

WHY DO WE HAVE THE PARCEL-AS-A-WHOLE RULE?

David A. Dana*

INTRODUCTION

The so-called parcel-as-a-whole rule (“PAAW”) provides that in assessing the diminution in value (“DIV”) of “property” as a result of a regulation, the relevant property is the “parcel as a whole” and not some sub-part of the parcel that was restricted in use by virtue of the regulation.¹ The rule applies along the three main dimensions of a property in land: vertical, horizontal, and temporal.² PAAW is essential to the regulatory takings inquiry because PAAW can play a large role in determining the applicable DIV. DIV drives the doctrinal takings analysis, at least post-*Lucas v. South Carolina Coastal Council*.³ If the DIV is less than 100%, the *Penn Central Transportation Co. v. City of New York* ad hoc, contextual, multi-factor analysis applies, and generally the government prevails.⁴ If the DIV is 100%, *Lucas*’s semi-categorical rule requiring compensation applies, and the claimant often prevails.⁵ Even in the world of *Penn Central* analysis, a greater DIV favors a taking more than a lesser one, and thus, in theory, can be outcome-determinative.⁶

* Kirkland & Ellis Professor or Law, Northwestern University School of Law

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

2. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331–32 (2002) (“An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest. Both dimensions must be considered if the interest is to be viewed in its entirety.”).

3. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–19 (1992) (holding when government deprives a landowner of “all economically beneficial uses” of his property without just compensation it affects a taking).

4. See *Penn Central*, 438 U.S. at 124; see also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (discussing regulatory takings analysis).

5. *Lucas*, 505 U.S. at 1016–20.

6. The academic literature regarding PAAW largely centers on the normative question of whether it should be construed broadly to make it more difficult for a claimant to establish a total *Lucas*-style wipeout or, rather, should be construed narrowly to make it easier for a claimant to establish a *Lucas*-style wipeout. Unlike this Article, the academic literature to date does not frame the question as why PAAW, or, more specifically, what is motivating the courts to cling to PAAW despite its conceptual problems. Compare Steven J. Eagle, *The Parcel and Then Some: Unity and Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549, 565–67 (2012) (arguing for a narrow application of PAAW that does not aggregate separately titled lots), and John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1557–58 (1994) (arguing for a very limited application of PAAW that would treat as separate any horizontal segment of land that has independent economic viability), with Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603, 603 (2012) (arguing for a broad application of PAAW that generally supports aggregation of contiguous lots, even if separately titled), and Keith Woffinden, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 638–40 (2008) (proposing an

So the parcel-as-a-whole rule, or more precisely perhaps, the diminution-in-value-of-the-parcel-as-a-whole rule (“DIVPAAW”), is an absolutely central feature of our regulatory takings jurisprudence. But why exactly do we have this central feature? Why has DIVPAAW been used by the courts as a core, mandatory part of regulatory takings analysis?

The Supreme Court has not addressed this question to any significant extent. In *Penn Central*, writing for the Court, Justice William Brennan famously articulated DIVPAAW,⁷ but never explained exactly why DIVPAAW is necessarily the rule to be used in takings cases; or for that matter, exactly why the terminal-plus-air rights constituted the parcel as a whole in that case and not, for example, the company’s various holdings in that portion of Manhattan, which is what the New York Court of Appeals took to be the relevant property.⁸ The iconic *Pennsylvania Coal Co. v. Mahon* case seemed not to take a parcel-as-a-whole approach in focusing only on the coal that could not be effectively mined as the relevant property for regulatory takings analysis.⁹ And yet neither the *Penn Central* majority nor subsequent opinions applying DIVPAAW have disavowed *Pennsylvania Coal* or, more generally, explained how DIVPAAW is consistent with *Pennsylvania Coal*.¹⁰

The arguable inconsistency between DIVPAAW and *Pennsylvania Coal* aside, the question “Why DIVPAAW?” is a natural one because DIVPAAW is, on its face, a highly problematic rule. Indeed, from first principles, it is not that easy to defend DIVPAAW.

For one thing, there is at least a partial disconnect between the language of the Takings Clause prohibiting “private property” from being “taken”¹¹ and DIVPAAW. How can there be a taking when only a percentage of the relevant parcel—the parcel as a whole—has been diminished in value or otherwise affected? Why if 80 acres of a 100-acre parcel is deprived of value, is there (at least potentially) a taking of the

alternative to the holding in *Penn Central* whereby courts would include contiguous property held by the same owner when determining the relevant parcel).

7. See *infra* notes 50–54 and accompanying text (discussing Justice Brennan’s *Penn Central* opinion).

8. See *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1276 (N.Y. 1977).

9. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419 (1922); see discussion of *Pennsylvania Coal* *infra* notes 38–48 and accompanying text.

10. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. at 124–28 (“*Pennsylvania Coal Co. v. Mahon* is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking’”).

11. See U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

property of the whole 100 acres under DIVPAAW? Why not a taking of the property in the form of the 80 acres? The latter would seem more linguistically straightforward. DIVPAAW does build on and refer to a specific property and speaks in terms of the effects on that property by virtue of government regulation, but it certainly does not follow unproblematically from the language of the Takings Clause.

Moreover, DIVPAAW is not a particularly obvious choice as a mechanism to assess the magnitude of the financial/economic/market burden placed on the landowner by regulation, and hence whether it is unfair for a burden of such a magnitude to be borne by the landowner rather than by the public at large (via their tax dollars funding just compensation). As the Supreme Court reaffirmed in *Lingle v. Chevron U.S.A. Inc.*, the regulatory takings analysis needs to consider not only the public purpose of the regulation, but also the impact of the regulation on the landowner.¹² Impact can be measured in non-economic, non-market terms, and as I discuss below, DIVPAAW as implemented has an aspect that arguably relates to psychological impact.¹³ But from the vantage of financial/economic/market impact, DIVPAAW only assesses impact on the landowner in a very limited, artificial way.

Most obviously, DIVPAAW tells us nothing, in any particular case, about how much money, in absolute terms or relative to the landowner's wealth, the landowner has lost because of the regulation. Nor, to the extent comparative financial/economic/market burdens matter in assessing fairness, does DIVPAAW tell us anything about the relative burden on the landowner challenging the regulation compared to other landowners or others in the same political jurisdiction. DIVPAAW does tell us that, all else being equal, Landowner A with a 90% DIV has borne a bigger burden than Landowner B with a 15% DIV. But there is no reason to assume all else is indeed equal. For example, Landowner B's 15% may translate into \$100,000 and 10% of his assets in the world, whereas Landowner A's 90% may translate into \$50,000 and less than one tenth of 1% of his assets in the world.¹⁴

12. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) ("A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.").

13. See *infra* notes 75–76 and accompanying text (discussing distinct investment-backed expectations in *Penn Central*).

