ERODING THE PARCEL

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INTRODUCTION

Regulatory takings doctrine defines the government's obligation to compensate property owners burdened by regulation. The doctrine prevents 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."[1] Under Supreme Court precedent, fairness for purposes of the Takings Clause requires the government to pay compensation when a regulatory burden constitutes the "functional equivalent" of direct appropriation of property, the traditional domain of the Fifth Amendment's Takings Clause.[2]

In many cases, the search for functional equivalence incorporates a modestly progressive approach to allocating social burdens. I am using the term "progressive" in the economic sense, rather than purely political terms: In other words, regulatory takings doctrine, like the income tax, is progressive because it demands more from those who have more. I suggest that the doctrine is only modestly progressive because it does not require larger landowners to contribute in greater proportion to their holdings. In other words, the rule resembles a flat percentage tax, but does not require greater proportionate contribution like the progressive income tax does. This aspect of the doctrine arises because most successful takings claims require the owner to demonstrate that a statute or regulation caused significant economic impact to the entirety of her property.[3] For example, a $100,000 impact may require compensation when experienced by someone with a low-value property, but the loss may remain with the owner of more valuable property. The Supreme Court has explained that the relevant property interest for conducting this comparative analysis is the "parcel as a

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1. Armstrong v. United States, 364 U.S. 40, 49 (1960).

2. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995). The concept of functional equivalence recognizes that the Fifth Amendment originally required compensation only where government directly appropriated private property, and that variety of government action remains at the core of the protection afforded by the Takings Clause. *See Lingle*, 544 U.S. at 537.

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

whole,"[4] although the Court has done little to flesh out this phrase.[5] In the absence of a severe reduction in the value of this "parcel as a whole," typically well in excess of a 50% diminution in value, the Takings Clause does not require the government to pay compensation.[6]

But what is the parcel as a whole? Does it encompass everything that an individual (or company) owns? If so, the Ted Turners and Plum Creek Timbers of the world could never receive compensation, no matter the regulatory burden.[7] Does it encompass only the legal description of a single lot? If so, landowners can manufacture compensation for themselves by the simple device of subdividing their property.

Courts have interpreted the parcel-as-a-whole rule to require an approach that moderates between these extremes, providing a kind of rough justice when it comes to allocating burdens based on wealth, while paying heed to the centuries-old presumption that property ought to be put to productive use.[8] If fairness is the goal of regulatory takings doctrine, our lodestar is the balance the parcel-as-a-whole rule strikes between these two values.

To capture the intuitive conception of fairness embodied in the parcel-as-a-whole rule, consider two landowners: Owner One owns a single acre of undeveloped wetland. Owner Two owns ten undeveloped acres, one of which is wetland. Each acre is worth an equivalent amount as a one-acre house lot, which, in the terms of real estate appraisers, is the "highest and best" use of the property.[9] Sometime after each landowner acquires her property, the federal government passes the Clean Water Act and prohibits filling of wetlands without a permit.[10] Neither landowner secures a permit

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4. *Id.* at 130–31.

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

6. *See, e.g.*, Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360, 384–85 (Fed. Cl. 2004) ("This court . . . has generally relied on diminutions well in excess of 85 percent before finding a regulatory taking.").

7. Ted Turner owns about 2 million acres and is "the second largest individual landholder in North America." *Turner Ranches*, TEDTURNER.COM, http://www.tedturner.com/turner-ranches/ (last visited Apr. 11, 2015). Plum Creek owns 6.8 million acres. *Our Land & Working Forests*, PLUM CREEK, http://www.plumcreek.com/about/our-land-working-forests (last visited Apr. 11, 2015).

8. *See infra* Part II (exploring a balance between economic progressivism and promoting the productive use of land).

9. *See* Stephen Sussna, *The Concept of Highest and Best Use Under Takings Theory*, 21 URB. LAW. 113, 113 (1989) (explaining that the "[h]ighest and best use" is the use that "is legally and physically possible," "appropriately supported," and "results in the highest land value").

10. *See* 33 U.S.C. § 1344 (2012) (establishing permit program for discharge of dredged or filled material into navigable waters). The timing of the imposition of a regulatory burden is not dispositive to determining the parcel as a whole or the ultimate outcome of a regulatory takings claim. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 632–33 (2001) (O'Connor, J., concurring) (identifying the

to fill her wetland, and therefore, no house can be built within that acreage. The value of the wetlands in their natural state is only 10% of the value of the property as a house lot. Both landowners, then, have lost 90% of the value of their acre of wetland. Are they similarly situated if they sue the government seeking compensation under the Takings Clause? The parcel-as-a-whole rule answers that question in the negative. Each owner may have suffered a loss of the same value, but economic impact is measured comparatively. Owner One has lost 90% of the value of the relevant parcel—her one acre—and may have a strong claim for compensation. Owner Two has lost 9% of the value of the relevant parcel—the ten acres—and almost certainly cannot secure compensation.

The conception of fairness embedded in the parcel-as-a-whole rule remains hotly contested. To the notion that those with more should contribute more, others may argue that it is unfair to require property owners, rather than taxpayers, to bear the cost of generating the public goods secured by regulation.[11] Professor Richard Epstein would add that allowing government to costlessly impose regulatory burdens on property owners "will necessarily lead to political mischief" [12] and a reduction in overall social welfare as unstable property rights associated with shifting regulatory regimes will dampen investment in productive activities.[13]

In two recent cases, the battle over what vision of fairness regulatory takings law embodies has been fought in the shadow of the parcel as a whole. The Supreme Court's decision in *Koontz v. St. Johns River Water Management District* and the Federal Circuit's decision in *Lost Tree Village Corporation v. United States* each has the potential to reorient takings doctrine away from conceptions of progressive economic fairness.[14]

"difficult question" of "what role the temporal relationship between regulatory enactment and title acquisition plays in" a takings claim); *see also* Richard J. Lazarus, *Celebrating* Tahoe-Sierra, 33 ENVTL. L. 1, 12 (2003) (explaining that the Court in *Palazzolo* found the timing of a regulatory burden to be relevant but not dispositive).

11. *See, e.g.*, E. Donald Elliott, *How Takings Legislation Could Improve Environmental Regulation*, 38 WM. & MARY L. REV. 1177, 1177–78 (1997) (arguing that "spreading the costs of environmental regulation over a larger segment of the population . . . [would] increase distributional fairness").

12. Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589, 590 (2013).

13. *Id.*

14. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013) (extending the *Nollan/Dolan* test, which does not contemplate the parcel as a whole); *see* Lost Tree Vill. Corp. v. United States, 707 F.3d 1286, 1292–93, 1295 (Fed. Cir. 2013) (holding that a single lot of wetland was the relevant parcel because a developer had not initially included it in development plans).

Before introducing the effects of *Koontz* and *Lost Tree*, let us reason on a blank slate to compare Owner Three and Owner Four to the two owners described above: Each owns ten acres, one of which contains wetlands. Each would also like to fill her acre of wetland. Owner Three applies for a permit to fill her wetland, which is granted on the condition that she purchase $10,000 of credits from a local wetland mitigation bank which will use the money to create and maintain wetlands within the same watershed as the development.[15] Owner Four constructs and sells houses on her nine acres of uplands. Then, with only the one acre of wetland remaining, she seeks a fill permit, which is denied. Are Owners Three and Four more similar to Owner One or Owner Two? From the perspective of the norm of progressive economic fairness embodied by the parcel-as-a-whole rule, both resemble Owner Two: Owners Two, Three, and Four each begin with the same value of land (ten times the value possessed by Owner One) and thus should contribute more of that value to social welfare than Owner One and an equivalent amount to each other.

