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THE "PARCEL AS A WHOLE" IN CONTEXT: SHIFTING THE BENEFITS AND BURDENS OF ECONOMIC LIFE – OR NOT

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I. INTRODUCTION

Perhaps more than any other area of law, land use planning manifests current societal values. From the application of skeptical substantive due process analyses to regulation of land uses to modern-day urban growth boundaries, underlying notions of property rights, fairness, and investment-backed expectations have long played a significant role in the development of property law and land use controls.[1] This article will study but one aspect of this overall thesis, judicial interpretations of the Fifth Amendment's Takings Clause to achieve fairness in a certain regulatory context, the selection of the precise parcel on which a takings analysis must focus when evaluating a takings claim. We contend that courts have implicitly relied upon this overarching notion in evaluating the validity of government regulation of a given parcel.

To ascertain whether a regulatory taking has occurred under the Fifth Amendment, the Supreme Court normally utilizes a three-factor analysis articulated by Justice Brennan in the 1978 *Penn Central* decision.[2] The proportion of the property affected by a regula-

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[1] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 171-74 (Touchstone 2005, 3d ed.) (1973); Edward J. Sullivan, *A Brief History of the Takings Clause*, GARVEY SCHUBERT BARER, http://www.gsblaw.com/news/publication/a_brief_history_of_the_takings_clause/ (last visited Mar. 31, 2014) (identifying some of the tensions present in Takings Clause jurisprudence).

[2] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The deci-

tion is often a decisive factor in affixing a value to the impact of the regulation. However, as this article will examine, the most difficult property regulations to evaluate have often been enacted as stopgap mechanisms to secure threatened cultural or ecological resources that may be present on that property,[3] with courts later left to interpret the validity of such regulations through fact-intensive inquiries. Thus, *Penn Central* is sometimes regarded as an outlier decision lacking precedent,[4] but it nonetheless remains the recognized analysis applicable to testing the limits of environmental regulations, as well as in determining the limits of constitutional land use regulations generally.

II. *PENN CENTRAL* AND MAJORITARIAN VALUES

In 1966, twelve years before the *Penn Central* decision, Congress passed the National Historic Preservation Act,[5] the first national law to foster preservation of historically and culturally significant properties.[6] The roots of the preservation movement in New York are often attributed to the demolition of Penn Station in October 1963.[7] Penn Station, occupying eight acres over two city blocks, and

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sion stated the factors as follows:

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

Id.

[3] Frank Michelman, *Property, Utility and Fairness*, 80 HARV. L. REV. 1165 (1967); *see* Richard A. Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3 (1986) (criticizing the utilitarian view of property); *see also* William A. Fischel, *The Rest of Michelman 1967*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 372 (Kenneth Ayotte ed., 2011) *available at*, http://www.dartmouth.edu/~wfischel/Papers/the_rest_of_michelman.pdf (criticizing the utilitarian view of property).

[4] Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549, 556-57 (2012).

[5] 16 U.S.C. § 470 (2006).

[6] *Id.* For a timely assessment of the merits of New York preservation laws, see J. Peter Byrne, *Historic Preservation and its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665 (2012).

[7] Eric. J. Plosky, *The Fall and Rise of Pennsylvania Station, Changing Attitudes To-*

still considered today to be a magnificent example of the Beaux-Arts architectural style, was in significant disrepair at the time.[8] The Pennsylvania Railroad Company optioned the air rights in the 1950s over the soaring waiting room and glass-roofed train terminal in order to dismantle and replace it with more profitable uses – present-day Madison Square Garden and Penn Station.[9] Public protests failed to halt this construction.[10]

Two years later, New York City established the Landmarks Preservation Commission ("Commission") to oversee and regulate redevelopment of architecturally and historically significant properties.[11] Shortly after its formation, the Commission designated Grand Central Terminal ("Terminal") a landmark and conferred certain responsibilities and use limitations upon the owner.[12] The Terminal's owner, Penn Central Transportation Co. ("Penn Central Co.") also faced maintenance and financial obstacles and sought to make use of the air space above the Terminal.[13] UGP Properties, Inc., an intended office building lessee, submitted two alternative development plans for a fifty-five and a fifty-three-story office building on top of the Terminal, respectively.[14] Both plans were rejected by the Commission as incompatible with the historic character and preservation of the Terminal.[15] Penn Central Co. did not appeal these decisions, but it subsequently filed suit, asserting that the preservation law effected a taking without compensation.[16]

The Court came to its finding of no taking through articulat-

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ward Historic Preservation in New York City (2000), http://www.subjectverb.com/www/writing/thesis.pdf; *but see* RANDALL MASON, THE ONCE AND FUTURE NEW YORK: HISTORIC PRESERVATION AND THE MODERN CITY (Univ. of Minnesota Press 2009) (discounting the singular importance of the event as the sole foundation for the preservation movement, but discussing its significance to the creation of the Landmarks Preservation Commission); *see also* David W. Dunlap, *50 Years Ago, Sharply Dressed Protesters Stood Up for a Train Station They Revered*, N.Y. TIMES, July 31, 2012, http://cityroom.blogs.nytimes.com/2012/07/31/50-years-ago-sharply-dressed-protesters-stood-up-for-a-train-station-they-revered.

[8] SAM ROBERTS, GRAND CENTRAL: HOW A TRAIN STATION TRANSFORMED AMERICA 165 (Grand Central Publishing 2013).

[9] *Id.* at 165-66 (stating today, the ceiling height of Penn Station terminal is 125 feet lower than that of the original main waiting room).

[10] *Id.* at 166.

[11] *Id.* at 168.

[12] *Id.* at 169.

[13] *Penn Cent.*, 438 U.S. at 116.

[14] *Id.* at 116-17.

[15] *Id.* at 117.

