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The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far

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The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*

> "The DENOMINATOR is the number which shows into how many parts a thing has been divided . . . . The NUMERATOR is the number which shows how many parts, expressed by the denominator, are taken."[1]

I. INTRODUCTION

In 1968, the owners of the Grand Central Terminal in New York City submitted a proposal to build a high-rise over their existing property.[2] The City of New York, under a historic preservation regulation, refused to let the property owners continue with construction because of fears that the plan would destroy the historic architecture of the building. As a result, the building owners brought an inverse condemnation suit.[3] In determining how to analyze the significance of the city's regulation on the owners' property, the Supreme Court stated that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . [on] the parcel as a whole."[4]

In the past thirty years, this statement, requiring courts to focus on the "parcel as a whole," has developed into what courts and commentators have termed the "denominator problem."[5] The Court's takings jurisprudence attempts to determine whether a government regulation results in a taking by looking at its effect on the "parcel as a whole," but, it might be unclear "inro how many

* I would like to thank Professor John Fee for providing invaluable feedback and guidance during the drafting of this piece—despite my incessant criticism and questioning. I also owe thanks to Marc Swenson for his help in preparing this Comment for publication.

1. JAMES M. COOK, THE WILLIAMS & ROGERS MENTAL ARITHMETIC 77 (1897).
2. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 116 (1978).
3. *Id.* at 116–17, 119.
4. *Id.* at 130–31.
5. *See, e.g.*, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179–80 (Fed. Cir. 1994); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 664–68 (1996).

parts [the] thing has been divided."[6] Should a court consider the effect of the regulation compared to all of the owner's property, all neighboring properties, all properties used for a similar use, or only the property affected by the regulation?

If the court only looks to the portion of the property affected by the regulation, the effect on the parcel as a whole will be quite large. If the court looks to all of the owner's property in aggregate, then the effect on the parcel as a whole might be quite small. In short, the more inclusive the definition of the "parcel" denominator, the smaller the impact on the entire parcel, and the less likely a property owner will be able to succeed on a takings claim; conversely, the more restrictive the definition of the "parcel" denominator, the more likely a property owner will be able to receive compensation for government action that affects the value of the property.

The aim of this Comment is to analyze the approaches to the relevant parcel problem and determine the best test for addressing the issue under the current legal regime. The discussion in this piece will focus on horizontal divisions of property—the horizontal parcel as a whole; i.e., the metes and bounds division of property into discrete lots as opposed to divisions of three-dimensional or abstract property rights such as air rights, subsurface rights, temporal rights, water rights, etc. This piece is not a criticism of Supreme Court jurisprudence regarding the denominator problem, but is a practical evaluation and recommendation based on existing law. By taking this approach, this Comment hopes to provide courts and practitioners with guidance in choosing a method for approaching the denominaror issue.

Specifically, this Comment proposes that courts should adopr a test in line with the Massachusetts Supreme Court in *Giovanella v. Conservation Commission of Ashland*[7] with slight modifications. Under this proposed rule, courts would apply a presumption based on contiguous, commonly-owned property; this presumption could only be rebutted by clear and convincing evidence that it upsets the property owner's reasonable expectations, which are approximated by a number of equitable factors. Although this approach is not without its own problems, ir best comports with the results of prior Supreme Court precedent and the policies behind the Supreme

6. COOK, *supra* note 1, at 77.

7. 857 N.E.2d 451 (Mass. 2006), *cert. denied*, 127 S. Ct. 1826 (2007).

Court rule, and gives some clarity and predictability for litigants, while providing flexibility to account for unjust circumstances.

Part II provides a background regarding the framework of the Supreme Court's regulatory takings jurisprudence and then analyzes what limited guidance the Court has given on how to apply the relevant parcel rule. Part III discusses possible solutions to the denominator problem that courts or commentators have adopted or recommended.[8] These possible solutions include (1) the contiguous property under common ownership approach, (2) the actual or intended use of the property approach, (3) the multi-factored balancing test, as adopted by the Federal Circuit, (4) the independent viable economic unit approach, and (5) the scope of government regulation approach. Part IV will introduce and analyze the test adopted by the Massachusetts Supreme Court in 2006 and the derivative approach that this Comment proposes. Part V offers a brief conclusion.