Prior to *Koontz* and *Lost Tree*, it is likely that most courts would treat Owners Two, Three, and Four similarly, and none would likely receive compensation. But as we shall see, those decisions suggest an alternative conclusion. In the wake of those decisions, Owner Three will proceed under a different framework altogether—the *Nollan/Dolan* test, which does not consider the parcel as a whole or the impact to the property owner. And owner Four may be able to convince the court that the relevant parcel to her claim for compensation is merely the one acre she owned at the time of the permit denial.

These decisions erode the parcel-as-a-whole rule without expressly adverting to that consequence. Real world circumstances are rarely as straightforward as my stylized hypotheticals and identifying the relevant parcel is a problem governed by an ad hoc, factual determination nestled within an additional layer of ad hoc balancing.[16] Developing a coherent

15. This loosely tracks the U.S. Army Corps of Engineers guidelines for the use of wetlands mitigation banks. *See* Philip Womble & Martin Doyle, *The Geography of Trading Ecosystem Services: A Case Study of Wetland and Stream Compensatory Mitigation Markets*, 36 HARV. ENVTL. L. REV. 229, 256–67 (2012) (describing the Army Corps. of Engineers' 2008 Final Mitigation Rule, specifically its effect on market-based compensatory mitigation and aquatic resource compensation).

16. The parcel-as-a-whole rule addresses just one of the factors identified as governing most takings claims by the Supreme Court. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002) (explaining that the proper analysis under *Penn Central* is ad hoc and factually based); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 130–31 (1978) ("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 . . . .").

vision for parcel analysis, referred to as the "denominator problem," has puzzled scholars and remains a corner of regulatory takings doctrine into which the Supreme Court has rarely sojourned.[17] In such terrain, neither *Koontz* nor *Lost Tree* needed to make grand legal pronouncements about the rule to have a dramatic impact.

The law of takings provides ample space to argue about how, precisely, to identify the parcel relevant to a takings claim and when parcel analysis matters at all. Predictably, those sympathetic to regulatory efforts argue for an expansive definition that favors government regulators, and those advocating for private property rights argue for a narrow definition resulting in more property owners securing compensation from the government.[18] *Lost Tree* handed a victory to property rights advocates, enabling developers to engage in strategic behavior to manipulate the denominator relevant to a takings claim. *Koontz* constitutes another victory, expanding the domain of the *Nollan/Dolan* test,[19] which is applicable to land use bargaining between developers and regulators and which focuses solely on the nature of the government action to assess a takings claim. This Article explores each of those developments and explains how they threaten to shift the notion of fairness embodied by the parcel-as-a-whole rule away from its progressive origins.

To explore the progressive nature of the traditional parcel-as-a-whole rule, and the current trend in limiting that rule, this Article proceeds in four parts. Part I provides an overview of the doctrine of parcel analysis as it

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17. *See* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 719–20 (1996) (explaining that a bright-line rule to help solve the denominator problem would, in fact, not be possible). The Supreme Court has stated that the parcel as a whole provides the proper denominator for assessing most takings claims, but has done little to expound the concept. *See Tahoe-Sierra*, 535 U.S. at 331 ("We have consistently rejected such an approach to the 'denominator' question."); *see* Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451, 456 (Mass. 2006) ("Repeated admonitions to use the 'parcel as a whole,' however, do little to define the contours of that whole parcel in any particular case."). Acknowledging this deficiency in Supreme Court case law, Professor Steven J. Eagle has explained: "The answer to this ostensibly simple question [of the relevant denominator] is not apparent, despite the growth of a cottage industry of judicial and academic scholarship devoted to it." *See also* Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y. 407, 413 (2013).

18. Justin R. Pidot, *Fees, Expenditures, and the Takings Clause*, 41 ECOLOGY L. Q. 131, 134–35 (2014).

19. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (requiring an "essential nexus" between the "legitimate state interest" and the government's conditions for an easement in exchange for a development permit); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (requiring the burden of an exaction to bear a "rough proportionality" to the harm threatened by the development); *see also* Pidot, *supra* note 18, at 135–37 (analyzing the effect of *Koontz* and proposing that the decision only applies to fees but not mandated expenditures).

stood before *Koontz* and *Lost Tree*. Part II explains that parcel analysis can be understood to balance two competing values: an economically progressive view about the allocation of social burdens, and a sensibility that property should be put to economically beneficial use. Part III examines the Federal Circuit's decision in *Lost Tree* and explains how that decision undermines parcel analysis, and thus the balance struck between modest economic progressivism and incentives for economically beneficial use. Part IV examines the U.S. Supreme Court's decision in *Koontz* and explains how that decision also undermines this balance. This Article then suggests that recent developments constitute a substantial erosion of the parcel-as-a-whole rule.

I. DOCTRINAL BACKDROP

The Fifth Amendment's Takings Clause provides: "nor shall private property be taken for public use, without just compensation."[20] In the earliest years of the republic, the clause applied only to government actions directly appropriating private property, typically by exercising the power of eminent domain.[21] As local, state, and federal governments increasingly exercised power to regulate the uses of property, courts extended the protection afforded by the Takings Clause to those circumstances "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[22]

The search for functional equivalency, and thereby for circumstances where government must pay owners, has consumed many judicial decisions and academic articles and is the subject of seventeen annual conferences.[23] At the risk of massive overgeneralization, the doctrines guiding that search can be subdivided into two categories: those focused on the severity of the

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20. U.S. CONST. amend. V.

21. *See* Pidot, *supra* note 18, at 140 (contending that *Koontz* should not be read broadly and instead should only be read to apply to fees); Treanor, *supra* note 2, at 792, 795, 797 (explaining that early interpretation of the Takings Clause did not require compensation where the government regulated the use of the property or where public projects indirectly caused harm to private property).

22. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

23. *See, e.g.*, John D. Echeverria, *The Death of Regulatory Takings*, 34 ECOLOGY L.Q. 291, 291–92 (2007) (considering the scope of the *per se* test announced in *Lucas*); Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 23 (2008) (arguing that the Supreme Court has not recognized the importance of functional equivalence); *see generally* Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 1–5 (2004) (examining the common law evolution of the Takings Clause and government regulation of economic affairs).

economic burden experienced by an owner, and those focused on the nature of the regulatory burden itself.[24]

Let me explain. The *per se* takings test articulated in *Lucas v. South Carolina Coastal Council*[25] and the ad hoc balancing test articulated in *Penn Central Transportation Co. v. City of New York*[26] each turn on the severity of the burden experienced by the owner. Those tests incorporate a comparison between the value of property before and after the imposition of a regulatory burden.[27] In other words, the economic loss experienced by an owner is compared to the value the owner retains after the burden is imposed. This comparison constitutes the entirety of the *Lucas* test.[28] Compensation is always owed if the government regulation eliminates the entire value of the property interest. That comparison is dominant, but not dispositive, under *Penn Central*, where courts consider the economic impact as part of an ad hoc balancing test.[29]

Identifying the value retained by an owner—which can be viewed as a fraction dividing economic impact by original value—requires identifying the relevant property interest.[30] The Supreme Court articulated a rule governing such parcel analysis in *Penn Central*, explaining that "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[31] Rather, a court must assess the "extent of the interference with rights in the parcel as a whole."[32] The Court reaffirmed the primacy of the parcel-as-a-whole rule in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, in which it rejected a

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24. The Court roughly identifies these categories in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 130–31 (1978). Notably, the first category is not entirely insensitive to the nature of the government action, which is the third prong of the *Penn Central* balancing test. *Id.*

25. Lucas v. S.C. Coastal Comm., 505 U.S. 1003, 1015–17, 1019 (1992).

26. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

27. How to go about this comparison remains a subject of dispute. *See* Eagle, *supra* note 17, at 416–22 (explaining that there are several ways to go about this comparison, but all formulations remain focused on the impact to the property owner, rather than the nature of the regulatory burden).