[16] *Id.* at 118.

ing and applying the now-familiar three factors to its inquiry: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with investment-backed expectations, and (3) the character of the government action.[17] In evaluating the merits of the Penn Central Co. claim, two elements to this seminal analysis emerged that have guided later takings cases: first, the nature of the ownership and second, the remaining value and size of the parcel and viability of its use.[18] This second factor has contributed to *Penn Central*'s legacy and provided the foundation for the relevant parcel doctrine, or "parcel as a whole" analysis:

> "[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. 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 . . . .[19]

As part of its portfolio, Penn Central Co. owned a number of other nearby properties that were eligible to receive transferred development rights from the Terminal.[20] One or two of these properties were found expressly eligible for such office building improvements.[21] Accordingly, the economic gain that could be made through building higher floors on other sites could have eased the concern of the Court in its evaluation of just compensation.[22] However, in considering the nature and extent of the limitations placed by the Commission (i.e., prohibiting exterior changes to the landmark without its permission) on the totality of interests in the Penn Central parcel, the Court found no taking as its analysis of property rights in the parcel under those three factors apparently demonstrated that, even after the Landmark designation, there was no justifiable need for compensation.[23] However, the Court did note in *dicta* that the transferrable rights "undoubtedly mitigate whatever financial burdens the law has im-

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17 *Id. at* 124.

18 Lucas v. S. Carolina Coastal Comm'n, 505 U.S. 1003, 1027-28 (1992).

19 *Penn Cent.*, 438 U.S. at 130-31.

20 *Id.* at 115.

21 *Id.* at 122.

22 *Id.*

23 *Id.* at 138.

posed."[24]

Historic preservation was not the only concurrent form of protective regulations that gave rise to a taking claim in the late 1970s. The year after the Court decided *Penn Central*, it heard a personal property case challenging the application of the Eagle Protection and Migratory Bird Treaty Acts as a taking.[25] The Acts made it illegal to engage in the sale or purchase of components of protected birds and possession or transportation of bird parts. Though the Eagle Protection Act had been in place since 1940,[26] by 1963, bald eagles were in danger of extinction. In the lower forty-eight states, only 487 nesting pairs remained.[27] As a result, in 1962, Congress amended the Act to encompass prohibitions on trafficking in feathers, eggshells, and other fractional parts.[28]

L. Douglas Allard and other traders in bird artifacts which contained the restricted components were prosecuted for the sale of such artifacts.[29] They sued, alleging first that the artifacts in their possession prior to the date of the statutes should be exempt from regulation, and in the alternative, if the Act did apply to their arti-

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[24] *Penn Cent*., 438 U.S. at 137. In his seminal book, however, Richard Epstein questions whether the substitution of air rights from one building to another under common ownership can offset an economic burden under landmark preservation regulations, instead positing that reliance, even in part, upon such a transfer constitutes a different form of taking (e.g., if air space is traded to another location, then it follows that the receiving location, too, has limited use of its air space – a presumptive exaction on its own). RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 189-90 (1985). In contrast, the authors in *Compensation in TDR Programs: Grand Central Terminal and the Search for the Holy Grail* framed a comment by the New York Court of Appeals' Judge Breitel, questioning the reasonable return that real property owners might or should expect, as the backdrop for their inquiry into what might enable an adequate TDR scheme, given proximate property developments, societal investments and private interests, and other economic theory factors. *See* Jon M. Conrad & Dwight H. Merriam, *Compensation in TDR Programs: Grand Central Terminal and the Search for the Holy Grail*, 56 U. DET. J. URB. L. 1 (1978).

[25] Andrus v. Allard, 444 U.S. 51, 52-56 (1979). The Bald Eagle Protection Act of 1940 is found at 16 U.S.C. §§ 668-668d, while the Migratory Bird Treaty Act is found at 16 U.S.C. § 703.

[26] *See* U.S. Fish and Wildlife Service Eagle Permits Information page, UNITED STATES FISH AND WILDLIFE SERVICE FWS.GOV, http://www.fws.gov/midwest/midwestbird/eaglepermits/bagepa.html (giving a history of the Bald Eagle Protection Act) (last visited Mar. 30, 2014).

[27] *Id.*

[28] Joint Resolution to Provide Protection for the Golden Eagle, Pub. L. No. 87-884, 76 Stat. 1246 (1962).

[29] *Andrus*, 444 U.S at 54.

facts, then the regulations effected a taking.[30] Justice Brennan, again writing for the majority, noted that Congress had twice reviewed and amended the applicable Eagle Protection Act without removing the Department's right to regulate previously owned artifacts.[31] In contrast, Congress wrote the contemporaneous Endangered Species Act to contain an exception for preexisting objects;[32] but Congress had made no similar exception with the Migratory Bird Treaty Act.[33] Justice Brennan concluded that while the Acts prohibited the most profitable use in the bundle of sticks, they did not appropriate ownership in its entirety and found no taking, as the right to possess, transport, or donate the artifacts remained.[34] In 2007, due to such stringent protections and preservation efforts, the bald eagle was deemed recovered and delisted from the Federal List of Endangered and Threatened Wildlife and Plants.[35]

III. SENSITIVE LANDS AND DEVELOPMENT RESTRICTIONS

Perhaps no area of land use litigation has exemplified the practical impact of real property regulations, benefits and burdens than takings claims involving environmentally-driven laws restricting development. Historically, the law had supported, if not outright encouraged, the conversion of sensitive ecological lands into productive agricultural or business use.[36] Since the 1600s, over half of the wetlands in the coterminous United States have been lost or otherwise intentionally drained for development.[37] As Penn Central Terminal was to the origin of the historic preservation movement, a series of

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30 *Id.* at 54-55.

31 *Id.* at 57.

32 *Id. at* 62.

33 *Id.*

34 *Andrus*, 444 U.S. at 66.

35 U.S. Fish and Wildlife Service Bald Eagle Delisting, UNITED STATES FISH AND WILDLIFE SERVICE FWS.GOV, http://www.fws.gov/pacific/ecoservices/BaldEagleDelisting.htm (last visited Mar. 31, 2014).