14. This inattention to the absolute, dollar-value magnitude of the loss also characterizes the Court's permanent physical occupation jurisprudence, which holds that such an occupation is per se compensable no matter how small the actual economic loss. See *Loretto v. Teleprompter Manhattan*

A final problem with DIVPAAW is that it allows courts to come to divergent results because DIVPAAW by itself provides no clear line regarding aggregation of contiguous or proximate, separately titled parcels that were once owned or are still owned by the same landowner. A number of state and lower federal court decisions have aggregated contiguous or proximate parcels in such instances into a single parcel for purposes of assessing the DIV; and, indeed, there generally seems to be a presumption in favor of aggregation when there is physical contiguity of separately titled parcels.¹⁵ But in several notable cases, such as *Loveladies Harbor, Inc. v. United States*¹⁶ and most recently *Lost Tree Village Corp. v. United States*,¹⁷ the courts have treated a single, undeveloped plot of land as “the property” even when it was part of a much larger swath of land that the developer developed over time and from which the developer may have garnered substantial profits. The courts in these cases have found categorical takings under the *Lucas* rule.¹⁸ Cases such as *Loveladies* and *Lost Tree* are arguably inconsistent with the animating spirit of the Supreme Court’s DIVPAAW cases, but they do not clearly contradict any discernible aggregation principle articulated by the Supreme Court—because the Court has not articulated one and, indeed, there may be no coherent aggregation principle it *could* articulate.¹⁹

CATV Corp., 458 U.S. 419, 420, 434–35 (1982) (affirming that “permanent physical occupation[s]” are per se takings even when a regulation “has only minimal economic impact on the owner”).

15. See, e.g., *Giovanella v. Conservation Comm’n*, 857 N.E.2d 451, 458 (Mass. 2006) (concluding there is a presumption that contiguous, commonly owned property is owned to be used as one unit of property); *Forest Props. Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (“Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel.”).

16. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181–82 (D.C. Cir. 1994).

17. *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1294 (Fed. Cir. 2013).

18. *Loveladies Harbor*, 28 F.3d at 1180; *Lost Tree Vill. Corp.*, 707 F.3d at 1294.

19. If courts were to apply DIVPAAW in a way that permitted landowners to claim a total loss of property simply by developing a large expanse of land in separately titled parcels, then DIVPAAW in effect might come to operate like what I call the Equivalence Rule, or ER: a rule according to which the physical area adversely affected or restricted by regulation is the relevant “property” for Takings Clause purposes. However, my premise is that courts generally do not want to invite a flood of takings cases and/or to massively chill the regulatory state, and that is why they generally do not apply DIVPAAW in the way the court in *Loveladies* and *Lost Tree* did. DIVPAAW, unlike the ER, gives courts the discretion to limit the scope of the government’s potential takings liability if they so choose, and by and large, they have so chosen. After all, *Loveladies* and *Lost Tree* have attracted so much attention precisely because they represent atypical treatments of DIVPAAW by a court.

My argument is that the courts “chose”²⁰ DIVPAAW and (more or less) continue to follow DIVPAAW because the two plausible alternatives to DIVPAAW pose greater practical and theoretical problems. DIVPAAW, in other words, for all its problems, was (and is) the best available approach for the courts as they muddled through the regulatory takings thicket they entered once they interpreted the Takings Clause as applicable to regulations, and not just to formal condemnations and permanent physical seizures or occupations.

Are there plausible alternatives to DIVPAAW? In fact, two have been suggested by some major opinions at some point in regulatory takings jurisprudence. The first alternative is that regulatory takings analysis focus not on the diminution in value of the parcel as a whole as a result of regulation, but on the sub-part or portion of the parcel the regulation has restricted in use. This, in effect, is what the dissenters in *Keystone Bituminous Coal Ass’n v. DeBenedictis*²¹ and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,²² and Justice Antonin Scalia in a well-known footnote in *Lucas*²³ seemed to favor.²⁴ It is also the rule some commentators, notably Richard Epstein, have argued for.²⁵ I call this approach the Equivalence Rule (“ER”) because it would create a close equivalence between the way the Takings Clause operates in the context of formal condemnations and in the context of regulatory/inverse condemnations.

The ER would by and large eliminate the confusion over determining what the “property” is in regulatory takings cases and would remove, or at least lessen, the current tension between the language of the Takings Clause itself and regulatory takings law. But it could lead to a very wide swath of regulations being deemed takings and would, thereby, effectively chill the functioning of the regulatory state to a degree that even conservative and libertarian-leaning judges would probably find untenable. Alternatively, the ER could force the courts down the path of frequently deciding that

20. Or, more accurately, judges, and in particular the Justices of the Supreme Court, if they were to have consciously chosen a rule as a group at a singular point of time, would have rationally chosen DIVPAAW as the best of the available options.

21. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (Rehnquist, C.J., dissenting).

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

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

24. See *infra* Part II (discussing the case law support for the Equivalence Rule).

25. See Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 105 (2012) (criticizing PAAW and arguing that “[t]here is no intellectual warrant” for the distinction between physical and regulatory takings, and hence “that distinction should be abolished”).

uncompensated destruction of a “property” through regulation is justified, and hence not a taking, based on nuisance-like harm the community would have borne from the landowner’s use had the regulation not prohibited the use.²⁶ This path could be more destabilizing than DIVPAAW to general confidence in the U.S. system as protective of property, and, even if that were not so, it would force the courts into making open value judgments that they often seek to avoid and that they might not be able to make in anything approaching a consistent way. The ER, in other words, leaves the courts with two options that are less appealing than DIVPAAW, even with all its messiness and imprecision: finding compensable takings practically everywhere; or broadly, but also inconsistently, expanding the nuisance exception to takings even beyond its pre-*Lucas* parameters.

The other plausible alternative to DIVPAAW would be to focus on the actual financial burden to landowners from regulation without requiring that the burden be measured in terms of effects on any specific property—and hence any specific loss in value or use of any specific property. The focus would be on the burden personal to the landowner, and thus could include burdens that are attenuated from the specific property subject to regulation, such as monetary fees or taxes. Since it would re-focus the inquiry away from the specific property subject to regulation, this approach also might make it conceptually easier for the courts to frame the burden on the landowner in terms of his or her other total assets and, from a comparative perspective, the burdens on assets of others similarly situated to the landowner. I call this approach the Direct Financial Impact (“DFI”) approach because its focus is on the direct financial impact on the person or entity that owns a specific property, rather than on the impact to a specific property. This approach arguably is what the majority in *Koontz v. St. Johns River Water Management District*²⁷ employs in the context of land use exactions and permitting conditions, and what Justice Sandra Day O’Connor’s plurality opinion employs in *Eastern Enterprises v. Apfel*.²⁸

The biggest problem with the DFI approach is conceptual: Since it moves regulatory takings analysis away from a specific property, it seems to make the Takings Clause and Takings Clause jurisprudence irrelevant as a source of judicial authority in suits nominally brought for Takings Clause violations. But if Takings Clause jurisprudence is or should be irrelevant in such cases, all that arguably remains as a source of judicial authority for

26. See *infra* Part II (discussing ER).

27. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

28. *E. Enters. v. Apfel*, 524 U.S. 498 (1998); see *infra* notes 98–102, 118–24 and accompanying text (discussing case law support for DFI).

reviewing economic regulation under DFI is substantive due process or equal protection. In the context of economic regulation, the courts employ substantive due process or equal protection with extreme deference, at least where the regulation does not differentially impact a suspect class, such as racial minorities. The DFI approach thus would, if the courts were consistent, require judicial deference and make almost any uncompensated regulation permissible. The Court in *Koontz* ignores these conceptual difficulties with the DFI approach even as it employs DFI.²⁹ That is at least one reason why *Koontz* is wrongly decided and could, troublingly, lead to more nominal takings decisions that are in effect substantive due process decisions, unjustifiably using heightened review for economic regulation.³⁰ I suggest that the conceptual issues with DFI, however, may lead the courts to limit the reach of *Koontz* and check what Peñalver and Fennell call “exactions creep.”³¹

My argument assumes that in choosing among DIVPAAW, the ER, and DFI, relevant factors would or should include: how each option fares in terms of its textual legitimacy as a Takings Clause rule; the ability of each option to capture the real economic burden of regulation on claimants; the likelihood each option would lead to a flood of regulatory takings cases and massive net takings liability for the government; and each option’s potential to destabilize other areas of constitutional law by creating doctrinal inconsistencies in the way economic regulation is reviewed. Table One, below, assigns a value for each factor for each option, for reasons that are explicated more fully below.