28. *Lucas*, 505 U.S. at 1019 ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good . . . he has suffered a taking.").

29. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (identifying three factors relevant to a fact dependent inquiry into whether a taking has occurred).

30. *See* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 177 (2004) ("The parcel determination requires identification of the relevant denominator in both physical and conceptual space . . . .").

31. *Penn Cent. Transp. Co.*, 438 U.S. at 130 (internal quotation marks omitted).

32. *Id.* at 130–31.

plaintiff's argument that a takings claim brought against a development moratorium should analyze only the value of the property during the life of the moratorium.[33] The Court explained that "[p]etitioners' 'conceptual severance' argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on the 'parcel as a whole.'"[34]

In the wake of these decisions, the question becomes: What constitutes the whole parcel? Sometimes the relevant parcel may appear obvious. In *Penn Central*, for example, the property owner sought compensation based on the denial of a request to construct a twenty-story building over Grand Central Station. The Court easily concluded that the air rights above the station should not be severed from the station itself because the owner's interest in the air rights was connected to its ownership of the surface.[35] Similarly, in *Tahoe-Sierra*, the Court held that the economic impact of a temporary moratorium on development must be compared to the value of permanent ownership of the property.[36]

Many situations lead to less straightforward analysis. Return to Owner Two, who owns nine acres of uplands and one acre of wetlands. How we characterize the relevant parcel dramatically changes the assessment of the economic impact of the denial of her permit to fill the wetlands. If the one acre of wetlands is itself the relevant parcel, then when Owner Two was denied a fill permit, she lost all, or virtually all, value in the land.[37] If, on the other hand, the economic loss of the permit denial is compared to the value of the entire ten acres, Owner Two experienced only about a 10% loss in value. The difference between a 10% loss of value, and a 99% or 100% loss of value is the difference between Owner Two receiving full compensation from the government and receiving nothing.

In the absence of a definitive test to govern parcel analysis from the Supreme Court, the lower courts have searched for a consistent means of

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33. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002). This ad hoc factual inquiry resembles the Supreme Court's articulation of the *Penn Central* test in its entirety. *See* Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.").

34. *Tahoe-Sierra Pres. Council*, 535 U.S. at 331 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 130–31).

35. *Penn Cent. Transp. Co.*, 483 U.S. at 130–31.

36. *Tahoe-Sierra Pres. Council*, 535 U.S. at 331.

37. That will often be true of such claims because "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993) .

identifying the relevant parcel.[38] Here, I focus on the development of the parcel-as-a-whole rule as applied to claims against the United States adjudicated in the Federal Circuit because that court is virtually the only federal court of appeals to hear takings claims.[39] The Federal Circuit has developed "a flexible approach, designed to account for factual nuances,"[40] which "focus[es] on the economic expectations of the claimant with regard to the property."[41] The analysis of economic expectations turns, in part, on the actions of a property owner and what property she treats as a "single economic unit."[42] The Court of Federal Claims ("CFC") decision in *Brace v. United States* summarized a suite of other factors that the court—the only district court to hear claims for compensation against the United States—relies on in identifying the relevant parcel, including "(i) the degree of contiguity between property interests; (ii) the dates of acquisition of property interests; (iii) the extent to which a parcel has been treated as a single income-producing unit, and (iv) the extent to which the regulated lands enhance the value of the remaining lands."[43] This list of factors contemplates consideration of whether property interests were acquired at

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38. For a good discussion of the various doctrinal approaches to parcel analysis, see generally 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, 603–04 (2011).

39. The Federal Circuit, as the court of appeals that reviews decisions of the Court of Federal Claims, hears almost all such claims brought against the United States. *See* 28 U.S.C. § 1295(a)(3) (2012) (stating that the Federal Circuit shall have exclusive jurisdiction over appeals from the U.S. Federal Claims Court). Few takings claims brought against a state can be heard in federal court. That is because takings claims against state and local governments are not ripe in federal court until a plaintiff has availed herself of any process the state makes available to seek compensation. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 195 (1985) (explaining that takings claims in federal court are not ripe until the owner has availed herself of remedies provided by state law in state court). That includes seeking compensation in state court and a state court decision on whether a taking requiring compensation under the Fifth Amendment precludes litigation of that issue in federal court. *See* San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 545 U.S. 323, 335, 338, 347–48 (2005) (affirming that the full faith and credit clause requires federal courts to give preclusive effect to certain state court judgments).

40. Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (quoting Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994), *abrogated on other grounds as recognized by* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004)).

41. *Id.* (citing Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 499–501 (1986)).

42. Norman v. United States, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (quoting *Forest Props., Inc*., 177 F.3d at 1365).

43. Brace v. United States, 72 Fed. Cl. 337, 348 (Fed. Cl. 2006) (citing *Loveladies Harbor*, 28 F.3d at 1180.). The Tucker Act waives the sovereign immunity of the United States for claims for money damages in excess of $10,000 so long as such claims are brought in the Court of Federal Claims. 28 U.S.C. §1491 (2012); *see also* 28 U.S.C. §1346 (a)(2) (permitting suits in all district courts seeking money damages "not exceeding $10,000 in amount").

the same time or in the same conveyance, although the CFC and Federal Circuit have no presumption that such land should be treated as one parcel.[44]

Parcel analysis, then, serves as a touchstone for those takings doctrines that focus on economic impact to the owner. Identifying the relevant parcel may be difficult and applicable rules may be indeterminate, but its identification is a necessary predicate to analyzing a landowner's claim for compensation.[45]

Parcel analysis is, however, entirely irrelevant to a second category of takings claims focused on the nature of the governmental act, rather than the burden that act imposes on the landowner. This category is made up of the *per se* takings test articulated in *Loretto v. Teleprompter Manhattan CATV Corp.*[46] and the test applied to exactions articulated in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard.*[47] Neither test considers the economic loss that a property owner may sustain, hence a court need not identify a relevant property interest. In other words, these claims involve no fraction for which the parcel as a whole could serve as the denominator. The so-called "substantially advance" test, which required government action to "substantially advance" a legitimate government interest or else constitute a taking,[48] shared this feature, but the Supreme Court abandoned that test altogether in *Lingle v. Chevron U.S.A. Inc.*[49]

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44. *Id.* The Massachusetts Supreme Court, on the other hand, has explained that "[c]ommon sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property," and thus has held that "the extent of contiguous commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel." Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451, 458 (Mass. 2006)

45. *See* Apollo Fuels, Inc. v. United States, 54 Fed. Cl. 717, 723 (Fed. Cl. 2002) (explaining that, as a threshold matter, the court must determine the specific parcel allegedly taken).

46. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

47. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

48. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *abrogated by* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

49. *Lingle*, 544 U.S. at 540, 542; *see* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 536 ("[Courts] now quickly dispense with takings claims that challenge the wisdom and means-ends fit of regulatory acts."). Professor Nestor Davidson has speculated about the possibility of an emerging equality-based takings regime addressing circumstances where property owners are singled out to pay for public goods. *See* Davidson, *supra* note 23, at 35–37 ("As a doctrinal matter, then, most regulations will be evaluated under *Penn Central*, and *Penn Central* will increasingly turn on a comparative fairness inquiry into the distribution of burdens . . . ."). Such a doctrine could also become divorced from the parcel-as-a-whole rule. To date, however, cases that have considered this issue have done so as part of a *Penn Central* analysis, presumably as part of the character of the government action. *See, e,g.*, Wild Rice River Estates, Inc. v. City of Fargo, 705

Loretto requires compensation for any permanent physical occupation of property, irrespective of the burden that occupation imposes on the owner.[50] In *Loretto* a property owner argued that a company committed a compensable taking when it installed a cable box on her property pursuant to a city ordinance requiring apartment building owners to allow such installation.[51] The Court agreed, and in doing so, ignored the economic loss suffered by the property owner, viewing the nature of the intrusion—a permanent, physical invasion—as automatically requiring compensation.[52] Indeed, installation of the cable box enhanced the value of the apartment building, meaning that the owner gained value,[53] yet still had to be compensated.