36 ROYAL C. GARDNER, LAWYERS, SWAMPS, AND MONEY: U.S. WETLAND LAW, POLICY, AND POLITICS 5 (2011) ("[I]n the 1900 case of Leovy v. United States, [177 U.S. 621, 623 (1900),] . . . the Court upheld the right of Louisiana to construct dams that dried out the swampy lands. Indeed, the Court observed that government not only had the power to conduct these reclamation efforts, but it was its duty to do so.").

37 *See, e.g.*, T.E. Dahl, *Wetlands Losses in the United States 1780's to 1980's*, U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE (1990), *available at* http://www.fws.gov/wetlands/Documents/Wetlands-Losses-in-the-United-States-1780s-to-1980s.pdf. (last visited Mar. 31, 2014).

environmental disasters in the 1960s and 1970s similarly served as the impetus for restrictions on development of sensitive lands.[38] In response to toxic waste, severe human health impacts, and a river on fire,[39] Congress passed a series of landmark protection laws intended to halt further ecological degradation and restore the environment.[40]

As with landmark protection regulations, development restrictions on sensitive lands and Clean Water Act Section 404 removal-fill permit requirements were met with significant resistance, particularly from those whose ownership and development plans predated controls.[41] Concurrent with a rise in takings litigation over wetland regulations came a greater awareness of the impacts that modern industry had on ecological resources and the birth of the modern environmental movement.[42] Judicial examination of the hydrologic connection between newly-regulated sensitive lands and navigable waters under the Clean Water Act[43] and the Rivers and Harbors Act[44] mirrored the search for a predictable application of *Penn Central*. Complex inquiries into whether the U.S. Army Corps of Engineers ("Corps") possessed jurisdiction over various types of wetlands were parsed out over contemporaneous cases, beginning with a more expansive view of agency authority under *United States v. Riverside Bayview Homes*,[45] later narrowed under *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*,[46] and

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[38] *See* Environmental Protection Agency ("EPA") Historical Topics (*e.g.*, Rachel Carson, "*Silent Spring*"; Love Canal (1978); Valley of the Drums (1979); Earth Day (1970), *all available at* http://www2.epa.gov/aboutepa/historical-topics.) (last visited Mar. 31, 2014).

[39] *See* Michael Rotman, *Cuyahoga River Fire*, Cleveland Historical Society, *available at* http://clevelandhistorical.org/items/show/63#.Uwi9j_ldWP8 (last visited Mar. 31, 2014).

[40] *See, e.g.*, the National Environmental Policy Act of 1969, 42 U.S.C. § 4321; the Clean Water Act of 1972, 33 U.S.C. § 1251; the Endangered Species Act of 1973, 16 U.S.C. § 153; the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451, and the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa.

[41] *See* ROBERT MELTZ, DWIGHT MERRIAM, & RICHARD FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 366 n.5 (1999) (noting that approximately 400 wetlands regulatory cases had been brought between 1960 and 1990, half of which raised Clean Water Act Section 404 permit takings claims and other regulatory challenges).

[42] GARDNER, *supra* note 36, at 7-8.

[43] 33 U.S.C. § 1251.

[44] 33 U.S.C. § 403.

[45] 474 U.S. 121, 134-35 (1985) (upholding the Corps' authority under the Clean Water Act to categorize "wetlands" in a reasonable manner and regulate fill activities on properties adjacent to navigable waters where a type of vegetation is present that requires surface or ground water saturated soils, and finding no taking).

[46] 531 U.S. 159, 174 (2001) (finding that seasonally-inundated isolated ponds do not

further refined in a split decision in *Rapanos v. United States*,[47] resulting in a site-specific hydrologic analysis of adjacent wetlands.[48]

The nuance inherent to wetlands takings determinations mirrors the lack of uniformity for a singular relevant parcel analysis. Developing a bright line list of guidepost factors to illuminate considerations to ascertain a sufficient loss of property value to constitute a taking is difficult given what are often fact intensive, *ad hoc* decisions.[49] For a time, the outcomes of many cases that mounted a takings challenge reflected pro-environmental preservation concerns.[50] However, later cases, such as *Loveladies Harbor, Inc. v. United States*[51] and *Florida Rock Industries, Inc. v. United States.*[52] reinvig-

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qualify as intrastate navigable water habitat for migratory birds, and thus are outside the scope of the Corps' jurisdiction).

[47] 547 U.S. 715, 739, 742 (2006) (deciding with a plurality of justices holding that EPA and Corps jurisdiction may extend over "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters). Similar to *Penn Central*, this decision prompted much consternation among environmental law practitioners, as it has been largely left to lower courts to interpret Justice Kennedy's "significant nexus" test factors. *See, e.g.*, Jennifer L. Bolger, *Post* Rapanos*: The Regulatory Miasma Engulfing Isolated Wetlands and the Clean Water Act*, 10 No. 3 ABA AGRIC. MGMT. COMMITTEE NEWSL. 8 (August 2009).

[48] Since the *Rapanos* decision, the EPA and the Corps have issued revised guidance and clarification on Clean Water Act jurisdiction, generally stipulating that both Justice Kennedy's "significant nexus" test and Justice Scalia's "continuous surface connection" test will be utilized in fact-specific decisions regarding agency jurisdiction where isolated wetlands are adjacent to non-navigable tributaries, non-navigable tributaries are not relatively permanent, or where wetlands are near but are not adjacent to non-navigable tributaries, given any hydrologic and ecological connections. *See* EPA and Corps' joint June 2007 Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States (rev. Dec. 2, 2008), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2007_6_5_wetlands_RapanosGuidance6507.pdf, http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf. A draft rule was also sent by EPA and the Corps to the White House Office of Management and Budget in September 2013, with release of the draft rule for notice and comment contingent upon completion of a draft scientific study, *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[49] *Penn Cent.*, 438 U.S. at 124.