29. See *infra* notes 115–22 (discussing how *Koontz* embraces, although not explicitly, the DFI approach).

30. See *infra* Part III (discussing DFI).

31. See Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 288 (suggesting *Koontz* may lead to an expansion in what is characterized as an exaction and what is subject to heightened review).

Table 1: Regulatory Takings Approaches

Approach	Textual Legitimacy	Ability to Capture Economic Burden	Potential to Open Litigation Floodgates	Potential to Destabilize Other Areas of Const'l Law
DIVPAAW	Medium	Medium	Low	Low
ER	High	Low	High (but not if nuisance exception expanded greatly)	Low
DFI	Low	High	Uncertain (depending on the standard of review used)	Uncertain (depending on the standard of review used)

As the table suggests, although DIVPAAW might not be the best approach in terms of *all* the relevant factors, it is not the worst in terms of any and avoids risks posed by the ER and DFI approaches. DIVPAAW is, on some measures, not a very good rule. But it was (and is) the best choice the courts have available to them: It allows the courts, notwithstanding occasional cases like *Lost Tree*, to maintain a tolerable status quo where the regulatory state can readily function. As a result, takings jurisprudence does not destabilize the rest of constitutional law, and there is still some bite to the Taking Clause in the regulatory context.

I. DIVPAAW IN THE SUPREME COURT

DIVPAAW is an invention of the United States Supreme Court. The most important opinions that address the rule, implicitly or explicitly, are *Pennsylvania Coal*,³² *Penn Central*,³³ *Keystone Bituminous*,³⁴ and *Tahoe-Sierra*.³⁵ What is interesting about DIVPAAW in these cases is that DIVPAAW is in a kind of dance with the ER. The majority in *Pennsylvania Coal* and the dissents in *Keystone* and *Tahoe* suggest the ER as the preferable approach, but do not explicitly discuss and endorse that

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

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

34. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

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

approach.³⁶ None of the opinions, including the dissents, come close to explicitly advocating abandonment of DIVPAAW.³⁷ Outside the exactions context, in the *Penn Central/Lucas* realm of regulatory takings, DIVPAAW thus appears very well-entrenched.

In the *Pennsylvania Coal* case, the “property” issue that engaged the dialogue between the majority and dissent implicated land’s vertical dimension.³⁸ The Pennsylvania Coal Company owned subsurface rights to coal, which Justice Oliver Wendell Holmes, writing for the Court, assumed could not be mined as a result of an anti-subsidence statute.³⁹ Justice Holmes took the subsurface coal to be “the property,” and found a 100% diminution in value (although he did not use that precise term or percentage).⁴⁰ Justice Holmes’s approach is resonant with the ER approach. He focused on the legal estate affected (mining rights and the corresponding support estate, which is a separate estate under state law).⁴¹ He explained that “the extent of the taking is great,” as “[i]t purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate.”⁴² For Justice Holmes, the regulation limiting the mining of coal was the equivalent to a formal condemnation: “To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”⁴³

Yet Justice Holmes did not endorse the general view that the adversely affected area or interest is always the “property” for determining “the extent of the taking.”⁴⁴ Justice Holmes also seemed motivated by the special,

36. See *id.* at 348 (Rehnquist, C.J., dissenting) (“The ‘practical equivalence’ . . . of a ‘temporary’ ban on all economic use is a forced leasehold.”); *Keystone*, 480 U.S. at 516–20 (Rehnquist, C.J., dissenting) (“[E]nforcement of the Subsidence Act and its regulations will require petitioners to leave approximately 27 million tons of coal in place. There is no question that this coal is an identifiable and separable property interest.”); *Pa. Coal Co.*, 260 U.S. at 414 (focusing on Act’s effect on landowner’s ability to mine coal).

37. See, e.g., *Pa. Coal Co.*, 260 U.S. at 413–15 (“One fact for consideration in determining [limits of government’s eminent domain power] is the extent of the resulting diminution”); *Penn Cent. Transp. Co.*, 438 U.S. at 130–31 (“‘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.”); *Keystone*, 480 U.S. at 517 n.5 (Rehnquist, C.J., dissenting) (“‘In deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature of the interference with rights in the *parcel as a whole*.’” (emphasis added) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 130–31)).

38. *Pa. Coal Co.*, 260 U.S. at 412.

39. *Id.*

40. *Id.* at 412, 414

41. *Id.* at 413–14.

42. *Id.* at 414.

43. *Id.*

44. See *id.* at 413–14 (discussing “values incident to property”).

contractual circumstances of the case, which were that the purchasers of the surface rights had signed contracts in which they specifically assumed the risk of subsidence from coal mining.⁴⁵ Thus, although Justice Holmes's opinion is closer in feel to the ER than to the DIVPAAW approach, it does not clearly embrace the ER as a general matter.

Justice Louis Brandeis, by contrast, powerfully endorsed DIVPAAW in his dissent. Justice Brandeis included within the relevant parcel the surface rights the coal company had once owned and presumably sold at some profit.⁴⁶ To aggregate mining rights with the surface area, one needed to ignore the time that had passed since the coal company had owned the surface, the current separation in ownership between surface and subsurface, and the fact that Pennsylvania law recognized surface, mineral, and support estates as three separate property estates.⁴⁷ All of this Justice Brandeis found unproblematic in a full-throttled defense of DIVPAAW building on the phrase "values are relative":

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. 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. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. . . . And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute.⁴⁸

In *Penn Central*, decided decades later,⁴⁹ Justice Brennan's opinion for the Court is strongly resonant of Justice Brandeis, especially on the

45. See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 581–83 (1984) (explaining that a concern about overtly redistributive politics overriding contractual obligations may have driven Justice Holmes in *Pennsylvania Coal*).

46. *Pa. Coal Co.*, 260 U.S. at 419 (Brandeis, J., dissenting).

47. *Id.* at 395 (argument for the plaintiff in error).

48. *Id.* at 419 (Brandeis, J., dissenting).

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

“property” definition issue. Writing for the Court, Justice Brennan envisioned the railroad terminal building plus the air rights above it as part of a single parcel (a single property), even though the air rights were alienable under New York law and were the subject of the specific regulatory restrictions at issue.⁵⁰ In language that the Supreme Court and other courts have cited repeatedly in defending DIVPAAW, Justice Brennan wrote:

“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 whole—here, the city tax block designated as the “landmark site.”⁵¹

Justice Brennan added a further wrinkle to the “what is the property” question by specifying that not all parts of the parcel as a whole, however defined, weigh as heavily in regulatory takings analysis.⁵² Rather, in assessing the economic impact of the regulation on the claimant, “the extent to which the regulation has interfered with distinct investment-backed expectations [is], of course, [a] relevant consideration[.]”⁵³ What this seemed to mean is that the part of the parcel where the claimant had spent money developing and had long ago commenced operations, and about which it therefore developed distinct investment-backed expectations (the terminal building itself, as opposed to the air rights overhead), somehow was more relevant than the rest of the parcel. In the *Penn Central* context, this meant that not only was the loss of the value of the air rights not a 100% loss because the parcel as a whole was the relevant measure, but also that any diminution in value due to the loss in value of the air rights had to be (somehow) discounted or weighed less because the air rights were not

50. *Id.* at 130–31.