II. THE SUPREME COURT, REGULATORY TAKINGS, AND THE HORIZONTAL PARCEL AS A WHOLE

A brief review of the origins of the regulatory takings doctrine and a property owner's ability to collect on a regulatory taking is necessary to understand the parcel as a whole rule and its application. This Parr will provide an overview of general regulatory takings jurisprudence, discuss the Court's guidance on the relevant parcel specifically, and briefly analyze the motivating policy behind the Court's judgments regarding the parcel as a whole.

8. This Comment only addresses those solutions that purport to follow Supreme Court precedent on the issue. For example, Professor Peter Byrne argues that restrictions on use through regulations have never historically qualified as takings under the Fifth Amendment and property owners should never receive compensation for restrictions on use. J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995). This test ignores and criticizes Supreme Court jurisprudence, making it impossible for a lower court to adopt the test on its own while following binding precedent. Similarly, Epstein's broad approach to compensation of the takings clause, *see generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985), would require overturning Supreme Court precedent and will not be directly addressed by this piece. *See* Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 17 (criticizing Supreme Court application of the parcel as a whole rule and stating that "no amount of precedent can render coherent a position that is not"). State constitutional decisions that conflict with the Supreme Court's interpretation of the Takings Clause will also not be considered. *See, e.g.*, Coast Range Conifers, L.L.C. v. Oregon, 76 P.3d 1148, 1158 (Or. Ct. App. 2003), *rev'd*, 117 P.3d 990 (Or. 2005).

A. Regulatory Takings Framework Generally

The Takings Clause of the Fifth Amendment to the Constitution states: "[P]rivate property [shall not] be taken for public use, without just compensation."[9] For the first century of our country's existence, the Court limited this restriction on government power to physical invasions or appropriations of land.[10] However, in *Pennsylvania Coal Co. v. Mahon*, the Supreme Court first recognized that a government restriction of the owner's use of land, even without any appropriation or physical invasion, could require just compensation under the Takings Clause.[11]

Justice Holmes, writing for the Court, stated that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[12] Despite this practical government interest, he recognized that this power "must have its limits or the contract and due process clauses are gone."[13] Justice Holmes then stated the general rule in broad terms: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[14]

Almost fifty years after *Mahon*, the Court established a general test for determining if a regulation has gone "too far."[15] In *Penn Central Transportation Co. v. New York City*, the Court adopted a three-part "ad hoc" test for determining if a regulation constitutes a taking.[16] The Court recognized that the purpose of the Fifth Amendment is to "'bar Governmenr from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,'"[17] but also clarified that, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic

9. U.S. CONST. amend. V.

10. 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, 183 n.24 (2004) (collecting cases that show the Court's limited historical view of regulatory takings).

11. 260 U.S. 393, 415–17 (1922).

12. *Id.* at 413.

13. *Id.*

14. *Id.* at 415.

15. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–28 (1978).

16. *Id.* at 124–25.

17. *Id.* at 123–24 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[18] The Court established that this inquiry into justice and fairness requires a court to evaluate (1) the "economic impact of the regulation," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) the "character of the government action."[19]

Since *Penn Central*, the Court has recognized one additional test for determining if a government regulation constitutes a taking.[20] In *Lucas v. South Carolina Coastal Council*, the Court established that a taking occurs "where regulation denies all economically beneficial or productive use of land."[21] Since *Lucas*, the Court has restated that this categorical taking occurs when a regulation deprives the property of "all economic value."[22] Although it is not clear whether the Court means that a deprivation of economic use or economic value will trigger the categorical taking,[23] it is clear that the regulation in *Lucas*, which restricted the owner's ability to build any permanent residential structure, thus leaving his property "valueless," was significant enough to constitute a taking.[24] Justice Kennedy, in his concurring opinion, stressed the importance of the owner's expectations in applying the *Lucas* rule. He remarked that "[t]he finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations."[25] Similarly, "the means, as well as the ends, of regulation must accord with the owner's reasonable expectations."[26]

18. *Id.* at 124.

19. *Id.*

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

21. *Id.* at 1015.

22. Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001).