[50] *See* MELTZ, *supra* note 41, at 520-23 (outlining the interplay between environmental concerns, takings law concerns, and conservation efforts in the Lake Tahoe and Nantucket Island regions).

[51] 28 F.3d 1171 (Fed. Cir. 1994), *abrogated by* Bass Enters. Prod. Co. v. Untied States, 381 F.3d 1360 (Fed. Cir. 2004).

[52] 45 Fed. Cl. 21 (stating that the parties spent more than a decade in litigation); *see* Florida Rock Indus. Inc. v. United States, 8 Cl. Ct. 160 (1985), *rev'd,* 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *rev'd*, 21 Cl. Ct. 161 (1990), *appeal filed*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), *rev'd*, 45 Fed. Cl. 21 (1999).

orated the weight and consequence behind the relevant parcel determination and illustrated an evolving calculus behind takings valuations.

Loveladies Harbor explored the importance of the denominator analysis, but ultimately found in favor of the private property interest.[53] In 1958, the plaintiff, Loveladies Harbor, Inc., acquired a 250-acre parcel, and in 1972, after the Clean Water Act took effect that same year, sought to develop the remaining undeveloped 51 acres.[54] After years of negotiations with the New Jersey Department of Environmental Protection, the parties settled and the state issued a permit for fill of 11.5 of the 51 acres.[55] In evaluating Loveladies Harbor's application for a federal Section 404 permit, the Corps was informed by the state Department of Environmental Protection that its own permit approval was not in conformance with state law requirements.[56] The Corps subsequently rejected the permit application in 1982.[57] Loveladies Harbor challenged the permit denial in the Court of Federal Claims, where the court found that the permit denial effected a $2,645,500 loss in the fair market value of the parcel.[58]

The court made clear its view of the denominator problem in takings claims: if it defined the relevant parcel broadly to include the entire undeveloped fifty-one acres, then the economic deprivation of the use of twelve acres is less proportionately significant.[59] Conversely, if the inquiry is narrowed to just the affected property then a near wipeout of economic value would result.[60] Relying heavily upon *Lucas v. South Carolina Coastal Council*,[61] the Court of Appeals for the Federal Circuit gave greater weight to a newly articulated factor in order to determine the relevant property interest – the timing of the environmental regulation's application given the "interest vested in the owner, as a matter of state property law, and not within the

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53 *Loveladies*, 28 F.3d at 1183.

54 *Id.* at 1174.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Loveladies*, 28 F.3d at 1174.

59 *Id.* at 1180.

60 *Id.*

61 *Lucas*, 505 U.S. 1003. *Lucas* found a *per se* or categorical taking if no viable economic use remained. *Id.* at 1031-32. The plaintiff in *Loveladies Harbor* made a similar assertion, but he focused on the smaller portion of his property, which had no use remaining, while the defendant focused upon the entire parcel, which would require use of the default *Penn Central* analysis. *Loveladies*, 28 F.3d at 1180-81.

power of the state to regulate under common law nuisance doctrine."[62] Predictably, Loveladies Harbor argued that the denominator should apply to the narrower parcel and property interest under consideration, while the state argued for the broader and more inclusive geographic approach.[63] In upholding the Federal Claims Court's decision finding a taking, the Court of Appeals for the Federal Circuit ultimately determined that Loveladies Harbor's land developed or sold before the imposition of new wetlands regulations should not be included as a part of the parcel under review.[64]

Florida Rock also examined the relevant parcel factors, and the case illustrates how the same facts can be interpreted in the denominator analyses by different courts under divergent theories and may lead to different results. Parcel owner Florida Rock Industries, Inc. had purchased 1,560 acres of wetlands prior to the passage of the Clean Water Act, intending to extract limestone beneath the property, a process that necessitated the destruction of on-site wetlands.[65] Though it initially began mining operations without a permit, when notified by the Corps of its illegal activity Florida Rock ceased operations and began permit negotiations with the federal agency.[66] The Corps initially agreed to provide a permit for three years of mining on approximately ninety-eight acres, but after reviewing Florida Rock's revised application, the Corps denied the permit on environmental impact grounds.[67] The Court of Federal Claims found that prior to permit denial, the value of the land was $10,500 per acre, while post-denial, the property's value was negligible, and accordingly awarded Florida Rock $1,029,000 plus interest and attorneys' fees.[68]

The case was subsequently appealed, remanded, and appealed again.[69] During the first appeal, the Court of Appeals for the Federal Circuit found that the parcel inquiry had contemplated only the inter-

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[62] *Loveladies*, 28 F.3d at 1179. *See also* Courtney Tedrowe, *Conceptual Severance and Takings in the Federal Circuit*, 85 CORNELL L. REV. 586, 614-16 (2000) (discussing fairness and strategic conceptual severance by both owners and the government as applied in this case, a narrower analysis that the court avoided by adopting a larger denominator in its parcel determination).

[63] *Loveladies*, 28 F.3d at 1180-81.

[64] *Id.* at 1181.

[65] *Florida Rock*, 45 Fed. Cl. at 25.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 26.

[69] *Id.* at 25.

est in the limestone, whereas the correct value assessment should have been made in appraising the whole of the interests in the property.[70] On remand, the parties submitted competing assessments of the value of the property and comparable sales.[71] Again, the Federal Claims Court found a taking.[72] Nevertheless, on the second and final appeal to the Federal Circuit, the court, after reviewing evidence on the record of unsolicited offers to buy the property as well as other wetland sales at the time of the permit denial, looked to the "market as a whole" in support for its decision.[73] Given that the value of the property was not eliminated entirely through the permit denial but was merely reduced by an estimated $6,000 per acre, the court held that no taking had occurred.[74]

On remand from the Federal Circuit, the Court of Federal Claims posited the case outcome and analysis of the parcel as a whole conundrum as follows:

> The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead.[75]

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[70] Florida Rock Indus. Inc. v. United States, 18 F.3d at 1563.