51. *Id.*

52. *See id.* at 124 (“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.” (citing *United States v. Causby*, 328 U.S. 256 (1946))).

53. *Id.*

the part of the parcel that was the subject of distinct, investment-backed expectations.⁵⁴

DIVPAAW, with this twist, at least in the *Penn Central* context, operates in very stark contrast to the ER, which would have focused exclusively on the property as the air rights regardless of whether they were the subject of distinct, investment-backed expectations. Thus, while the case law does not allow “conceptual severance” of the parcel based on the portion that was adversely affected by government regulation, it does allow, and indeed call for, a different kind of conceptual severance based on the landowner’s distinct, investment-backed expectations.

In his dissent in *Penn Central*, Justice William Rehnquist did not argue against DIVPAAW generally or in favor of the ER generally.⁵⁵ Instead, he sought to turn the inquiry away from the impact on the landowner and toward the character of the government actions.⁵⁶ According to Justice Rehnquist, “it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.”⁵⁷

In *Keystone Bituminous*, which addressed an anti-subsidence statute just like *Penn Coal* had,⁵⁸ contrasting views between the majority and dissenting opinions regarding DIVPAAW and the ER were more evident. The *Keystone* majority focused on the claimant’s coal in Western Pennsylvania, and more specifically, the individual mines. It emphasized that no specific mine was rendered commercially unviable as a result of the anti-subsidence statute, even if it were true that 27 tons of coal no longer

54. The *Penn Central* majority was opaque as to how precisely this discount should operate, *see id.* at 136–37, and indeed, subsequent case law has not clarified the interaction between parcel definition and DIV calculation, and distinct investment-backed expectations. The Federal Circuit seems to hold the view that where there is a total loss in value of the relevant “property,” distinct investment-backed expectations are irrelevant and the *Lucas* quasi-categorical rule applies. *See* *Am. Pelagic Fish Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). But this is only the view of the Federal Circuit and is not shared by other circuits or state courts, *see, e.g.,* *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) (setting forth a test in which “the economic impact of the regulation” is only one factor the court considers), and the Federal Circuit’s approach begs the (logically prior) question of whether in determining what is the relevant property to be used to assess DIV, how much, if at all, distinct investment-backed expectations should matter?

55. *See Penn Cent. Transp. Co.*, 438 U.S. at 147 (Rehnquist, J., dissenting) (“Appellees have imposed a substantial cost on less than one one-tenth of one percent of the buildings in New York City for the general benefit of all its people. It is exactly this imposition of general costs on a few individuals at which the ‘taking’ protection is directed”).

56. *Id.* at 147–50.

57. *Id.* at 149–50 (quoting *United States v. Cress*, 243 U.S. 316, 328 (1917)) (internal quotation marks omitted).

58. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 473–74 (1987).

could be mined.⁵⁹ (The amount of aggregation that is permissible or required is opaque in the majority opinion: Is the property the coal in each separate mine? Or a set of mines? Or all the mines in a region, however defined?) The dissent focused on the 27 tons of coal as a distinct interest—the interest that the regulation is rendering valueless—and the support estate as a distinct estate in land under Pennsylvania law.⁶⁰ For the dissent, *Keystone* was essentially indistinguishable from *Pennsylvania Coal* on the “what is the property” and “was it deprived of all value” questions.⁶¹

The tension between DIVPAAW and the ER is also evident in the majority and dissenting opinions in *Tahoe-Sierra*. This case established that the parcel as a whole includes its duration over time, such that temporary restrictions on a parcel must be thought of as the equivalent of partial horizontal or vertical restrictions on a parcel.⁶² Justice John Paul Stevens’s opinion for the Court draws an extremely sharp line between formal condemnations and physical takings—by which I think he means permanent physical occupations of land—and regulatory takings: the former being a domain of “for the most part . . . the straightforward application of *per se* rules” and the latter being the domain of “‘essentially ad hoc, factual inquiries,’ designed to allow ‘careful examination and weighing of all the relevant circumstances.’”⁶³

For Justice Stevens, this divide explains why assessing the “property” should not be the same in regulatory takings as in formal condemnations,⁶⁴ or, in my terms, why the ER approach to identifying the property in a regulatory takings case is incorrect. His opinion for the Court explains that the ER approach is “circular” in the context of temporal restrictions and would turn every “delay” into “a total ban”: “[T]he moratorium and the normal permit process alike would constitute categorical takings.”⁶⁵

The dissent is strongly suggestive of the ER approach, emphasizing that a temporary moratorium is the equivalent of a formal condemnation of a leasehold.⁶⁶ Chief Justice Rehnquist writes, “[t]he ‘practical

59. *Id.* at 496–97.

60. *Id.* at 518–20 (Rehnquist C.J., dissenting).

61. *See id.* at 517–18 (explaining that the law “will require petitioners to leave approximately 27 tons of coal in place” and “the right to coal consists in the right to mine it” (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922))).

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

63. *Id.* at 322 (quoting *Penn. Cent. Transp. Co. v. City of New York* 438 U.S. 104, 124 (1978)); *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (internal citations omitted).

64. *Tahoe-Sierra Pres. Council*, 535 U.S. at 323.

65. *Id.* at 331.

66. *Id.* at 347 (Rehnquist, C.J., dissenting).

equivalence,' . . . of a 'temporary' ban on all economic use is a forced leasehold."⁶⁷ He continues, "what happened in this case is no different than if the government had taken a 6-year lease of their property," which, had it been done through formal condemnation, would have required just compensation.⁶⁸ The dissent, however, does not openly call for a disavowal of DIVPAAW; rather, to the extent the dissent argues for the ER approach, it seems to do so only in the context of the temporal dimension of property.⁶⁹

The Supreme Court case law does not expressly address when contiguous or proximate interests that are separately titled and were once commonly held by a landowner/developer should be aggregated for purposes of assessing DIV. Justice Brandeis's dissent strongly supports aggregation in such circumstances because, by the time of *Pennsylvania Coal*, the surface rights and the mining rights were separately titled and separately owned.⁷⁰ But there is no clear, principled basis articulated in the Supreme Court opinions for determining when to aggregate and how much to aggregate in such situations. In theory, aggregation could be allowed not at all, to some extent, or a great deal. All approaches would be consistent with a nominal parcel-as-a-whole principle. The Court has not attempted to articulate a principle that would provide guidance to state and lower federal courts across a range of cases, although it could have, but did not, grant certiorari in a case that directly posed this issue.⁷¹

The Federal Circuit's efforts in this regard highlight why the Supreme Court might want to avoid the question of when and how much to aggregate. The Federal Circuit has opined that the aggregation question is case-specific and highly contextual, but should to a large extent be driven by how the developer treated the development project at issue.⁷² Where the developer treated separately titled plots or units as a single project, they

67. *Id.* at 348.

68. *Id.* at 349.

69. *See id.* at 346–47.

70. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 419–20 (1922) (Brandeis, J., dissenting).

71. *See, e.g.,* Petition for Writ of Certiorari at i, *K & K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531 (Mich. 1998) (No. 97-1957), 1998 WL 34103491 (presenting the question: "In determining the 'relevant parcel' for a takings analysis may a court consider not only the property on which the government has denied all use, but also other contiguous properties owned in whole or in part by the same owners?"); *K & K Constr., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531 (Mich. 1998), *cert denied*, 525 U.S. 819 (1998).

72. *See Siegel, supra* note 6, at 610–11 (explaining that under the Federal Circuit's approach, "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").

should be aggregated for purposes of DIVPAAW, and where the developer did not treat them as a single project, they should not be aggregated.