The other doctrine that requires no consideration of the parcel as a whole arises from the twin cases of *Nollan* and *Dolan*.[54] These decisions established a test for determining when an exaction—a government condition imposed in exchange for a regulatory permission—violates the Takings Clause, thereby entitling the property owner either to compensation or relief from the condition.[55] The *Nollan/Dolan* test is insensitive to the relationship between the cost of a regulatory imposition and the value of the remaining property, instead focusing solely on the exaction.[56] Specifically, a court must determine if the exaction bears an essential nexus with, and rough proportionality to, the burden the private project at issue threatens to public interests.[57] The rough proportionality step requires an economic comparison, but that comparison is between the value of the exaction and the severity of the burden threatened by the permitted development to the public.[58] The value of the property retained by the owner is irrelevant to the analysis.

N.W.2d 850, 858 (N.D. 2005) (considering the fact that a development "moratorium did not single out Plaintiff's property" as supporting conclusion of no taking).

50. *Loretto*, 458 U.S. at 440.

51. *Id.* at 424.

52. *Id.* at 426.

53. *See* Jim Chen, *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of Regulated Industries*, 67 OHIO ST. L.J. 1265, 1304–05 (2006) (explaining that installation of a cable box enhances the value of an apartment).

54. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32, 837, 841–42 (1987); Dolan v. City of Tigard, 512 U.S. 374, 383–84, 391 (1994).

55. *Nollan*, 483 U.S. at 831–32, 837, 841–42; *Dollan*, 512 U.S. at 383–84, 391.

56. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386, 391.

57. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391.

58. *See Dolan*, 512 U.S. at 391, 393–96 (comparing the city's purpose for the proposed easement against the burdens the easement would cause the petitioner).

The two categories of takings doctrine identified provide avenues by which courts could undermine the parcel-as-a-whole rule. First, courts could shift takings claims from the first category to the second category—i.e., moving more claims into the *Loretto* or *Nollan/Dolan* box, thereby obviating the need for parcel analysis altogether. Second, courts could shape parcel analysis so as to shrink the parcel as a whole, thereby magnifying the calculated economic impact of a regulatory burden. As we shall see, recent developments erode the parcel-as-a-whole rule along both avenues.

II. PROGRESSIVE ECONOMIC FAIRNESS AND THE PARCEL AS A WHOLE

Before exploring the mechanisms by which *Lost Tree* and *Koontz* erode the parcel-as-a-whole rule, this Part expands upon what is at stake. Parcel analysis may have its flaws and doubtlessly injects unpredictability into takings claims because it is, at best, muddy. While some may celebrate muddy takings rules,[59] in my view, muddiness is not itself a virtue in this domain. While indeterminacy may be inevitable in light of the myriad of factual contexts in which takings claims play out, it increases transaction costs because parties have difficulty assessing the strength of cases, and chills regulatory activity because government actors have difficulty assessing potential liability.[60] Muddy rules should not, however, always be abandoned. The indeterminacy adhering to the parcel-as-a-whole rule arises from the desire to balance two competing values: economic progressivism and protection for productive use of land.[61] The balance is rough, but as

59. *See* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 150–55 (2002) (describing the virtues of muddy takings rules); *see generally* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (discussing the possible benefits and drawbacks of muddy property rules).

60. *See* Pidot, *Fees*, supra note 18, at 133 n.6 (suggesting that larger compensation awards may have a substantial chilling effect on government entities); *see also* John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracy's Laboratories*, 28 STAN. ENVTL. L.J. 438, 462–65 (2009) (identifying government entities abandoning regulation out of concern for the prospect of compensation awards); George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193, 207 (1987) ("Greater legal uncertainty, other things equal, will increase differences between the parties' settlement offers and, thus, will exaggerate the effect of a predominant litigation strategy.").

61. By balancing these two values, the parcel-as-a-whole rule borrows from the divergent normative approaches of two different Justices influential in the development of takings law. Justice Stevens emphasized the responsibility of land owners to the public, and Chief Justice Rehnquist emphasized the burden regulation places on individual rights. *See* Mark W. Cordes, *The Land Use Legacy of Chief Justice Rehnquist and Justice Stevens: Two Views on Balancing Public and Private Interests in Property*, 34 ENVIRONS ENVTL. L. & POL'Y J. 1, 4 (2010).

Carol Rose has observed, takings cases involve compromises between competing sets of considerations and values and are, thus, "messy and fraught with intellectual and even practical imperfections, but as in most other areas of life, the adjustment of property relations has a considerable element of 'muddling through.'"[62] The parcel-as-a-whole rule does a good job "muddling through." The balance of values, the vision of fairness, and the social good that balance entails, is a worthwhile, or at least defensible, one. In this Part, I explore that balance, which can perhaps better be described as modest economic progressivism checked by concern for promoting the productive use of land.

My defense of the values embodied in the parcel-as-a-whole rule provides a counterpoint to Professor David Dana's contribution to this symposium. Dana argues that the parcel-as-a-whole rule remains the touchstone of much takings doctrine because the "two plausible alternatives . . . pose greater practical and theoretical problems."[63] Specifically, Dana considers, and rejects as unworkable, a rule requiring compensation for every regulatory burden. He also considers and rejects a rule requiring compensation only when regulatory burdens cause a significant impact to the total wealth of a property owner, rather than to the value of the property owned.[64] I agree that the general adherence of courts to parcel analysis may be explained by pragmatic considerations. As discussed in Part IV, however, I worry more than Dana does about the fidelity of courts to the application and spirit of the parcel-as-a-whole rule moving forward. The rule is not only practically preferable, it also embodies sound values for limiting the burdens imposed by government regulation. My purpose here is to explain those values.

First, the vision of fairness: The parcel-as-a-whole rule contemplates economic fairness by generally requiring those with more property to experience a greater apparent economic loss in absolute terms than those with less property.[65] That approach follows from intuitions about whether

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62. Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 285 (1996).

63. David A. Dana, *Why Do We Have the Parcel-As-A-Whole Rule?*, 39 VT. L. REV. 617, 620 (2015).

64. *Id.* at 5–6.

65. *Cf.* Carol M. Rose, Mahon *Reconstructed: Why The Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 568 (1984) ("When a court expands the relevant property to which the 'taken' portion is compared, the diminution in value test emerges as a deep pocket rule, as holders of extensive property must suffer a greater diminution in value in order to establish a takings claim.").

apparent losses match actual losses, as well as about the relative value of such actual losses.[66]

The concept of "reciprocity of advantage" suggests that apparent losses measured by economic valuation of the impact of a regulatory burden may produce inflated results because such losses will be offset by sometimes difficult-to-quantify gains created by that regulatory regime (specific reciprocity of advantage) or created by other government activities (general reciprocity of advantage).[67] In other words, Owner Two—possessing ten acres, one of which is wetlands—will experience a loss related to her inability to develop one acre, but may also experience gains as her remaining nine acres enjoy enhanced value. That enhanced value may take the form of increased property value due to the proximity of that land to protected open-space. The remaining parcels may also experience difficult-to-monetize benefits, such as flood protection.[68] Thus, Owner Two enjoys specific reciprocity of advantage. Apart from the legal protection of wetlands, Owner Two's property may also have enjoyed the benefits of numerous other government activities, such as zoning restrictions ensuring the area remains residential or a decision to build a highway off ramp nearby. General reciprocity of advantage suggests that Owner Two's

66. Intuitions about fairness are ingrained in the parcel-as-a-whole rule, because, as Professor Danaya Wright has explained "gut-level fairness is still the ultimate criteria behind regulatory takings doctrines." Wright, *supra* note 30, at 179–80 .

67. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 140 (1978) ("In the words of Justice Holmes . . . there is 'an average reciprocity of advantage.'") (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). However, the Supreme Court has not explicitly recognized the concept of general reciprocity of advantage. Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. & PUB. POL'Y 1, 21–22 (2010). The concept appears consonant with the Court's suggestion that regulations "adjusting the benefits and burdens of economic life to promote the common good" are less likely to require compensation than other government programs. *Penn Cent. Transp. Co.*, 438 U.S. at 124. The California Supreme Court summed up the concept, explaining that reciprocity of advantage "lies not in a precise balance of burdens and benefits accruing to property from a single law . . . but in the interlocking systems of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive." San Remo Hotel v. City and Cnty. of S.F., 41 P.3d 87, 109 (Cal. 2002).

68. *See* J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RES. L. REV. 753, 768–69 n.53 (2008) ("'Experts estimate that a 1-acre wetland can hold up to 1.5 million gallons of water.'" (quoting Jon Kusler, *Wetlands, Hurricanes, and Flood Hazards* 34, 34–35, *in* AFTER THE STORM: RESTORING AMERICA'S GULF COAST WETLANDS 34, 35 (Gwen Arnold ed., 2006))); *see also* Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1175 (2007) ("Although not free from dispute, there is evidence that every 2.7 linear miles of coastal wetlands can reduce the height of storm surges by one foot."). For a variety of reasons, including cognitive errors and market failures, flood protection may be undervalued in the market. *See* Justin R. Pidot, *Deconstructing Disaster*, 2013 BYU L. REV. 213, 235–43, 249 (2013).

experience reaping such rewards should be taken into account when she seeks compensation for the denial of a permit to fill her wetlands.

Both specific and general reciprocity of advantage is likely to redound more significantly to those with more property. Because governmental programs create uneven benefits across the landscape, a person or company with greater holdings is more likely to benefit somewhere. In other words, the more wealth—in terms of land, currency, and other assets—a person or company owns, the more likely it is that she has enjoyed a windfall from government action. While we do not require disgorgement of such government givings, those benefits can influence assessment of whether it is fair for an individual to experience a regulatory burden uncompensated.[69]

If reciprocity of advantage suggests that the relative wealth of a plaintiff may skew estimates of economic impact—particularly to the extent generalized reciprocity of advantage is recognized—fairness also suggests that even where economic impact is actually the same, a property owner's experience of loss relates to her endowment of wealth. A one dollar tax levied against a pauper seems less fair than a one dollar tax levied against a millionaire. From the perspective of an economist, differential perceptions about the fairness of this one dollar burden may relate to the diminishing utility of wealth.[70] The first dollar is simply worth more to a person than the million-and-first dollar, and thus the loss to the pauper reduces aggregate social utility more significantly than the loss to the millionaire. In non-economic terms, many of us view depriving someone of assets necessary to meet basic necessities as more unfair than depriving someone of assets necessary to purchase luxuries.[71]

The parcel-as-a-whole rule embodies a modestly progressive economic view of fairness. On the whole, it has the effect of making wealthier individuals, as roughly approximated by the size of land holdings, shoulder a larger economic burden—in absolute, if not relative amounts—before

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69. *See* Scott Hershovitz, *Two Models of Tort (And Takings)*, 92 VA. L. REV. 1147, 1149 (2006) ("In the absence of a Givings Clause, government cannot recapture (or, more accurately, is not required to recapture) the benefits it confers on people by giving property."); Cordes, *The Fairness Dimension*, *supra* note 67, at 19 ("Recognizing that government activity added a substantial portion of value to the land considerably lessens the perceived unfairness of loss value.").

70. Eric A. Posner & E. Glen Weyl, *An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets*, 107 NW. U. L. REV. 1307, 1313 (2013).

71. Perhaps resources necessary to meet needs lower on Maslow's hierarchy should simply be given preferential treatment in terms of thinking about fairness. *See* James B. Wadley & Pamela Falk, Lucas *and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway?*, 19 WM. MITCHELL L. REV. 331, 360–61 (1992) (suggesting that "our law has exalted private property" in part, due to the fact that "dysfunction may result when individuals are prevented from asserting dominion and control over things that might be claimed as their own").

compensation will be owed by the government. This vision of fairness may militate in favor of what Professor Dana refers to as a "Direct Financial Impact" approach to parcel analysis in which economic losses would be measured against the entirety of a plaintiff's portfolio of assets, rather than just the value of a particular parcel of property.[72] For the reasons he discusses, such an approach may be practically unworkable and difficult to defend from a textual approach—the Takings Clause does, after all, refer to property not wealth.[73] Assessing economic impact based on specific property also effectuates a second value that runs through both takings law and property law more generally: a general presumption that property should be put to economically beneficial use.[74]

Many foundational tenets of the common law of property revolve around the notion that putting property to productive use benefits society.[75] That impulse manifests itself in a number of corners of American property law: Traditional adverse possession allows someone to acquire ownership by making use of the land of another thereby creating incentives for productive use.[76] Someone mistakenly improving the property of another may often seek compensation for their activities.[77] Property owners

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72. Dana, *supra* note 63, at 622.

73. Professor Dana suggests that the parcel-as-a-whole rule is itself on dubious footing when it comes to the text of the Takings Clause. *Id*. at 638, 644. To this thought I would add that the entire enterprise of regulatory takings is also on such footing. Nonetheless, a rule entirely divorced from property would seem to step too far from the language of the Constitution.

74. The presumption that property should be put to economically beneficial use, rather than leaving it undisturbed, may be outdated in an age where undisturbed land is increasingly scarce. *See* JAN G. LAITOS, THE RIGHT OF NONUSE 5, 94 (2012) (positing that the American legal system needs to expand to include the values of nonuse); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 521–26 (1996) (proposing that American law's preference for development disadvantages wilderness).

75. *See* Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 28 AZ. ST. L. J. 1075, 1082–83 (1997) (describing ways in which private property rights create benefits like individual prosperity, protecting liberty, developing new ideas, and providing social cohesiveness); Sprankling, *supra* note 74, at 533 (explaining the "American orientation [to property law was] designed to stimulate the creation of productive land through the destruction of wilderness"). Carol Rose has explained that "other views of the purpose of private property have coexisted with the wealth maximizing view since at least the framing of the Constitution," and specifically that property has long been viewed as foundational to the development of good moral character. Rose, Mahon *Reconstructed*, *supra* note 65, at 587–88, 590–91.

76. *See* Fraley v. Minger, 829 N.E.2d 476, 484, 486 (Ind. 2005) (explaining that the policy behind the common law of adverse possession is "favoring the productive use of the land" (quoting John G. Sprankling, *supra* note 74, at 534–40)).

77. *See* Sprankling, *supra* note 74, at 544–47 (describing American common law protections to the mistaken improver of land).

generally cannot prevent construction on neighboring property to preserve access to light or air.[78]

Concern about productive use of land also appears in regulatory takings decisions, perhaps most famously in *Lucas v. South Carolina Coastal Council*. In that case, the Supreme Court explained that in all but a few narrow circumstances, compensation must automatically be paid if government action deprives an owner of "'economically viable use of land.'"[79] While the *Lucas* decision plainly concerns itself with the experience of a land owner who suddenly finds herself with useless land, the Court simultaneously articulates a test harkening back to the general property law norms about the importance of using land productively. Government action that essentially requires land to remain fallow not only deprives the owner of income, but also deprives society of the benefits of having land placed in productive use.