[71] *Id.* at 1564.

[72] *Id.* at 1562.

[73] *Id.* at 1565.

[74] *Id.* at 1572.

[75] *Florida Rock*, 45 Fed. Cl. at 23-24; *see also supra* note 52 (outlining the procedural history of the *Florida Rock* case). The decision also echoed a significant factor that often plays a background role in case outcomes over wetlands development restriction challenges, as it did in *Loveladies* – the timing of the federal and state law with particular regard to whether such regulations were in place prior to purchase of the property. *See also* David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 842 (1999). With *Florida Rock*, the owners had purchased the property only months before the Clean Water Act was enacted. *Florida Rock*, 45 Fed. Cl. at 25. The economic burden of the regulation seemed to tip the scales in the owners' favor, with the partial taking that the court attributed to the regulation in its "market as a whole" analysis

Acknowledging that not all economic use of the property had been taken under the *Penn Central* analysis but that nonetheless a partial regulatory taking had occurred within the ninety-eight-acre parcel, the court awarded Florida Rock $752,444 plus interest from the date of the taking and encouraged the parties to engage in settlement agreements in lieu of additional appeals.[76]

IV. ADDITIONAL RELEVANT PARCEL OBSERVATIONS

While some have detailed various objective tests in relevant parcel inquiry cases,[77] the cases do not reflect such a facile analysis; however, several commonalities are frequent components of the cases.[78] This section reflects these commonalities.

A. *Penn Central* Remains the Rule

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency[79] serves as the case that most commonly stands for the temporal application of the parcel as a whole inquiry and reinforced the lasting significance of *Penn Central*.[80] The facts of the case were driven by an urgent need for protection and restoration of Lake Tahoe and implemented through land use moratoria.[81] Development adjacent to the lake significantly affected water quality and had the effect of adding sediment and nutrient loads, so that in 1980, the Tahoe Regional Planning Agency imposed two successive mora-

reflecting the balancing test undertaken by the court. *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, 201 (2004). *See also* Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), in which completion of a developer's phased development project was frustrated due to increased scope of regulation; nonetheless, the court did not find a taking.

[76] *Florida Rock*, 45 Fed. Cl. at 23.

[77] *See, e.g.*, John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535 (1994) (articulating an independent economically viable development test referenced in Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001)); STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(e)(5) (4th ed. 2009) (suggesting a "commercial unit" test generally in real estate transactions in the area).

[78] Eagle, *supra* note 4, at 556-57.

[79] 535 U.S. 302 (2002).

[80] *Palazzolo*, 533 U.S. 606; *see also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[81] John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ENVTL. L. REP. 11235 (2002).

toria on development, cumulating in a total ban lasting thirty-two months, to allow time to draft and implement a regional plan and implementing rules.[82] Landowners sued, claiming a temporary taking.[83] At the district court level, the plaintiffs' claims of a partial taking were rejected under *Penn Central* but validated under their total, albeit temporary, deprivation of economic use theory under *Lucas*.[84] On appeal, the Ninth Circuit reversed a trial court conclusion that a temporary taking had occurred, determining that *Lucas* applies only where all productive use is permanently denied.[85] Writing for the majority, Justice Stevens rejected the notion that one could sever dozens of months of regulation from the overall fee simple estate to serve as the basis of a taking; both temporal and physical aspects of property must be seen as part of the parcel as a whole.[86] Temporary restrictions that will terminate at a future, ascertained point pass with time and largely leave the parcel in its entirety unaffected. Accordingly, unless categorical takings are implicated through physical invasion or deprivation of total economic use,[87] the *Penn Central* factors govern.[88]

B. Common Ownership Provides Impetus for a Presumption of Contiguous Whole

In a recent case, *Lost Tree Village Corp. v. United States*,[89] a development company was denied use of a mosquito impoundment site by the Corps; however, the Federal Circuit, on appeal from the Court of Federal Claims, found no unified scheme or other evidence of intended inclusion of that site within a greater development plan

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[82] *Id.* Temporary moratoria were enacted after Tahoe Regional Preservation Authority ("TRPA") was unable to meet Congressional deadlines to set environmental threshold carrying capacities for Lake Tahoe. *See also* Angela Schmitz, *Taking Shape: Temporary Takings and the* Lucas *Per Se Rule in* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority, 82 OR. L. REV. 189, 198-200 (2003).

[83] Echeverria, *supra* note 81.

[84] *Tahoe-Sierra*, 535 U.S. at 316.

[85] *Id.* at 319.

[86] *Id.* at 331.

[87] *See, e.g.*, *Lucas*, 505 U.S. 1003 (holding that no viable economic use for the land and no administrative process for relief is a required element); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1992) (defining physical invasion of property).

[88] For further discussion of these points, see Steven Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. (2014) (forthcoming), *available at* http://ssrn.com/abstract=2359566, at 37-41.

[89] 707 F.3d 1286 (Fed. Cir. 2013).

and treated that parcel alone as the relevant parcel for a takings analysis.[90] Lost Tree had purchased 2,750 acres on a barrier island, other islands, and a peninsula, and proceeded with development on a piecemeal basis.[91] Its first 404 permit for a large portion of its holdings was approved after modifications; the lot at issue at the time was an impoundment site and was not included in development plans or plat recordings.[92] After the company learned through a neighboring development that such lots could potentially be used to generate mitigation credits, it submitted a permit application in order to utilize the site for that purpose, though no such use was made of the site, which was then overlooked by its owner for a number of years.[93]

In reviewing the nature of the development to ascertain the appropriate parcel denominator, the Federal Circuit both rejected the aggregate of plaintiff's holdings, as well as the lot alone as the relevant parcel.[94] The Court of Federal Claims had combined the lot at issue with another contiguous plat and other scattered undeveloped wetlands.[95] With that combination, the value of the relevant parcel then diminished by 58.4%, so that no taking was found.[96] In this and other analogous cases, the absence of economic expectations and the distinct temporal treatment of the parcel led Federal Circuit courts to believe that development of the lot had simply been ignored by the developer in the master plans.[97] Here, Lost Tree had left some lots undeveloped purposefully, advertising them as open spaces, not as part of a unified development scheme or development plan.[98] That unintentional separate treatment by the developers of this leftover parcel appeared to be a significant factor in the outcome of this case in which the Court of Federal Claims' aggregation of the lot at issue with other surrounding lots was rejected, the lot at issue was viewed

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90 *Id.* at 1288.