One problem with this approach is that it encourages developers to treat development on portions of a site that are at highest risk of future regulation (such as environmentally sensitive areas) as distinct projects, and thus to set up an argument against aggregation in the event of future regulation.⁷³ More fundamentally, though, there is no obvious reason why the developer's conception of the project should play a major role in determining aggregation. From the perspective of economic impact, the effect on the developer is the same whether it regarded two contiguous lots as one project or two projects, provided the end result is that one of the two lots cannot be developed as a result of a new regulation. One might argue that the psychological impact on the developer is greater if it regarded the lot that cannot be developed as a separate project, as opposed to a part of a two-lot project, but that psychological supposition would require support, and I know of none.⁷⁴

Demoralization costs, as Frank Michelman used the term, was likely the concern that drove the Court in *Penn Central* to highlight the portions of a parcel where the claimant had distinct, investment-backed expectations, or, in Michelman's exact language, "distinctly perceived, sharply crystallized, investment-backed expectation[s]."⁷⁵ But Michelman, and presumably the *Penn Central* Court, were principally concerned about the demoralization that occurs when an owner who has invested in and become accustomed to operating a lawful business, such as a brick yard or a train terminal, is suddenly prohibited from continuing to do so.⁷⁶ In such cases, it is reasonable to assume that the owner has become attached to the use, and feels more strongly about it in some emotional sense than a project that has not yet been built or put into operation.

73. *Id.* at 612 (explaining that a number of state courts and the Federal Court of Claims have expressed concern "about litigants engaging in strategic behavior to evade the parcel-as-a-whole rule").

74. There is indeed a paucity of studies attempting to measure, directly or through surveys or simulations, the psychological impacts of different kinds of uncompensated government actions. By contrast, there have been some efforts to assess psychological reactions in eminent domain scenarios. See, e.g., Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 720–22 (2008) (arguing that an individual's subjective attachment to their property and the emotional reactions that arise out of unfair treatment by the government contribute negatively to public perception of eminent domain).

75. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214–15, 1233 (1967).

76. See, e.g., *Haddacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (upholding the uncompensated closure of a well-established brickyard).

But as an intuitive matter, it is not clear why a developer would be more demoralized in Situation A than in Situation B. In Situation A, the developer conceives of itself as pursuing two separate projects, albeit on contiguous lots, and a new regulation prevents construction on one of the two lots. In Situation B, the developer conceives of itself as pursuing a two-lot construction project, and a new regulation prevents construction on one of the two lots. In both instances, the economic impact would be the same, and it seems plausible to suppose so would be the psychological impact.

II. WHY THE COURTS HAVE NOT CHOSEN THE ER ALTERNATIVE TO DIVPAAW

DIVPAAW, as already explained, is a conceptually and practically problematic rule. But no rule can be evaluated in isolation. The questions we must ask are: What are the plausible alternatives? and What are their costs and benefits? One alternative that is clearly at play in the case law but not embraced is the ER. The ER is based on the idea that “the property” in a regulatory context is what is deprived of value by regulation, just as “the property” in a formal condemnation is the area that is subject to the government’s taking of title and hence deprived of value to the landowner. In theory, one might conceive of a range of possible equivalence rules. In one form, any area (or temporal slice of any area) deprived of value by regulation would be “the property” for takings analysis, period. In another form, the vertical or horizontal area affected by regulation (or a temporal slice of it) would be treated as the property as long as it could be separately titled, and perhaps also separately alienated by the landowner as a matter of state property law, even if the title was not so arranged at the time of the regulation. In yet another form, an area affected by regulation would be “the property” as long as it had a distinct and separate title under state law at the time of the promulgation of the regulation, even if the area was connected to a larger area held by the same owner.

In a footnote in *Lucas*, Justice Scalia comes close to endorsing something like the third of these theoretically possible forms of the ER. He suggests “the property” should be the area affected by regulation if substantive state property law would lead a reasonable owner to expect that the area qualified as a distinct property interest when the regulation was promulgated or applied:

The answer to this difficult question may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—*i.e.*, whether and to what degree the State’s law has

accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.⁷⁷

In practice, however, the limit in an ER that the area affected by regulation be constituted as a separate interest or estate under state law at the time of the regulatory restriction in order to qualify as “the property” would not be much of a limit at all. Landowners and developers could respond to such a takings regime *ex ante* (before regulation) by simply holding their parcels as collections of smaller, separately titled interests—for example, a 100-acre parcel could be held instead as 100 one-acre parcels, and a fee simple could instead be constituted as a series of successive leaseholds.⁷⁸ Or, as in *Loveladies Harbor*, the developer could sell off all of the land except the environmentally sensitive land, so that at the time of the regulatory restriction, the land that remained constituted a separately titled parcel.⁷⁹

Moreover, once the courts adopted the view that the regulated area was “the property,” as long as it had been configured as a distinct estate or interest under state law *ex ante*, it would be impossible for courts to coherently explain why landowners should not be entitled to have the area affected by regulation treated as “the property” for takings analysis simply because they could have taken measures to configure it as having a separate title but did not. And the historically important *numerus clausus* principle notwithstanding, almost any sub-part of a landholding could be separately titled under modern state law, which allows land to be diced and sliced horizontally, vertically, and temporally in innumerable ways.⁸⁰ Any effort to contain the ER thus would not be feasible, and in practice, the area

77. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992).

78. *Cf. id.* at 1066–67 (Stevens, J., dissenting) (“[I]nvestors will manipulate the relevant property interests, giving the Court’s ruling sweeping effect.”). *Lucas* itself apparently did not have the effect Justice Stevens suggested, but that is so, I would suggest, because *Lucas* did nothing to undo PAAW and the general practice of aggregating nearby or contiguous land subject to regulatory restriction with land not so subject.

79. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1174 (Fed. Cir. 1994). In *Loveladies*, the court found the relevant parcel to be what remained after 199 of 250 acres were developed and sold. *Id.* at 1181–82.

80. Even with *numerus clausus*, property can be reconfigured in countless variations: a fee simple, for example, can be converted into a series of leaseholds with a reverter, or a fee simple can be subdivided into a score of smaller fee simples. The incredibly complicated ways in which interests in and based upon mortgages were fragmented during the recent housing boom suggests that where there is an economic incentive, investors can be highly innovative with respect to forms and configurations of property.

(vertically, horizontally, temporally) restricted in use and deprived of value would generally be “the property” for regulatory takings analysis.

If that is the case, then the question becomes: What would be the result of a regime where “the property” almost always or always was the exact area restricted by regulation? In many cases, the result would be a finding by the court that the relevant “property” had been deprived of all economically viable use or reduced to zero market value, and that the government therefore owed just compensation. Even before *Lucas* purportedly established a (quasi) categorical rule that 100% deprivations in the use or value of “the property” were compensable takings, the courts had hinted as much; *Lucas* does build on previous case law.⁸¹ Moreover, as the *Lucas* majority states, once one concludes that “the property” has lost all value, it seems to be more of a functional equivalent to an outright condemnation because condemnations deprive all value and are per se compensable.⁸² Thus, if the ER were adopted, it would seem that land use (and perhaps other) regulations of all sorts would routinely trigger a compensation requirement. The world, in terms of regulatory takings, would be turned upside down from one in which regulatory takings are rarely found to one in which compensation was almost always required. The government would either have to pay, and pay frequently, whenever it regulated or regulate much less than it currently does.