The parcel-as-a-whole rule largely undercuts, rather than enhances, protection for productive uses of land in that it permits government regulation to entirely restrict the use of some portion of a parcel so long as the remainder retains sufficient value. But at the margins the rule serves to identify those circumstances most likely to cause widespread elimination of productive use and requires government to pay compensation or develop procedures to alleviate such regulatory burdens. This is a small thumb on the scale in favor of the productive use of land, but it is a thumb nonetheless.

To understand the balance struck by the existing contours of parcel analysis, consider a fifth hypothetical property owner. Recall that Owner One owns one acre of wetlands and Owner Two owns nine acres of uplands and one acre of wetlands. Both have been denied a permit to fill their wetlands, a government decision that reduced the value of the wetland acres by 90%. Now let's add information about the overall wealth of Owners One and Two. Owner One has modest means and Owner Two is wealthy; in other words, the relative assets of each align with the extent of their relative land holdings. Owner Five owns only one acre of land and that acre is occupied by wetlands. Owner Five also has considerable non-land assets and is wealthy, with total wealth that is the same as Owner Two.

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78. Parker v. Foote, 19 Wend. 309, 309, 318 (N.Y. 1838) (rejecting the English doctrine of ancient light because "it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences").

79. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (emphasis omitted).

The modest economic progressivism embodied by the parcel-as-a-whole rule distinguishes between Owner One and Owner Two. Owner Two will be unlikely to receive compensation because the government denied a permit to fill her one acre of wetlands, while Owner One appears likely to have a strong claim. This difference may, in part, relate to reciprocity of advantage: Owner Two's remaining nine acres of land may be directly benefited by preservation of wetlands. The value of the property may increase due to the amenity value of wetlands and open space generally, and the remaining land may also receive less easily monetized benefits.

Progressive economic fairness also supports differentiating between Owner One and Owner Two. Owner Two has more wealth, and so can be expected to sustain a greater absolute loss for the reasons discussed above. That same vision of progressive economic fairness would seem to suggest that Owner Five should be treated similarly to Owner Two because both have similar wealth. However, because the parcel-as-a-whole rule focuses on economic impact on the value of parcels of property, and not to the entire asset portfolio of an individual or business, Owner Five finds herself in the same position as Owner One: She loses 90% of the value of her property and hence is likely entitled to compensation. Here, the parcel-as-a-whole rule's concern with promoting productive use of land trumps economic fairness. The trade-offs between these two values—economic fairness and promoting productive use of land—are fairly debatable. But the rule attempts rough protection of both.

The rough justice obtained by the parcel-as-a-whole rule serves us well. The rule works, however, only to the extent that it applies to a particular regulatory takings problem, and it remains insensitive to strategic behavior by landowners. As the next two Parts will reveal, recent decisions undercut both criteria.

III. *LOST TREE*: GAMING THE PARCEL

Lost Tree Village Corp. v. United States addresses a takings claim arising from the denial of a permit to fill a wetland.[80] The decision permitted a large real estate developer, through its course of conduct, to limit the parcel as a whole relevant to its claim that the United States owed compensation. As a result of that decision, the developer secured a court of

80. Lost Tree Vill. Corp. v. United States, 707 F.3d 1286, 1288 (Fed. Cir. 2013).

federal claims ruling that it experienced a near total loss of economic value, and that consequently, the government must pay compensation.[81]

The Lost Tree Village Corporation was established by E. Llwyd Ecclestone in 1959 to develop residential communities in south Florida.[82] After completing an eponymous development near North Palm Beach,[83] Mr. Ecclestone turned his eyes northward. In 1968, Lost Tree entered an options contract to purchase 2,750 acres in Indian River County.[84] Lost Tree exercised its option in a series of six transactions between 1969 and 1974.[85] In the final transaction in August 1974, Lost Tree purchased plat 57, which would become the subject of the litigation, alongside other property on John's Island and the nearby Gem Island.[86]

Between 1969 and the mid-1990s, Lost Tree developed the John's Island community, which encompassed its holdings on John's Island and Gem Island.[87] The development consists of more than 100 lots, a hotel, two golf courses, and supporting infrastructure.[88] The community is private and access is restricted by security gates.[89] By the late 1990s, Lost Tree had completed major development activities. Llwyd Ecclestone's daughter, Helen Stone, managed the operation of Lost Tree at that time, and after completing the development of John's Island, she wanted to restructure the company as a commercial real estate owner, rather than as a real estate developer.[90] To accomplish that task, Lost Tree hired new executive staff to manage the business and account for its remaining land assets on and around John's Island, reportedly no easy task because the company had kept poor records.[91] That accounting revealed that Lost Tree retained ownership of several tracts of wetlands, including plat 57 and nearby plat 55.[92] In 2002, Lost Tree asked the Army Corps of Engineers for a permit to

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81. Lost Tree Vill. Corp. v. United States, 115 Fed. Cl. 219, 231 (Fed. Cl. 2014) (finding a 99.4% reduction in property value due to denial of permit).

82. Lost Tree Vill. Corp. v. United States, 100 Fed. Cl. 412, 414 (Fed. Cl. 2011), *rev'd*, 707 F.3d 1286 (Fed. Cir. 2013).

83. *Id.* at 415; *see also* LOST TREE VILL. CORP., http://www.losttree.com/ (last visited Apr. 14, 2015) (detailing Lost Tree Village Corporation's real estate development achievements, particularly in North Palm Beach, Florida).

84. *Lost Tree Vill. Corp.*, 100 Fed. Cl. at 415.

85. *Id.*

86. Brief of the United States as Appellant at 18, Lost Tree Vill. Corp. v. United States, No. 14-5093 (Fed. Cir. Aug. 8, 2014).

87. *Lost Tree Vill. Corp.*, 100 Fed. Cl. at 416–17.

88. *Id.* at 416–18, 423.

89. *Id.* at 416, 423.

90. *Id.* at 414, 418–20.

91. *Id.* at 418–20.

92. *Id.* at 421.

fill plat 57.[93] Rather than proposing any new mitigation, the company pointed to existing mitigation credits it had earned for other activities.[94] The Army Corps had previously granted Lost Tree fill permits as part of its development of John's Island, and the agency decided that enough wetlands had been destroyed on the island and denied the permit.[95] Lost Tree then brought a claim in the CFC seeking compensation for the permit denial.[96]

The CFC relied on the factors identified in *Brace* to identify the parcel relevant to Lost Tree's claim.[97] The CFC rejected the United States' argument that the relevant parcel encompassed the entire John's Island community.[98] The court noted that the entirety of Lost Tree's holdings in the area were purchased around the same time and were contiguous in nature, both factors weighing in favor of finding that the relevant parcel was the entire community.[99] The court found, however, that Lost Tree had not treated the entirety of its property as a "single economic unit" because Lost Tree had never developed a single master plan for its development activities and had not provided for utility services on plat 57 at the time that the surrounding area was developed.[100] The court also found that the amount of time that had passed between primary development and the permit application for plat 57 weighed in favor of a narrower relevant parcel because that indicated that plat 57 was not part of Lost Tree's "planned actual or projected use" of its John's Island property.[101]

The CFC concluded that the relevant parcel did include the remaining holdings of Lost Tree, including plat 57 and plat 55.[102] It also found that plat 57 and plat 55 were "undoubtedly contiguous" and that the planned use for each was comparable.[103] Based on this parcel analysis, the court concluded that the permit denial reduced the value of Lost Tree's property by 58.4%. Finding that diminution in value insufficient to require compensation, the CFC granted judgment for the United States.[104]