91 *Id.*

92 *Id.* at 1289.

93 *Id.* at 1290-91.

94 *Lost Tree*, 707 F. 3d at 1291.

95 *Id.*

96 *Id.*

97 *Id.* at 1290. The court's view of the undeveloped parcel at issue, originally omitted, then proposed as a wildlife open space preserve in one permit application, might be viewed as the "reciprocity of advantage" discussed in Pennsylvania Coal Co. v. McMahon, 260 U.S. 393 (1922), as open spaces, setbacks, and other regulatory requirements contribute to well-planned communities. Similarly, the externalities sustained by the *Lost Tree* plaintiffs are part of such burdens of land use regulations. *See* MELTZ, *supra* note 41, at 580-83.

98 *Lost Tree*, 707 F.3d at 1293.

as the relevant parcel and a taking was found.[99]

Daniels v. Area Plan Commission of Allen County[100] reflects the inverse situation, where common ownership afforded a beneficial presumption of a contiguous whole. Plaintiffs bought property in a subdivision that was platted for eighty lots and restricted to residential use via a restrictive covenant.[101] The owners of three lots along a major north-south corridor requested rezoning in order to redevelop the properties for commercial uses.[102] Against the plaintiffs' objections, the Allen County Planning Commission approved the rezoning request and vacated the restrictive covenant.[103] The plaintiffs filed a takings claim and were granted a preliminary injunction at the district court level that voided the removal of the restrictive covenant.[104] While ripeness was the primary issue, as the plaintiffs did not avail themselves of state court relief, the court reviewed the restrictive covenant and takings claim through an extensive analysis of the subdivision as a whole.[105] The voiding of the covenant was ultimately found to be a taking that conferred no public benefit, despite no demonstrable loss in property value of owners' neighboring land.

C. Facial Takings Claims Often Fail, Absent Specific Valuation of Denied Use

In *Keystone Bituminous Coal Association v. DeBenedictis*,[106] petitioners, an association of coal operators and corporations, challenged two sections of a Pennsylvania Subsidence Act ("Subsidence Act").[107] Section 4 of the Subsidence Act, as implemented by administrative rules of the Pennsylvania Dept. of Environmental Resources ("DER"), required approximately fifty percent of coal beneath three categories of structures to remain in place for certain uses: public

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99 *Id.* at 1294.

100 306 F.3d 445 (7th Cir. 2002).

101 *Id.* at 449.

102 *Id.* at 449-50.

103 *Id.* at 450.

104 *Id.* at 451.

105 *Daniels*, 306 F.3d at 459-61. The court also found that the plaintiffs' § 1983 claim was ripe, as the available state remedies (monetary damages and injunctive relief) would not provide adequate relief and, therefore, met the exception to the state remedies exhaustion requirement set forth in Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). *Id.* at 457-58.

106 480 U.S. 470 (1987).

107 *Id.* at 474.

buildings and noncommercial buildings used by public; residential dwellings; and cemeteries.[108] Section 6 of the Subsidence Act allowed DER to revoke a mining permit if coal extraction would cause damage to one of the three protected categories of uses and structures (and the permit holder had not repaired damage, deposited an equal sum, or satisfied claims within six months of subsidence).[109] At the District Court level, the court found for the DER and respondents, holding that although severely restricting a mineral right on some portions of a parcel involves one of the more important sticks in the bundle of rights, that action alone is not facially indicative of a taking.[110] The Court of Appeals, however, did not view the support estate as a singular property interest, but as part of the greater whole – inclusive of both the surface and mineral estate in the land's entirety.[111]

The Court, finding for the state, distinguished *Pennsylvania Coal Co. v. Mahon*,[112] on two grounds: first, unlike the Kohler Act that altogether prohibited mining causing subsidence under structures, here, health and safety were at stake; and second, the Kohler Act effectively enacted a blanket prohibition against mining in certain areas and was viewed by the Court as largely protective of private interests.[113] Here, the purpose of the Subsidence Act was to protect the public welfare.[114] Notably, the question presented was not an as-applied challenge but whether the enactment of the Subsidence Act itself was a facial taking.[115] As petitioners only brought a facial

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[108] *Id.* at 476. Conversely, the coal companies had an estimated 1.46 million tons of coal available in mines – with the restricted portion constituting less than 2% of the total resource. *See* MELTZ, *supra* note 41, at 410.

[109] *Keystone Bituminous*, 480 U.S. at 477.

[110] *Id.* at 479. For a lengthier discussion of the history behind subsurface mining restrictions, see MELTZ, *supra* note 41, at 411-16.

[111] *Keystone Bituminous*, 480 U.S. at 480.

[112] 260 U.S. 393 (1922).

[113] *Keystone Bituminous*, 480 U.S. at 484. The nature of investment-backed expectations in the vertical severance context, particularly as in *Pennsylvania Coal* and *Keystone Bituminous*, where the mining companies may have once owned both the surface and subsurface rights, raises interesting implications for the Takings Clause. *See* WRIGHT, *supra* note 75, at 201 (discussing whether the Takings Clause is designed or intended to insure all landowners against risky investments or only protect against catastrophic losses).