Nobody, with the possible exception of some committed libertarians, would want such a result. Much of the value of property in land, of investments in land, comes from land use regulation; and land use regulation can only operate if there is room for uncompensated regulatory change. It is not an oddity that conservative Justices of the *Lochner* era joined the opinion in *Euclid* that held zoning generally was constitutional, even when it effected marked diminutions in value.⁸³ Nor was it an oddity that contemporary conservative Justices, including Justices Scalia and

81. See *Lucas*, 505 U.S. at 1017–18 (citing *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

82. *Id.* at 1017.

83. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 378–79 (1926). See JESSE DUKEMINIER ET AL., *PROPERTY* 980 (8th ed. 2014) (“Why would Justice Sutherland and his conservative allies on the Court endorse a seemingly radical reform like zoning? Perhaps because . . . they recognized that zoning could protect the value of land owned by the propertied class—not to mention the values of the class itself . . .”); Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 *YALE J. ON REG.* 91, 107–10 (2011) (exploring different accounts of *Euclid*).

Anthony Kennedy, have joined opinions finding no taking.⁸⁴ Some justices, judges, and commentators no doubt would prefer less regulation of certain sorts, and perhaps more frequent compensation when there is regulation. But faced with a choice of the current DIVPAAW regime and one in which takings would be routinely found, people across a wide political spectrum would agree that DIVPAAW is preferable because, as Justice Holmes noted, government “hardly could go on” if every regulation were compensable.⁸⁵

There is an alternative scenario, however: a scenario in which embrace of the ER would not necessarily result in either the retreat of the modern regulatory state or massive just compensation payouts. This alternative scenario is suggested by Andrea Peterson in an article where she takes to task Justice Stevens’s claim in his majority opinion in *Tahoe-Sierra* that there should be a clear divide in how formal and physical takings are considered, on the one hand, and regulatory takings, on the other, lest regulations routinely be held to have effected takings.⁸⁶ Her argument, in part, is that courts need not find regulatory takings even if the “what is the property” and “what is the loss of property” inquiries in formal condemnations, physical takings, and regulatory takings are made equivalent because a court never need grant compensation if the regulation was aimed at harm the landowner was or would be imposing upon the community.⁸⁷

To translate Peterson’s argument into my terms: If the courts were to embrace the ER fully in regulatory takings cases, they could avoid the result of finding regulatory takings everywhere by expanding the harm/nuisance exception to the requirement that just compensation be paid when property is taken. What we would see in cases then is almost no discussion of DIV—as that would be 100% typically—but rather a singular focus on whether the regulatory restriction was necessary to prevent harm or otherwise could be characterized as nuisance control.

One obstacle for the courts in this scenario would be *Lucas* itself, which attempts to limit what a court can deem a nuisance exception to takings liability to those principles embedded in the background law,

84. For example, Justices Kennedy and O’Connor joined the majority opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), and Justice Scalia joined the majority opinion in *Connolly v. Pension Benefit Corp.*, 475 U.S. 211, 212 (1986).

85. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1992).

86. See Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra’s Distinction Between Physical and Regulatory Takings*, 34 *ECOLOGY L.Q.* 381, 410 (2007).

87. *Id.* at 403–12.

especially common law, when the owner took title.⁸⁸ Justice Scalia clearly intended his formulation of the scope of the nuisance exception to allow judges limited discretion in finding that a regulatory DIV of 100% is not a compensable taking.⁸⁹ On the other hand, some post-*Lucas* courts have found in state law more limiting background principles than Justice Scalia might have anticipated—proving, yet again, that there are limits on how much the Supreme Court can control the lower courts’ interpretation of its precedent.⁹⁰

There would be negative consequences to courts finding conduct nuisance-like simply because their only other choice would be to require compensation and potentially chill regulation. The nuisance or harm label can be stigmatizing. There would be a kind of demoralization cost that comes from being denied compensation because you are told your planned activity is a nuisance and is so clearly a nuisance that you should have reasonably realized as much even when you first bought the land and before there were any regulatory restrictions. These demoralization costs may exceed those that arise from our current regime, where landowners are in effect told: You have not lost a part of what we regard as your property, but it is (usually) a part you have not yet developed and the government has a good reason for its regulation, so you will not be compensated. In both instances, there would be no compensation, but at least in the latter, there is no overt criticism or negative judgment of the landowner’s plans for his or her land.

The other problem with expanding the scope of the nuisance exception in response to the embrace of the ER is that judges may come to wildly different results even in arguably similar cases. For investors in land, predictability of legal treatment—even if the predictability is that there will be no compensation for regulatory losses—is a value in itself.⁹¹ Investors operate on the basis of pre-investment, estimated rates of return, and that requires knowing whether and how much compensation would be available. But judgments about nuisance and harm are notoriously contentious and

88. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–32 (1992).

89. *Id.* at 1031.

90. See generally Michael C. Blum & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Categorical Takings Principles*, 29 HARV. ENVTL. L. REV. 321 (2005) (discussing the many ways courts have expanded “background principles” post-*Lucas* to bar takings claims).

91. For a discussion of the value of ex ante certainty in property regimes, see Abraham Bell & Gideon Parmachovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 538–39 (2005).

subjective, and bound to be heavily influenced by the particular ideology of the judge hearing the case.⁹²

Moreover, even if the courts could achieve some consistency in the many nuisance calls they would have to make in a world with the ER as the guiding principle in regulatory takings, institutional concerns about their own legitimacy would make them inclined to avoid this approach. Judging something a nuisance or a harmful activity—particularly when the activity otherwise has economic benefits and has long been allowed or even encouraged, and there is no direct threat to human life or safety—puts judges in the terrain of making explicit and contestable value judgments that they might be more comfortable not being forced to make and defend in opinions.

III. WHY THE COURT (MOSTLY) HAS NOT CHOSEN THE DFI ALTERNATIVE TO DIVPAAW

As explained above, DFI, another possible alternative to DIVPAAW, would have courts look at the direct financial impacts of regulation on the claimant, even if those impacts could not be characterized as a loss in value or use of a specific property. This approach would remove the artificial constraints DIVPAAW creates for courts when they consider impact.

Under this approach, which does not require impact to be measured in terms of loss of value or use of a specific property, courts could look at monetary fees and taxes that relate to rights to develop property as losses covered by the Takings Clause. Courts could even consider out-of-pocket losses on development projects and expectation damages in the form of lost expected profits from development projects that could not be undertaken, or could not be undertaken as originally planned, because of regulation.

Moreover, because the focus of this approach is not the specific property, but rather the specific claimant in its personal or corporate capacity, it would seem that, under this approach, there would be no objection to assessing the impact on the claimant in terms of (in the land context) contiguous, proximate, and neighboring landholdings in the relevant political jurisdiction, or perhaps, even more broadly, the claimant's total assets and not just the area subject to regulation or some parcel as a

92. For an exhaustive account of nuisance law in the United States, see generally Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189 (1990). As Prosser famously noted, “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 549 (1941).

whole that includes that area. Under this approach, as for example in *Lost Tree*,⁹³ when considering the impact on the claimant, without even asking what “the property” at issue in the case was, a court could seemingly consider the areas that were allowed to be developed and the profits reaped thereby.

This approach, again because it disassociates the impact or burden inquiry from what happened exclusively to the value or use of the claimant’s specific property, also would free the courts to take a comparative perspective and look to see whether the claimant has borne more costs from regulation than others similarly situated. This comparative perspective does not fit within the logic of DIVPAAW, even though a comparative perspective is urged by some of the Justices in some regulatory takings opinions, including, notably, Justice Stevens in his dissent in *Lucas*.⁹⁴

In sum, the DFI approach would allow courts to take a much broader view regarding what is relevant in assessing impact. In some instances, the approach could favor the landowner, and in others, it could favor the government, depending on how the court chose to operationalize DFI and the facts of the particular case. By removing the specific property element from takings analysis, however, the DFI approach would seem to lose the legitimacy the courts gain from rooting regulatory takings case law in the language of the Takings Clause itself. In this way, the DFI approach is a stark contrast to the ER approach, which would close the distance between regulatory takings jurisprudence and the language of the Takings Clause.