23. For a discussion of whether economic use or economic value is the appropriate inquiry, see James S. Burling, *Use Versus Value in the Wake of* Tahoe-Sierra, *in* TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF *TAHOE-SIERRA* 99–106 (Thomas E. Roberts ed., 2003); Douglas T. Kendall, *The Use/Value Debate and* Tahoe, *in* TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF *TAHOE-SIERRA*, *supra*, at 95–98.

24. *Lucas*, 505 U.S. at 1020, 1031–32. Although the Court remanded the case for a determination of whether background principles of state law prohibited the uses by Lucas, the Court recognized without such principles the regulation would constitute a taking. *Id.* at 1031–32.

25. *Id.* at 1034 (Kennedy, J., concurring).

26. *Id.* at 1035

In summary, under the current legal regime, a property owner can establish a taking where a regulation limits the use or value of property by applying the three-part ad hoc inquiry under *Penn Central* or by showing a complete deprivation of economic value or economic use under *Lucas*. Under both of these tests, the size of the parcel is a commanding variable in the takings equation. As the Supreme Court has noted:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."[27]

B. The Parcel as a Whole

Generally, the Court has refused to allow a property owner to claim a taking based on a property interest severed from the parcel as a whole. Although the Court has struggled in the past with the logical consistency of this rule, and has recognized some exceptions, it appears to stand as the guiding principle under the Court's current precedent.

1. Introduction of the parcel principle

In *Penn Central*, the Court first established the general principle that a court must look to the entire parcel, without severing individual property interests.[28] In this case, a historic preservation program run by the City of New York prohibited the owners of the Grand Central Terminal from constructing a proposed high-rise on the top of their structure.[29] The owners had entered into a contract for construction and lease of the high-rise with another company and claimed that the Ciry had taken their property interest in these air rights.[30] The state court examined the takings claim in light of all the property held by owners in the entire area and found that a taking

27. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

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

29. *Id.* at 116–17.

30. *Id.* at 116, 119.

had not occurred.[31] However, the air right to the property could also have been viewed as an independent property interest that had been taken without just compensation. The Supreme Court refused to view the relevant property as a simple right to airspace or as the aggregate of all the owner's holdings in the area, instead focusing on the city tax block:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole*—here, the city tax block designated as the "landmark site."[32]

Although the Court rejected the property owner's argument and the state court's conclusion regarding segmentation of the property, the Court failed to explain its own application of "the parcel as a whole."[33] Why did the parcel as a whole have to refer to the entire city tax block? Was it because the ordinance designated it as the landmark site, because the land was a contiguous, commonly-owned piece of property, or some other reason? The Court failed to provide any additional guidance.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, the Court reaffirmed its refusal to sever property interests from the parcel as a whole.[34] In *Keystone*, a Pennsylvania regulation required fifty percent of the coal beneath certain structures to remain in place to provide surface support.[35] The plaintiffs, owners of subsurface mining rights in the state, argued that the Pennsylvania statute violated the Takings Clause by effectively appropriating the coal and taking their interest in the separate "support estate" recognized under Pennsylvania law.[36]

The Court began its analysis by reiterating the parcel as a whole rule from *Penn Central*.[37] The Court also quoted language from a

31. Penn Cent. Transp. Co. v. New York, 366 N.E.2d 1271, 1276–77 (N.Y. 1977).

32. *Penn Cent.*, 438 U.S. at 130–31 (emphasis added).

33. *Id.* (continuing with the remainder of the Court's analysis without expounding on how the Court determined that the landmark site was the relevant parcel).

34. 480 U.S. 470, 506 (1987).

35. *Id.* at 476–77.

36. *Id.* at 478–79.

37. *Id.* at 497.

previous decision in *Andrus v. Allard*: "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[38]

With regards to the coal in place, the Court concluded that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes."[39] The Court justified this position by recognizing a number of zoning ordinances that also prohibit use of valuable units of property, such as, "[a] requirement that a building occupy no more than a specified percentage of the lot on which it is located" or a "setback ordinance requiring that no structure be built within a certain distance from the property line."[40] In response to Keystone's argumenr that Pennsylvania recognized a "support estate" and that the regulation deprived the owner of the value of that estate, the Court concluded that it would not allow such "legalistic distinctions" to sever "a bundle of property rights."[41] Thus, the Court refused to allow Keystone to sever the subsurface property interests for purposes of the takings analysis.