[114] *Keystone Bituminous*, 480 U.S. at 474.

[115] *Id.* at 493, 495. In contrast, the company in *Pennsylvania Coal* had shown that the statute precluded its ability to engage in its business. *See* Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 ENVTL. L. 881, 901 (1999).

challenge, some of their arguments were based on statistics and estimated costs and thus made discerning the relevant parcel more complex.[116] Justice Stevens noted in his decision that irrespective of the Subsidence Act, some of the underground coal would have had to remain in place given extraction constraints.[117] Petitioners also acknowledged in interrogatories that only two percent of coal would need to be left in place under the Subsidence Act and were unable to demonstrate the isolated effect of the regulation alone.[118] Relying upon prior parcel as a whole jurisprudence, the Court rejected an attempt to isolate and frame the coal into the sole property interest affected – either as a specific volume of coal or as a separate support estate.[119] Citing *Penn Central*, the Court explained that while "verbal formulizations" do not provide a prescriptive blueprint for determining the baseline condition of the property being taken, they do often provide sufficient sideboards (e.g., through the character and nature of action and interference) to review the merits of claims.[120] The surface regulation character of the action here was common under zoning regulations and, as noted in the Court of Appeals' decision, the support estate exists to serve either the minerals or surface estate and cannot be feasibly segmented from the parcel.[121]

D. The Influence of Prior Knowledge in the Parcel as a Whole Analysis

In those cases where developers and owners are aware prior to their purchase of existing property restrictions affording limited economic use or the likelihood that development permits will be denied and the owner decides to proceed nonetheless, courts have been significantly less inclined to find a taking. In *Ciampitti v. United States*,[122] the real estate developer plaintiff bought beachfront lots in New Jersey in the early 1980s bordering, in part, on an area designated as wetlands. The properties were below grade and did not have

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116 *Keystone Bituminous*, 480 U.S. at 495.

117 *Id.* at 498.

118 *Id.* at 496, 498.

119 *Id.* at 497-98; *see also* Stedfast, *supra* note 115, at 913 (discussing the application of *Penn Central's* 'reciprocity of advantage' and the public benefit that accrues from the prevention of harm to the community through such regulations).

120 *Keystone Bituminous*, 480 U.S. at 497.

121 *Id.* at 498, 501.

122 22 Cl. Ct. 310 (1991).

streets or utilities.[123] Over the subsequent years, the developer and various business partners invested in dozens more lots, some owned by a family predecessor venture group.[124] In 1983, the plaintiff purchased forty-five lots; fourteen were designated wetlands and eighteen were subject to some form of regulation.[125] As the neighboring area had, in part, been developed at the time of purchase, and since the properties contained a deed grant that allowed removal-fill, the developer believed that he would nonetheless be permitted to develop the area notwithstanding federal limitations.[126] Negotiated settlements between the state and developer allowed for upland development, but after the applicable wetland permit application was denied, the developer filed suit alleging a taking.[127] In finding that no taking had occurred, the court, in its relevant parcel analysis, was perhaps most influenced by the actual and constructive notice of the applicable wetland regulations prior to purchase, thereby reducing any legitimate investment-backed expectations.[128]

Walcek v. United States.[129] provides an analogous case, where actions by the developer undoubtedly tainted the evaluation of its takings claim. Prior to the Clean Water Act, the plaintiff purchased 14.5 acres in two transactions, failing to conduct due diligence on suitability for development prior to purchase.[130] Though the town had zoned the property for residential use, approximately four-to-five acres were regulated as wetlands by the State of Delaware.[131] During an attempted sale, the plaintiffs discovered the applicable regulations, and then knowingly began to fill the property without a permit, terminating that activity only after the issuance of a cease and desist order.[132] After a takings complaint was filed, the Corps authorized some development in a 1996 permit conditioned on wetland remediation

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123 *Id.* at 312.

124 *Id.* at 312-13.

125 *Id.* at 313.

126 *Id.* at 315.

127 *Ciampitti*, 22 Cl. Ct. at 316-17.

128 *Id.* at 315; *see* Good v. United States, 189 F.3d 1355, 1362-63 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000) (finding no taking when the landowner similarly continued to proceed with property development irrespective of increasing regulation); *see also* Coursen, *supra* note 75, at 840.

129 303 F.3d 1349 (Fed. Cir. 2002).

130 *Id.* at 1351.

131 *Id.*

132 *Id.* at 1352.

elsewhere.[133] Accordingly, the Federal Claims Court determined that it was not a categorical taking.[134] On appeal, the Court of Appeals concurred that the proper acreage was what had been submitted to the court originally: that out of the 14.5 whole acres, the 13.2 federal wetland acres had been impacted by regulation, and since the 1996 permit allowed 2.2 acres to be developed, all economically viable use had not been deprived.[135] The plaintiff's permit denial was thus not a categorical taking, as the court's relevant analysis found that the remaining portion of the property that could be developed provided an economically viable use.[136]

E. Interruptions in Ownership and Takings Claims

In *Palazzolo v. Rhode Island*,[137] petitioner Anthony Palazzolo had invested in three undeveloped salt-water marshland waterfront properties with business partners in 1959.[138] He later bought out his associates but ownership of the parcels remained under the corporate name.[139] Petitioner submitted various applications for residential lot development; all were ultimately denied by state agencies.[140] In 1971 and 1983, Rhode Island enacted further regulations protecting salt marshes as coastal wetlands.[141] In 1978, the corporation's charter was administratively revoked, and petitioner inherited the property as the sole shareholder.[142] He subsequently filed an inverse condemnation action after the final denial of a beach club proposal in 1985, seeking $3.15 million in damages derived from his appraisal of the property's highest and best use, i.e., for residential subdivision lots.[143] The lower courts ruled in favor of the state, finding that an upland parcel of the property still had value, Palazzolo's claim was not yet ripe, and, furthermore, he had no right to challenge pre-1978 regula-

