nonseverability rule cannot apply in the same absolute way that it does in the vertical and functional contexts."⁹⁸ Thus, the underpinning of his rationale is that if, for example, a mining company owns subsurface mining rights, and an unrelated commercial enterprise is operating an unrelated factory on the surface, a court reviewing the mining company's takings challenge to regulations prohibiting mining must always include the value of the factory in its economic impact analysis. But, while courts have sometimes combined separately owned vertical interests (and separately owned horizontal interests) to address strategic behavior,⁹⁹ they have never stated the "absolute" rule posited by Professor Fee. By setting up this straw person, Professor Fee can argue that in contrast to vertical and functional interests, "all property would blur into one" unless courts have "some further set of criteria to define a parcel horizontally."¹⁰⁰

In reality, however, the courts do not combine any separately owned interests—vertical, functional, or horizontal—absent strategic behavior, or a partnership or other special relationship between the owners. Therefore, Professor Fee's attempt to avoid Supreme Court precedent by limiting his test to horizontal interests does not stand up. But these narrow parcel definitions do not merely suffer from their clashes with precedent. More fundamentally, there are strong doctrinal and policy reasons for rejecting these definitions.

V. THE REGULATORY TAKINGS DOCTRINE'S JUDICIAL AND SUBSTANTIVE DUE PROCESS ORIGINS CALL FOR CABINING ITS IMPACTS BY USING A ROBUST PARCEL TEST

The Supreme Court has repeatedly and consistently explained that the concept of regulatory takings is a judicial creation that did not exist prior to 1922. For example, as recently as 2005, a unanimous Court made clear that "until the Court's watershed decision in *Pennsylvania Coal Co. v. Mahon*,"

property interests such as those involving upper-floor condominiums, air rights, or mineral interests should be excluded." *Id.*

98. Fee, *supra* note 45, at 1558.

99. See *supra* notes 58–60, 74–82 and accompanying text.

100. Fee, *supra* note 45, at 1558.

the general consensus was that the Takings Clause did not cover regulations of property.¹⁰¹ Similarly, three years earlier in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court explained why it uses a different analysis in reviewing regulatory as opposed to physical takings claims. In contrast to physical takings, regulatory takings were a relatively recent creation: “Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage”¹⁰²

Justice Scalia’s majority opinion in *Lucas v. South Carolina Coastal Council* likewise referred to the recent vintage of regulatory takings.¹⁰³ The opinion pointed out that “[p]rior to Justice Holmes’s exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, or the functional equivalent of a ‘practical ouster of [the owner’s] possession.’”¹⁰⁴ And Justice Kennedy pointed out in his concurring opinion in *Eastern Enterprises v. Apfel* that a single sentence in *Pennsylvania Coal* “is, of course, the genesis of the so-called regulatory takings doctrine.”¹⁰⁵

These observations are consistent with the Court’s historic view of the Takings Clause. Back in 1879, the Court thus explained that governmental actions “not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.”¹⁰⁶

While many scholars strongly agree with the position that regulatory takings are a relatively new construct,¹⁰⁷ some suggest that the issue is at least debatable.¹⁰⁸ The doubters’ arguments usually turn on analyzing state court opinions involving cases that are difficult to characterize as regulatory takings (most involving indirect physical damaging of property),¹⁰⁹ or

101. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

102. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002).

103. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992).

104. *Id.* (alteration in original) (citations omitted) (quoting *Knox v. Lee (Legal Tender Cases)*, 79 U.S. (12 Wall.) 457, 551 (1871)); *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

105. *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring) (citing *Lucas*, 505 U.S. at 1014 (1992)).

106. *Transp. Co.*, 99 U.S. at 642.

107. See, e.g., John D. Echeverria, *From a “Darkling Plain” to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 974–75 (2006) (including articles cited on those pages); Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 886–87 (2001) (including articles cited in note 10).

108. See, e.g., David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497 (2004) (including articles cited on pages 533–42).

109. See *id.* at 519–33 (listing cases involving compensation for direct and indirect physical damage to properties, as opposed to land use restrictions). The one case cited in Thomas’s article as

highly conjectural hypotheses regarding the intent of some Founding Fathers.¹¹⁰ Even if we considered the issue uncertain, however, our experience with a strongly related doctrine that the judiciary also probably created—substantive due process—should counsel caution in interpreting the extent of the clause’s reach.