Moreover, because the DFI approach eliminates the requirement of lost value of a specific, regulated property, it would seem to open up almost any sort of regulation to review as a possible Takings Clause violation. This appears to be the main point of Justice Kennedy’s concurrence in *Eastern Enterprises v. Apfel*.⁹⁵ *Eastern Enterprises* concerned a federal law that required a company to fund pensions for former workers, even though there were no pension arrangements when the workers were employed, the company never explicitly agreed to provide pensions, and the company had long since off-loaded its coal operations.⁹⁶ The plurality, authored by

93. *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013).

94. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1074–75 (Stevens, J., dissenting) (“In considering Lucas’ claim, the generality of [the burdens imposed by] the Beachfront Management Act is significant.”).

95. *E. Enters. v. Apfel*, 524 U.S. 498, 540–42 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

96. *Id.* at 514–15 (plurality opinion).

Justice O'Connor, found a regulatory taking, invoking *Penn Central* and emphasizing the financial impact of the legislation on Eastern Enterprises:

As to the first factor relevant in assessing whether a regulatory taking has occurred, economic impact, there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern. The parties estimate that Eastern's cumulative payments under the Act will be on the order of \$50 to \$100 million. . . . Eastern's liability is thus substantial, and the company is clearly deprived of the amounts it must pay the Combined Fund.⁹⁷

What is striking about Justice O'Connor's invocation of the \$50 million to \$100 million required payments is that there is no indication that a specific property has been subject to regulation; there is no piece of land or existing, defined fund, just a bare statutory liability which could be compared to any tax or levy.⁹⁸ In his concurrence, Justice Kennedy seizes on that point, explaining that "[u]ntil today . . . one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."⁹⁹ Justice O'Connor's approach, a DFI approach, "would expand an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause" and "would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts."¹⁰⁰ It could lead to "all governmental action be[ing] subjected to examination under the constitutional prohibition against taking without just compensation, with the attendant potential for money damages."¹⁰¹

The problems of the lack of a mooring of DFI in the Takings Clause and the potentially broad sweep of review using the DFI approach are related. If the DFI approach leads to review of a hugely expanded range of cases, yet the Takings Clause itself cannot provide a justification for review (and perhaps takings precedents and jurisprudence therefore are lacking in relevance), then we potentially have many instances of regulation reviewable under the Takings Clause, but without any obvious source of law and legal tradition to guide the review. The only two possibilities in this

97. *Id.* at 529.

98. *Id.* at 529–30.

99. *Id.* at 541 (Kennedy, J., concurring in judgment and dissenting in part).

100. *Id.* at 542.

101. *Id.* at 541–43.

regard are substantive due process—which was openly considered in *Eastern Enterprises*—and equal protection.

Crudely speaking, substantive due process review allows courts to invalidate fundamentally unfair and unjust legislation or regulation. Much of substantive due process case law is unrelated to the impact or severity of the burden regulation imposes upon the regulated parties. Instead it focuses on whether the regulation rationally advances its stated goal—whether the means fit the ends. Indeed, the courts sometimes speak of substantive due process as only about means-end rationality, and not about the magnitude or character of the burden regulation imposes.¹⁰² But substantive due process, to the extent it is about fundamental fairness, can also look to fairness of the burden imposed on parties affected by regulation, as in the use of substantive due process, for example, to invalidate retroactive imposition of heavy burdens.¹⁰³

At least since the end of the *Lochner* era, however, substantive due process review has been highly deferential to the political branches in the context of economic regulation, which is generally accepted as not implicating a fundamental constitutional right. Justice Stephen Breyer makes that point powerfully in his dissent in *Eastern Enterprises*. He argues that under substantive due process review, the retroactive imposition of even millions of dollars of liability for a company that employed workers who need retirement benefits was not so extreme, not so obviously unfair and unjust, as to violate substantive due process under a long line of precedents severely restricting the discretion of courts to invalidate ordinary economic regulation under the rubric of substantive due process.¹⁰⁴

Equal protection review is equally deferential to the political branches in the context of ordinary economic regulation. Equal protection jurisprudence looks at burden, but it looks at it in comparative terms: How, for example, did the burden imposed on Class A differ from that imposed

102. The Court in *Lingle* characterized the *Agins*' "substantially advance legitimate state interests" test, a classic means-ends test, as sounding in due process rather than the Takings Clause. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) ("We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.").

103. See *E. Enters.*, 524 U.S. at 547 (Kennedy, J., concurring in judgment and dissenting in part) ("Although we have been hesitant to subject economic legislation to due process scrutiny as a general matter, the Court has given careful consideration to due process challenges to legislation with retroactive effects."); *id.* at 556 (Breyer, J., dissenting) ("The question involved—the potential unfairness of retroactive liability—finds a natural home in the Due Process Clause.").

104. See *id.* at 567 (Breyer, J., dissenting) ("Eastern . . . benefited from the labor of the miners for whose future health care it must provide, and . . . remained in the industry, drawing from it substantial profits . . .").

on Class B? Unless either Class A or B are members of a suspect class, such as a racial minority, the government only needs to show it had some conceivably rational basis for treating the two classes in different ways. In practice, outside the realm of suspect classes, in the context of economic regulation, the Equal Protection Clause allows the government to regulate with only a minimal check from the courts.¹⁰⁵

Thus, the DFI approach would logically lead the courts, again because of its lack of grounding in the Takings Clause and in order to maintain consistency with more than half a century of deferential review of economic regulation under the substantive due process and equal protection rubrics, to review nominal takings cases that lacked a focus on burdens to specific properties under a standard of review that was highly deferential to the government. And if the logic of consistency compelled highly deferential review under the DFI approach in “takings” cases not involving burdens to specific properties, then the logic of consistency would compel a similar deferential review under the DFI approach in “takings” cases involving specific properties.

Thus, logic would seem to make the DFI approach less appealing than DIVPAAW (for all its problems) both for judges who are relatively pro-regulation and those who are wary of regulation and its impacts on property rights. The former would not welcome the fact that adopting DFI would open up much more regulation to Takings Clause review. But the latter would not welcome the fact that adopting the DFI approach should logically lead the courts to comport takings review with substantive due process or equal protection review. Thus, while more cases might be subject to review under DIVPAAW, the scrutiny of review would be less, even perhaps in cases that look like traditional takings cases involving restrictions on specific parcels of land.

Judges and justices, of course, do not always have to heed the logic of consistency so that their decisions comport with relevant lines of precedent. Which brings us to *Koontz*. In *Koontz*, the developer proposed development on an area that included wetlands.¹⁰⁶ The St. Johns River Water Management District (“District”) suggested that it would allow development if the developer set aside more of his land for preservation than he had already done, or if he paid a sum of money toward a District

105. See Nestor M. Davidson, *The Problem of Equality of Takings*, 102 NW. U. L. REV. 1, 5 (2008) (“[C]oncerns animating the equality dimension should not sound under the Takings Clause, but rather under the Equal Protection Clause . . .”).

106. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2592–93 (2013).

fund to be used to enhance off-site wetlands owned by the District.¹⁰⁷ Rather than say no to these conditions and continue negotiations, or apply for a permit to see what conditions, if any, the District actually would impose, the landowner sued, claiming the suggested permit conditions were unconstitutional conditions under the *Nollan/Dolan* line of takings cases.¹⁰⁸

In *Nollan* and *Dolan*, however, the permit condition at issue was the dedication of land on the permittee's specific property for use as a public easement—for lateral beach access in the case of *Nollan*¹⁰⁹ and for bike riding in the case of *Dolan*.¹¹⁰ Under either the DIVPAAW or ER approach, a court would treat a permanent physical occupation in the form of a public easement as a compensable taking because permanent physical occupations are *per se* takings no matter how much of the relevant parcel they involve, at least since *Loretto v. Teleprompter Manhattan CATV Corp.*¹¹¹ *Nollan* and *Dolan*, although they do not explicitly address the “what is the property” issue in regulatory takings, at least involved a specific parcel of land and conditions that involved what the law has consistently treated as a separate property interest (an easement), albeit one that was embedded in a larger, specific parcel of land.¹¹² *Dolan*'s rough proportionality test is worded expansively and cryptically enough that it might encompass the DFI approach, in that it might allow a court to consider financial impact separate from loss of the value of the specific property, loss of use of the specific property, or loss of the right to exclude others from the specific property.¹¹³ But the specific burden in *Dolan* itself was the loss of the right to exclude with respect to a specific portion of a specific property.¹¹⁴

Koontz, by contrast, takes issue with a permit condition (or really a suggested one) that was a lump sum monetary payment that need not have been funded out of any specific property held by the landowner.¹¹⁵ The

107. *Id.* at 2593.

108. *Id.* One undesirable possible consequence of *Koontz* is that it will make regulators less willing to negotiate with developers, with the result that more permits are denied outright and regulators and developers are less able to work out creative, mutually beneficial solutions. See Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 175–76 (2015).

109. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828 (1987).

110. *Dolan v. City of Tigard*, 512 U.S. 374, 380 (1994).

111. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (“We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.”).

112. *Dolan*, 512 U.S. at 380; *Nollan*, 483 U.S. at 828.

113. *Dolan*, 512 U.S. at 391.

114. *Id.* at 380.

115. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2593 (2013).

suggested condition itself stood completely apart from any specific property held by the landowner, even if the condition was occasioned by development plans for the specific property.¹¹⁶ As Justice Elena Kagan persuasively argues in her dissent, the line between this suggested monetary condition and a building permit fee or a property tax tied to improvements on land is, as a conceptual matter, rather nebulous.¹¹⁷ By removing the requirement that takings involve a burden on a specific property, rather than simply a liability, *Koontz* seems to dramatically open up the range of cases that could be reviewed as takings cases; *Koontz*, in other words, even though it is joined by Justice Kennedy,¹¹⁸ would appear to be just what Justice Kennedy warned against in his concurrence in *Eastern Enterprises*.¹¹⁹

The *Koontz* decision does not explicitly embrace DFI and repudiate DIVPAAW, but there is nothing in it that suggests agreement with the DIVPAAW approach.¹²⁰ Notably, Justice Samuel Alito never considers how the suggested monetary payment to enhance off-site wetlands compared, as a fractional matter, to the value of the landowner's entire parcel or planned development project.¹²¹

Once one moves away from a specific property, even if one nominally frames a case as a takings case, the highly deferential standard of review used for substantive due process or equal protection should apply as a matter of consistency. But in holding that *Nollan/Dolan* heightened review applies to the District's suggested monetary payment condition, and that the suggested payment was unconstitutional under that heightened standard of review,¹²² the *Koontz* majority insists that heightened review used in ordinary takings cases should apply even when the limitation of a burden on a specific property is removed from takings jurisprudence. In this sense, the *Koontz* decision is not tenable, and if the Court expanded upon the decision, it could in effect create a new post-*Lochner* jurisprudence of heightened scrutiny for essentially ordinary economic regulation, including an array of fees and taxes.

116. *Id.*

117. *Id.* at 2607–08 (Kagan, J., dissenting).

118. *Id.* at 2591 (majority opinion).

119. *See supra* notes 99–101 and accompanying text.

120. *See Koontz*, 133 S. Ct. at 2600–01 (“This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.”).

121. *See id.* at 2598 (discussing offsite mitigation but failing to consider how it compares to the value of the entire parcel or development project).

122. *Id.* at 2599–603.

Perhaps implicitly sensing this problem, Justice Alito argues that there are special considerations—special risks of unfair, unjust government action—in the land use exactions context that warrant the heightened review of *Nollan* and *Dolan* even when the condition is merely a condition to pay money.¹²³ As Justice Alito writes, “land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.”¹²⁴ But as Justice Kagan argues, without rebuttal from the majority, the *Koontz* majority seems to be creating a solution in search of a problem.¹²⁵ Moreover, even if there was an exceptional risk of governmental unfairness in the impositions of exactions in the form of monetary payments not tied to a specific property, the question, logically, should be a comparative one: Is the risk so much greater than in the other contexts of economic regulation, where deferential review is accepted, that a different, heightened review is justified? Why is there not deference to the political branches here, as is generally the case with economic regulation? Particularly in the case of standardized fees that are based on broadly applicable legislation or regulations, which *Koontz* may or may not be intended to encompass, the argument that there is a distinctively high risk of governmental abuse whenever a land use permit is in the legal/regulatory mix seems unpersuasive on its face. And the *Koontz* majority never even tries to address this issue.

Koontz, then, represents a move by the Court that seems to undermine, or at least work around, DIVPAAW in favor of DFI. DFI with heightened review, as in *Koontz*, represents a de facto stepping away from the jurisprudential tradition of deference in the context of economic regulation, at least where the burdens are liabilities rather than burdens on specific properties. But because the DFI approach with heightened review under an ostensible takings rubric has so many conceptual problems, and clearly does not fit with more than half a century of jurisprudence, I think that, in the end, the Supreme Court and lower courts will confine *Koontz* to a limited range of cases and seek to rebut efforts to expand the holding beyond cases involving very similar facts. If the Supreme Court and lower federal courts do not contain *Koontz*, they risk delegitimizing the lower standard of review now reserved for substantive due process and equal

123. *Id.* at 2594.

124. *Id.*

125. *Id.* at 2608 (Kagan, J., dissenting).

protection (in terms of the standard of review for economic regulation) and creating confusion and instability in these relatively well-settled areas of constitutional jurisprudence. Even conservative justices and judges who may balk at some particular kinds or instances of regulation, by and large would not want to delegitimize and/or destabilize major areas of constitutional law that allow the United States to have a system of economic regulation on par with that found throughout the industrialized world.¹²⁶

CONCLUSION

The parcel-as-a-whole rule, in its DIVPAAW form, is an awkward rule. It is not fully consistent with the text of the Constitution and not tailored to measure the economic impact of regulation. But, unlike the ER, it gives courts ample discretion to limit the reach of takings liability. DIVPAAW does not push the courts into the rocky terrain of labeling ordinary regulation as nuisance control simply to prevent the chilling effect of compensation requirements. Nor, unlike the DFI approach, does DIVPAAW ignore constitutional text altogether and conflate substantive due process with takings analysis. DIVPAAW thus avoids the destabilization of constitutional law that could follow from DFI. Thus, on balance, one has to say the courts' choice to adhere to DIVPAAW—albeit with a number of aberrant decisions—has been a wise one.

126. Cf. John Echeverria, Koontz: *The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 50–51 (2014) (suggesting that the decision's clouded reasoning may lead the Court not to rely upon it in the future).