133 *Id.* at 1353.
134 *Walcek*, 303 F.3d at 1353-54.
135 *Id.* at 1356.
136 *Id.* at 1355-56.
137 533 U.S. 606 (2001).
138 *Id.* at 613.
139 *Id.*
140 *Id.* at 614.
141 *Id.*
142 *Palazzolo*, 533 U.S. at 614.
143 *Id.* at 615-16.

tions because of the interruption in the chain of title.[144]

The relevant parcel issue before the Court involved a change in the chain of title of the properties from Palazzolo's joint ownership with his associates to his later acquisition of the subject properties as a sole owner, which commenced after the regulations were enacted.[145] The state argued that the passage of title from the corporation to Palazzolo as an individual should serve to restart the clock on the permissibility of takings challenges.[146] The Court was not persuaded, instead holding that the effect of such a rule would be draconian.[147] Such a practice could effectively insulate a state against takings claims by later landowners, regardless of how egregious the restriction might be and would equally bar successors or inheritors to property from later bringing claims.[148] Equally, the Court observed that notice of prior statutes does not obviate a state's "duty to compensate for what is taken."[149]

As the Court found the petitioner's claims were not unripe, the case was remanded to the state Supreme Court for further examination of the economic impact of the denial of the permits.[150] Justice O'Connor concurred in a separate opinion, also cautioning that the discussion of the relationship between timing of ownership and regulation is not to be given undue weight, as the "polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."[151] Nevertheless, as Justice O'Connor noted in her concurrence, a landowner's notice of a regulation was not irrelevant: "[I]t would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."[152]

An earlier, if unusual, takings case further illustrates the tension between proffered benefits and burdens of land use controls. In

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144 *Id.* at 616.

145 *Id.* at 626.

146 *Id.* at 626-28; *see* 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, 131-32 (2003) (noting that the effect of *Palazzolo* served to reinforce *Penn Central* as the rule, even when substantial losses in property value are sustained, absent a *Lucas* categorical taking).

147 *Palazzolo*, 533 U.S. at 627-28.

148 *Id.* at 627.

149 *Id.* at 628.

150 *Id.* at 632.

151 *Id.* at 633 (O'Connor, J., concurring).

152 *Palazzolo*, 533 U.S. at 633.

Hodel v. Irving,[153] the plaintiffs were Oglala Sioux heirs that brought a takings challenge to the Indian Land Consolidation Act.[154] The intent behind the statute was to keep tribal land under tribal ownership, as allotment of lands often ended up in non-tribal hands.[155] The Act attempted to preserve ownership through a prohibition on property transfers to multiple interests.[156] The Act provided that where the interest represented two percent or less of the total acreage, it escheated to the tribe.[157] Deprived of ownership through this process, the plaintiffs brought an as-applied takings claim.[158] The Court of Appeals overturned the district court's holding that the Act was constitutional, finding that the plaintiffs had a right to control disposition of their own property.[159] The Supreme Court concurred that the right to leave property to relatives and others in death was one of the most valuable sticks in the bundle of sticks and that the seizure of tribal property upon an owner's death and transfer of title to the tribe exceeded any reasonable policy goals of the statute.[160] Here, the parcel was not only the immediate, but also the future, interest in ownership.[161]

V. CONCLUSION

As a philosophical construct, it is impractical to believe that an objective relevant parcel takings test can be construed from such highly fact-specific cases often driven by changing regulatory priorities. On balance, relevant parcel inquiries may also provide a more fair and comprehensive, albeit somewhat subjective approach to the application of the *Penn Central* factors.[162] However, on behalf of those who bear the primary burden of such regulations, there is much value to be sought in refining and clarifying multifactor analyses of

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153 481 U.S. 704 (1987).

154 *Id.* at 709-10.

155 *Id.* at 712.

156 *Id.*

157 *Id.* at 709.

158 *Hodel*, 481 U.S. at 710.

159 *Id.*

160 *Id.* at 716.

161 *Id.* at 717.

162 *See* Dwight Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003); *see also* Daniel R. Mandelker, *Speech: New Property Rights under the Taking Clause*, 81 MARQ. L. REV. 9, 19 (1997) (echoing this reticence to set formulaic tests in his critique of segmentation analysis's contribution to takings theory).

the relevant parcel.[163] There are some factors that may be gleaned from the cases thus far, however:

1. *Penn Central* remains the default analysis for any regulatory takings analysis that is not in a presumptive *per se* category.[164]

2. Contiguous parcels in the same ownership will be presumed to be the relevant parcel for takings purposes.

3. Facial claims involving multiple parcels in the same ownership will not likely result in a successful regulatory takings claim. Specific facts must be analyzed.

4. Concepts as indefinite as "property rights," fairness, and investment-backed expectations are significant latent factors in determining whether a parcel may be carved out from other ownerships and treated separately.

5. Similarly, courts are not supportive of unlawful conduct, such as the knowing failure to secure required permits, in evaluating a relevant parcel.

6. Conversely, a court may be impressed by the treatment of a parcel as separate from other lands under the same ownership over time.

In short, the recognition of the allocation of burdens and benefits of economic life by a court in dealing with the contention that a parcel should be treated separately is not governed by a simple binary equation. Rather, the cases demonstrate that the judicial task is to weigh and balance an open-ended number of factors to achieve an optimum constellation of property rights, fairness, and investment-backed expectations. While the struggle to achieve that balance is difficult, in the absence of the Supreme Court's cutting the Gordian

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[163] *See Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) (stating that "[t]here is an inherent tendency towards circularity . . . for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."); *see also* Eagle, *supra* note 4, at 552.

[164] *See Lucas*, 505 U.S. at 1015*; see also Loretto*, 458 U.S. at 432, 440 (demonstrating alternative analytical frameworks to the *Penn Central* approach).

knot, that task remains the expectation of the courts for the foreseeable future.