Lost Tree appealed and secured reversal of the CFC's decision. The Federal Circuit agreed that the entirety of the John's Island community was

93. *Id.* at 424–25.
94. *Id.* at 424.
95. *Id.* at 425.
96. *Id.* at 425–26.
97. *Id.* at 427–28.
98. *Id.* at 430–31, 433, 436.
99. *Id.* at 430.
100. *Id.* at 433.
101. *Id.*
102. *Id.* at 435.
103. *Id.* at 434.
104. *Id.* at 437, 439.

not the relevant parcel.[105] The court disagreed, however, that anything other than plat 57, standing on its own, should be considered.[106] The court rejected including plat 55 in the parcel because "the mere fact that the properties are commonly owned and located in the same vicinity is . . . insufficient . . . to find they constitute a single parcel for the purposes of the takings analysis."[107] The court further found that the timing and plan for development of plat 55 was sufficiently different than that proposed for plat 57, that Lost Tree had distinct economic expectations for each plat, and therefore, that the two should not be considered together.[108]

On remand, the CFC found that analyzing the economic impact considering plat 57 alone indicated that Lost Tree had suffered a 99.4% diminution in value, and therefore, that a compensable taking—either under the *Lucas* test or *Penn Central* test—had occurred.[109] The United States took a second appeal to the Federal Circuit, preserving the parcel issue for further review, presumably either before the Federal Circuit *en banc* or the Supreme Court.[110] That appeal is still pending.

The *Lost Tree* approach to parcel analysis has several notable features, which together create perverse incentives for property owners to engage in strategic conduct to manufacture successful takings claims. First, a developer can affect parcel analysis by declining to produce a master plan for development, even where the developer purchases contiguous property in the same transaction, all of which is ultimately put to the same use. Second, a developer can affect parcel analysis by phasing development, leaving the most heavily burdened properties for development after developing property relatively unencumbered by regulatory obligation. Third, a developer can improve its chances of securing compensation by making the resource-inefficient decision to postpone installation of utility infrastructure for property subject to regulatory burdens. Each of these features of the *Lost Tree* decision are solely within the control of the property owner herself. The financial gain from taking this approach may be substantial. In the case of Lost Tree, the company has transformed virtually worthless vestigial land into a more than $4 million dollar compensation award.[111]

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105. Lost Tree Vill. Corp. v. United States, 707 F.3d 1286, 1293–94 (Fed. Cir. 2013).
106. *Id.* at 1294.
107. *Id.*
108. *Id.*
109. Lost Tree Vill. Corp. v. United States, 115 Fed. Cl. 219, 233 (Fed. Cl. 2014).
110. Brief of the United States Appellant, *supra* note 86, at 1.
111. *Lost Tree Vill. Corp.*, 115 Fed. Cl. at 233.

The Federal Circuit's decision tracks the situation of Owner Three, who sells her nine upland acres and then seeks a permit to fill her remaining acre, which is denied. Under the Federal Circuit's analysis, Owner Three resembles Owner One—who always owned only one acre of wetlands—not Owner Two—who also started with ten acres. In the wake of this ruling, sophisticated property owners can game the parcel-as-a-whole rule and increase their likelihood of prevailing in a takings claim by engaging in strategic behavior.[112]

This outcome in *Lost Tree* is particularly striking because it appears to have few obvious limiting principles. It seems to provide a general road map for those owning regulated property. Ironically, the decision upends the economic sensibility of the parcel-as-a-whole rule because it most benefits those with more wealth and more property—those able to engage in strategic subdivision and who have ample assets to delay cashing in on the value of property burdened with regulation until sometime after disposing of less regulated property. Such an approach takes money, sophistication, and access to good legal counsel. As a result, progressive economic fairness has been transformed into a regressive regime that favors the wealthy.

IV. *KOONTZ*: AVOIDING THE PARCEL

The Supreme Court's decision in *Koontz v. St. Johns River Water Management District* expands the circumstances, perhaps significantly, in which regulatory decisions will be analyzed as exactions under the *Nollan/Dolan* framework, thereby avoiding parcel analysis altogether.[113] This decision has understandably received more attention than *Lost Tree*, both because it is a Supreme Court decision, and thus has significantly greater importance to the overall architecture of takings law, and because the legal changes it wrought are more obvious.[114]

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112. It is conceivable, as Steven Eagle has argued, that the government also has the ability to "manipulate the takings fraction by increasing its denominator through the inclusion of vast areas beyond the boundaries of the deeded parcel." *See* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549, 565 (2012). Concerns about manipulation are asymmetric. Either side can (and will) present arguments about the contours of the appropriate parcel: The government will likely argue for a broad parcel definition; and the plaintiff will argue for a narrow parcel definition. That is simple advocacy. It is the role of courts to weigh those respective positions and arrive at a result. *Lost Tree* enables more than strategic argumentation; rather, it allows developers to engage in strategic behavior to affect the outcome of a court's analysis.

113. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013).

114. *See, e.g.*, Pidot, *supra* note 18, at 163–68 (arguing that the *Koontz* decision "extends the *Nollan/Dolan* test only to fees . . . and leaves open the question of whether that test also applies to

Koontz arose from a dispute between Coy Koontz, Sr. and the St. Johns River Water Management District ("District").[115] Koontz owned fourteen acres of land within the District's jurisdiction, the vast majority of which was made up of wetlands.[116] Koontz applied for a permit to fill 3.4 acres of the wetland to allow him to develop the property for commercial purposes.[117] The District informed Koontz that it would only grant a permit if Koontz agreed to fund rehabilitation efforts for wetlands in the area or reduce the number of acres he wanted to fill.[118] Koontz refused both options and declined to negotiate with the District, which denied his permit.[119]

Koontz filed an action in Florida court arguing that the conditions the District proposed violated the *Nollan/Dolan* takings test, even though those conditions were never actually imposed and required payment of money rather than a dedication of land.[120] The Florida Supreme Court rejected his claim, ruling that *Nollan/Dolan* only applies to conditions imposed in an actual permit, rather than conditions proposed during a negotiation that ends with a permit denial.[121] The court further ruled that the test only applies where a condition requires transfer of land to the government.[122] Because *Nollan/Dolan* did not apply, the court ruled that Koontz could only bring a regulatory takings claim under *Penn Central*, a claim that would have been governed by the parcel-as-a-whole rule.[123]

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expenditures"); *see also* Mark Fenster, *Substantive Due Process by Another Name:* Koontz*, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 415 (2014) (explaining that after *Nollan* and *Dolan*, "[t]he entire field of exactions now, apparently, falls under the unconstitutional conditions doctrine rather than the Takings Clause"); Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 288 (2013) ("That the Supreme Court has failed in this difficult balancing act is no surprise. How it has failed, and why it may continue to fail, is an interesting question . . . ." (emphasis omitted)).

115. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1223 (Fla. 2012), *rev'd*, 133 S. Ct. 2586 (2013).

116. *Id.* at 1223–24. Because Coy Koontz, Sr. passed away before the Supreme Court case, his estate was represented by his son, Coy Koontz, Jr. *See Koontz*, 133 S. Ct. at 2591 (describing the history of the case).

117. *Koontz*, 77 So. 3d at 1223–24.

118. *Id.* at 1224–26. The District also offered Koontz the option of reducing the acreage of wetlands he wanted to fill, but this option received no sustained attention by the Supreme Court. *Id.*

119. *Id.* at 1224.

120. *Koontz*, 133 S. Ct. at 2593–94.

121. *Koontz*, 77 So. 3d at 1230–31.