The relationship between substantive due process and regulatory takings is close and intertwined. As Justice Stevens explained in his *Dolan v. City of Tigard* dissent:

The so-called “regulatory takings” doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.¹¹¹

Others, including Professor Eagle, agree that the regulatory takings doctrine grew out of substantive due process.¹¹² Indeed, Professor Eagle points out that the *Penn Central* framework for analyzing regulatory takings claims is premised on the substantive due process notion of “fairness.”¹¹³

The Court, of course, has been careful to limit the reach of the judicially created concept of substantive due process following the ill-

supporting the right to compensation for “rights that are taken or diminished” nowhere suggested that it was dealing with land use restrictions. *Id.* at 524. The case—*Wales v. Stetson*, 2 Mass. (1 Tyng) 143, 146 (1806)—held that the defendant properly removed a private turnpike from a public road because the turnpike was a public nuisance. The court did include prefatory dicta in a footnote that “the property or right granted” by legislation may subsequently be taken for reasonable compensation, *id.* n.(a), but the court never explained what that meant. Moreover, contrary to the author’s suggestion, the court did not even indicate that it was addressing “diminished” rights. The case therefore provides little support for the notion that early American cases recognized regulatory takings.

110. Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181, 240–42 (1999).

111. *Dolan v. City of Tigard*, 512 U.S. 374, 406–07 (1994); *see also* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting) (criticizing the Court’s use of a standard “that has been discredited for the better part of this century”).

112. *See* Eagle, *supra* note 47, at 901 (“The origins of the Supreme Court’s regulatory takings jurisprudence are based on substantive due process.”); John A. Humbach, *The Takings Clause and the Separation of Powers: An Essay*, 21 PACE ENVTL. L. REV. 3, 18 (2003) (“*Pennsylvania Coal* was not actually decided under the takings clause but under the due process clause . . .”); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 862 (2006) (*Pennsylvania Coal* “was uniformly recognized in the pre-*Penn Central* era as a rather ordinary substantive due process case”); Wayne McCormack, *Lochner, Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 460 (2005) (“*Mahon* and *Euclid* were driven almost entirely by the due process thinking of the *Lochner* era.”).

113. Eagle, *supra* note 47, at 922.

advised *Lochner* era.¹¹⁴ It applies only to a measure that “shocks the conscience.”¹¹⁵ The Court took a similar approach in cabining the breadth of the Takings Clause when it discarded the “substantially advances” test for takings in *Lingle*.¹¹⁶

The Court should likewise be conservative by containing the reach of other aspects of regulatory takings. This approach would include using a robust parcel-as-a-whole rule. Indeed, that is the lesson of *Tahoe-Sierra*, where the Court took a conservative approach by looking at the owner’s entire temporal property interest, including the owner’s future interest in the property.¹¹⁷ The same approach should apply in defining the owner’s “horizontal” interest—the area of land comprising the denominator. Courts should interpret the parcel rule in a manner that avoids an excessive use of the judicially created (or at least likely judicially created) regulatory takings concept.

VI. A NARROW PARCEL RULE WOULD IMPROPERLY TIP THE SCALES AGAINST THE GOVERNMENT

A robust parcel rule not only respects precedent and the Takings Clause’s history; it also ensures that the public interest is included in the takings calculus. Some advocates view the Takings Clause as a vehicle for bringing about their view of an ideal, libertarian state. For example, in Richard Epstein’s preface to his 1985 book, *Takings*, he summarizes its

114. Justice Scalia’s plurality opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, for example, warns that a concurring opinion’s suggestion that due process might be the proper vehicle for reviewing certain judicial property law decisions “propels us back to what is referred to (usually deprecatingly) as ‘the *Lochner* era.’” 130 S. Ct. 2592, 2606 (2010) (citing *Lochner v. New York*, 198 U.S. 45, 56–58 (1905)). And in *Griswold v. Connecticut*, the Court criticized the era as one in which the Justices sat “as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” 381 U.S. 479, 482 (1965); see also Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 917–18 (2001) (“[T]he court was criticized for substituting its own view of public policy (against the New Deal) for that of the legislature . . .”). See generally *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field’ lest the liberty [or interest] protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” (citations omitted) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))).

115. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2265 (2009) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998)); *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 401 (3d Cir. 2003) (applying the “shocks the conscience” standard to a substantive due process land use claim in a Third Circuit opinion authored by Justice Alito before his appointment to the Supreme Court).

116. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005).

117. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331–32 (2002).

overarching theme as follows: “I argue that the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers’ compensation laws, transfer payments, progressive taxation.”¹¹⁸ He goes on to assert that when government “diminish[es] the rights of the owner in any fashion,” there is a prima facie taking “no matter how small the alteration.”¹¹⁹

As outlined in the previous section, because the regulatory takings doctrine has little or no grounding in original intent but is instead a judicial creation, the doctrine is open to the expansive theories of Richard Epstein and others. Possibly recognizing this danger, when Justice Holmes created (or at least first articulated) the concept that eventually became known as a regulatory taking, he famously limited its scope by observing that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹²⁰ Justice Holmes’s mindfulness of the need to limit the scope of this doctrine likely reflected his prior endorsement of government’s right to restrict development and protect natural resources.¹²¹

Consistent with this need for balance, the Court has emphasized, as discussed here, that a takings analysis cannot focus only on the regulated area; it must look at the entire parcel. Otherwise, every regulation would amount to a taking, because “[t]o the extent that any portion of property is taken, that portion is always taken in its entirety.”¹²² As pointed out by the Massachusetts Supreme Judicial Court, in rejecting a landowner’s argument that Massachusetts’ takings provision should apply to a smaller parcel than the Fifth Amendment, such a position “would upset the balance between protecting the public interest and protecting private property rights that is encompassed by the three-prong *Penn Central* test, and would elevate

118. EPSTEIN, *supra* note 41, at x.

119. *Id.* at 57.

120. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

121. *See Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355–56 (1908) (discussing state police powers). The Court in *McCarter* elaborated upon the government’s right to restrict development under state police powers, stating:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited [T]he police power may limit the height of buildings, in a city, without compensation. . . .

. . . [The State may] protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . [T]he State may make laws for the preservation of game

Id.

122. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993).

private property interests over public interests in virtually all circumstances.”¹²³

VII. LIKE THE REGULATORY TAKINGS DOCTRINE ITSELF, THE PARCEL
RULE SHOULD BE BASED UPON FAIRNESS AND JUSTICE

Even more fundamentally, a broad parcel approach is needed to promote the two concepts that underlie the regulatory takings doctrine: fairness and justice. The Court has frequently explained that its doctrine is built upon those two principles. As previously noted, when the Court took a step back in *Lingle* to analyze the underpinnings of its regulatory takings decisions it stated that “[w]hile 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.’”¹²⁴

To elaborate on this concept, the Court has devised factors to help courts determine whether a regulation amounts to a taking. The factors set the bar extremely high: The regulation must be “so onerous that its effect is tantamount to a direct appropriation or ouster.”¹²⁵

The Court usually determines whether a regulation is “so onerous” as to constitute a taking by applying the factors outlined in its “polestar” regulatory takings case, *Penn Central*.¹²⁶ *Penn Central* directs courts to look at a regulation’s economic impact and, in particular, its interference with “distinct investment-backed expectations.”¹²⁷ *Penn Central* drew those concepts from a law review article written by Professor Frank Michelman,¹²⁸ which in turn suggested that the concepts are grounded on interrelated notions of utilitarianism and fairness. Professor Michelman argued that the economic impact and expectations inquiries are designed to determine whether “[a]n imposition is . . . critically demoralizing” and should therefore be compensated.¹²⁹ He later expanded upon that concept, stating that the inquiries rest on three assumptions:

123. *Blair v. Dep’t of Conservation & Recreation*, 932 N.E.2d 267, 275 (Mass. 2010).

124. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (alteration in original) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

125. *Id.*; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 n.17 (2002).

126. *See Tahoe-Sierra*, 535 U.S. at 336 (affirming that the principles in *Penn Central* are the “polestar” for regulatory takings review).

127. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

128. *Id.* at 128 (citing Michelman, *supra* note 17, at 1234).