122. *Id.*

123. *See id.* at 1231 ("As noted by the United States Supreme Court, *Nollan* and *Dolan* were not designed to address the situation where a landowner's challenge is based not on excessive exactions but on a denial of development. Here, all that occurred was that St. Johns did not issue permits for Mr. Koontz to develop his property based on existing regulations and, therefore, an exactions analysis does not apply." (citations omitted)).

The Supreme Court granted Koontz's petition for certiorari to consider both issues addressed by the Florida Supreme Court and reversed on both. A unanimous court held: "The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that applicant turn over property or *denies* a permit because the applicant refuses to do so."[124] A bare majority of the justices also held that the *Nollan/Dolan* test applies to conditions that require permit applicants to pay fees.[125]

The *Koontz* case loosely tracks the situation of Owner Four, who sought a permit to fill her wetlands that was granted on the condition that she pay a $10,000 mitigation fee. After *Koontz*, Owner Four's claim receives better treatment than that of Owner Two, who possesses the same amount of property but whose permit application was denied outright. In the face of Owner Four's claim, the relevant government permitting agency must meet heightened scrutiny that focuses only on the governmental action and disregards the impact to the landowner.[126] This dichotomous treatment has long been true where a permit condition requires transfer of real property to the government.[127] That is, after all, the heart of the *Nollan* and *Dolan* cases. In the wake of *Koontz*, the full extent of the *Nollan/Dolan* test remains unclear, but the category of plaintiffs that it covers has expanded.[128] Fee requirements plainly fall within that test, at least so long as the fee is imposed through an adjudication. Potentially, that test also

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124. *Koontz*, 133 S. Ct. at 2595.

125. *Id.* at 2591, 2598–99. The contours of the *Koontz* holding are unclear, and I have argued elsewhere that it should only be viewed as applying to conditions requiring a transfer of money from the applicant to the government and not to conditions requiring the applicant to engage in mitigation activities that require an expenditure of money. *See* Pidot, *supra* note 18, at 136–37 (arguing that courts should treat fees and expenditures differently under *Koontz*).

126. The difference in treatment between outright permit denials and failed permit negotiations has caused some to worry that the ultimate upshot of *Koontz* may be in chilling negotiations between government officials and developers, ultimately resulting in either over or under regulation. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 646 (2004); Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of* Koontz *on the Local Government/Developer Relationship*, 30 TOURO L. REV. 455, 471 (2014) ("Koontz serves as a major obstacle to . . . collaboration.").

127. In other words, a permit applicant required to dedicate one acre of land is treated differently from one required to pay a fee equal to the value of one acre of land.

128. In the wake of this decision, Lee Anne Fennell and Eduard M. Peñalver expressed concern that the framework in *Koontz* has no obvious limits. *See* Fennell & Peñalver, *supra* note 114, at 289 ("Ideally, a boundary principle would be relatively easy to apply and would track relevant normative considerations reasonably well. In the exactions context, however, markers that can even minimally approximate these criteria are in short supply—and the Court thinned its options further in *Koontz*."); *see also* Pidot, *supra* note 18, at 135 (arguing that *Koontz* covers fees but not compelled expenditures); Fenster, *supra* note 126, at 646 (arguing that *Koontz* may not apply to legislatively imposed exactions).

applies to conditions requiring an expenditure of funds to pay for mitigation activities and conditions imposed by legislatures on permits. And the test could extend further yet, as the decision itself lacks any discussion of a meaningful limiting principle.[129]

Unlike *Lost Tree*, *Koontz* likely creates few opportunities for strategic behavior. Rather, it simply shuttles cases into the *Nollan/Dolan* framework because permit applicants do not directly control governmental decisions to impose conditions on permits. Nonetheless, if *Koontz* is interpreted broadly, many takings claims may now evade parcel analysis altogether. In so doing, *Koontz* eviscerates the progressive economic sensibility contained within the parcel-as-a-whole rule. In its place arises a regime that ignores entirely the relative impact of regulatory burdens on property owners, and instead, simply assesses claims based on an analysis of the conditions proposed by government actors.

CONCLUSION

The *Koontz* and *Lost Tree* decisions have dealt serious blows to the parcel-as-a-whole rule and the fairness sensibility contained within it. It is too early to say if these blows will prove fatal, and if parcel analysis will become either irrelevant or entirely controlled by the strategic behavior of sophisticated parties. This Article has suggested that the erosion of this long-standing feature of regulatory takings doctrine undermines a (modestly) progressive economic approach to allocating regulatory obligations. Perhaps that is the aim of these decisions. After all, a recent empirical study revealed that business interests fare better in the Supreme Court under the leadership of Chief Justice John Roberts than under any Court since World War II.[130] The American citizenry has also drifted from economic progressivism in recent years, and a majority of Americans now favor replacing the progressive income tax with a flat tax.[131]

Koontz and *Lost Tree* reflect these sentiments without admitting their influence. But this opacity is undesirable: We should recognize these

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129. *See* Fennell & Peñalver, *supra* note 114, at 288 ("[T]he *Koontz* majority eschewed any boundary principle that would hive off its exactions jurisprudence from its land use jurisprudence more generally."). The Supreme Court does, however, make clear that property taxes are not subject to *Nollan/Dolan* scrutiny. *Koontz*, 133 S. Ct. at 2600–01.

130. *See* Lee Epstein, et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1413, 1433 (2013) (ranking Supreme Court justices by how favorable they are to business interests).

131. *58% Favor Taxing All at the Same Percentage Rate*, RASMUSSEN REPORTS (Mar. 15, 2012), http://www.rasmussenreports.com/public_content/business/taxes/march_2012/58_favor_taxing_all_at_the_same_percentage_rate.

changes in doctrine for what they are. Each decision disproportionately benefits well-heeled individuals and businesses with substantial real property holdings. After *Koontz*, government can demand precisely the same contribution from a millionaire or a pauper in return for granting a regulatory permission. The burden experienced by the property owner is irrelevant. Rather, constitutionality turns on the relationship between the harm threatened by the permitted activity and the value of the exaction demanded by the government. After *Lost Tree*, property owners can structure development activities to manufacture compensation awards. This strategy, however, is not equally available to all owners. Rather, it requires large land holdings, sophisticated legal expertise, and sufficient wealth to hold burdened parcels of land for sufficient time to reset the relevant parcel in the eyes of the courts. The result in *Lost Tree* is, perhaps, particularly troubling because it effectively turns the parcel-as-a-whole rule from progressive to regressive. In the wake of that decision, smaller land holders may be less likely to secure compensation because, in general, they may lack the wealth necessary to play a long game.

Koontz and *Lost Tree* also diverge significantly from a recent pattern of victories for government defendants.[132] The *Penn Central* test that has dominated regulatory takings doctrine for the last decade generally favors government defendants, particularly because that test typically requires plaintiffs to prove significant economic impact to the parcel as a whole, typically well in excess of 50% of its value.[133] That math has now changed. Under the new rules explored in this Article, government regulators will be able to afford to secure fewer public goods, and wealthier plaintiffs will be able to secure more compensation when asked to contribute to social welfare.

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132. Little empirical evidence exists about the win/loss ratio of government parties in takings claims. A study of 133 randomly selected cases decided under *Penn Central* before 2002 found that government defendants won 86.6% of the time. F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company*?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141 (2003).

133. *See* Lost Tree Vill. Corp. v. United States, 100 Fed. Cl. 412, 427, 437 (Fed. Cl. 2011) (ruling that a diminution of value of 58.4% falls short of a compensable taking); Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360, 385 (Fed. Cl. 2004) (arguing that "it stretches the concept of partial taking too far to say that a diminution on the order of 50 percent or less has the effect of a taking").