129. Michelman, *supra* note 17, at 1213.

- (1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning several discrete “things” whose destinies he controls;
- (2) that deprivation of one of these mentally circumscribed things is an event attended by pain of a specially acute or demoralizing kind, as compared with what one experiences in response to the different kind of event consisting of a general decline in one’s net worth; and
- (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease.¹³⁰

Since these assumptions underlie the “polestar” *Penn Central* analysis, they presumably should also underlie the inextricably intertwined parcel-as-a-whole evaluation, especially given the fact that the parcel-as-a-whole rule was first articulated in *Penn Central*.

Thus, the determination of what constitutes the parcel should turn on considerations of fairness in general, with a particular focus on the owner’s reasonable expectations when she acquired the acreage in question. (Critics hold legitimate concerns that this approach is unfair where the owner only passively receives the property, such as through an inheritance. In such situations, the focus should be on the prior owner.) Where including the acreage in question with other acreage would cause objectively unexpected, demoralizing pain to the owner, that acreage should be excluded. The acreage should be included, however, where the owner could have reasonably anticipated the acreage’s inclusion,¹³¹ the owner treated it as if it were part of the larger parcel, or it otherwise would be fair to include the acreage.

130. *Id.* at 1234. Professor Michelman stated that the economic impact and expectations analysis that he previously described “depends on” these three assumptions. *Id.* He characterizes the first assumption as “self-evident,” the third as “probably true,” and the second as “the most suspect” of the three. *Id.*

131. The anticipation could be based upon existing or reasonably anticipated regulations. See, for example, *Tahoe-Sierra*, where the Court strongly indicated its agreement with Justice O’Connor’s view in *Palazzolo v. Rhode Island* that the “temporal relationship between regulatory enactment and title acquisition” is an important consideration in takings cases. *Tahoe-Sierra*, 535 U.S. at 335 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 632–33 (2001)).

CONCLUSION

Litigants are fiercely contesting parcel-as-a-whole issues as this Article goes to publication. Parties in *Lost Tree Village Corp. v. United States*, for example, recently litigated whether the parcel in a 2,750-acre Florida development is a single, undevelopable five-acre wetland plat, all 2,750 acres, or something in between.¹³² On August 19, 2011, the Court of Federal Claims held that the “parcel as a whole” included the five-acre wetland plat and a second, slightly larger developable plat, together with some small scattered wetlands.¹³³ The court ultimately rejected the takings claim based upon the value of the second plat.¹³⁴ The developer has appealed.¹³⁵

Another battle that is brewing involves U2 guitarist David Evans’s plan to build five homes on 156 acres of an undeveloped ridgeline overlooking Malibu.¹³⁶ The plan proposed to build homes on lots that were purportedly owned separately.¹³⁷ The California Coastal Commission determined that the development was inconsistent with its Coastal Act, and that it could treat most or all of those lots as a single parcel and thereby allow fewer than five homes without imposing a taking.¹³⁸ It based its takings analysis, in part, on strong evidence that some, if not all, of the putatively separate owners were acting as partners.¹³⁹ Owners have since filed California state court petitions challenging the Commission’s determination.¹⁴⁰

These disputes should be resolved through the flexible approach applied by most courts, with an emphasis on what the owners reasonably expected to do with their properties as evidenced by their investments and other actions. The disputes should not be resolved by using a narrow parcel rule, which would help elevate takings cases to a *Lochner*-era substantive due process status.

132. *Lost Tree Vill. Corp. v. United States*, 92 Fed. Cl. 711, 711–712 (2010).

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

134. *Id.* at 439.

135. Notice of Appeal at 1, *Lost Tree Vill. Corp. v. United States*, 92 Fed. Cl. 711 (2010) (No. 08-117e) (filed Oct. 14, 2011).

136. See CAL. COASTAL COMM’N, STAFF REPORT TH 13C-H (2010), available at <http://documents.coastal.ca.gov/reports/2011/6/Th13c-s-6-2011.pdf>.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Mulryan Props. LLLP v. Cal. Coastal Comm’n*, No. BS133269 (Cal. Super. Ct. filed Aug. 12, 2011); *Ronan Props. LLLP v. Cal. Coastal Comm’n*, No. BS133270 (Cal. Super. Ct. filed Aug. 12, 2011); *Lunch Props. LLLP v. Cal. Coastal Comm’n*, No. BS133271 (Cal. Super. Ct. filed Aug. 12, 2011); *Vera Props. LLLP v. Cal. Coastal Comm’n*, No. BS133272 (Cal. Super. Ct. filed Aug. 12, 2011).