Keystone and *Penn Central* establish that the parcel as a whole rule does not allow a property owner to sever subsurface rights or air rights from the remainder of the property. However, these cases do not definitively answer whether the parcel as a whole rule applies to horizontal segmentation of property as well.

2. Horizontal divisions and the parcel

In *Lucas*, the Court recognized the difficulty in applying the rule to horizontal divisions of property—i.e., divisions of lot boundaries, but failed to provide any definitive characterization of how to apply the test.[42] After laying out the Court's categorical rule for regulatory takings, the majority noted:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation

38. *Id.* (quoting Andrus v. Allard, 444 U.S. 51, 65–66 (1979)).
39. *Id.* at 498.
40. *Id.*
41. *Id.* at 500.
42. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992).

> requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[43]

Despite this general reflection on the difficulty of applying the rule, the majority did provide some guidance. First, the opinion points to the state court decision in *Penn Central*, where the court had utilized all the property held by the landowner in the vicinity for determining the economic effect of the tegulation.[44] The Court noted that this would be "an extreme—and, we think, unsupportable—view of the relevant calculus."[45] Thus, it appears the Court will not uphold a parcel definition based on all of a property owner's unrelated holdings in a given area. The Court went on to speculate that

> [t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[46]

Ultimately, the Court failed to resolve the issue because the government had deprived Lucas of all economic use that he held in the area.[47]

In *Palazzolo v. Rhode Island*, the Court also mentioned the problems of applying the parcel as a whole rule to horizontal divisions of land, but again, it did not provide additional clarity in how to apply the rule.[48]

> Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole [such as Keystone] but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id*
47. *Id.*
48. Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2000).

> commentators. Whatever the merits of these criticisms, we will not explore the point here.[49]

The Court found that the petitioner had failed to raise the denominator issue in state courts and the argument was not one of the issues granted for certiorari.[50] Based on *Palazollo* and *Lucas*, it is unclear how to apply—or even if the Court requires—the parcel as a whole analysis with respect to horizontal divisions of land. However, the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* shed some light on the issue, and, according to some commentators, resurrected the parcel as a whole rule.[51]

Tahoe-Sierra involved a takings challenge to a moratorium on construction for areas surrounding Lake Tahoe.[52] Property owners argued that the moratorium constituted a taking under the *Lucas* test because it deprived them of all economic use of their property for an extended period of time.[53] The Court stated that the starting point for the takings analysis is to ask "whether there was a total taking of the entire parcel."[54] The Court decided that by dividing the property interest up into "temporal segments"—i.e., divisions of time—the petitioner's argument "ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"[55]

Thus, despite the language in *Lucas* and *Palazzolo* questioning the application of the parcel as a whole rule, *Tahoe-Sierra* reaffirmed that the Court would continue to utilize the test for regulatory takings. The Court also provided some guidance on the property interest courts should look to in determining the relevant parcel:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both

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49. *Id.* (citations omitted).

50. *Id.* at 631–32.

51. Timothy J. Dowling, Tahoe-Sierra*'s Effect on the Parcel-as-a-Whole Rule and Its Importance in Defending Against Regulatory Takings Challenges*, *in* TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF *TAHOE-SIERRA*, *supra* note 23, at 33.

52. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 310–12 (2002).

53. *Id.* at 320.

54. *Id.* at 331.

55. *Id.*

> dimensions [—geographical and temporal—] must be considered if the interest is to be viewed in its entirety.[56]

By defining a property interest based on its metes and bounds, the Court reaffirmed that the parcel as a whole rule applies not only to subsurface rights, air rights, and temporal rights, but also, at least on some level, to horizontal segmentation of land.

Exactly which metes and bounds to apply is still unclear based on Supreme Court precedent. Indeed, "[t]o say that a parcel of land is defined by its metes and bounds is a tautology; we still need some external rule to tell us what 'it' is."[57] However, as discussed above, the Court has given some guidance, even if it is only in extreme circumstances. Language in *Lucas* indicates that the Court is unwilling to go so far as to include all unrelated property held by a landowner in a given area. On the other hand, from the language in *Keystone*, it appears that the Court is also unwilling to narrow the parcel so far as to allow individuals to collect for traditional setback requirements or reasonable requirements for open space. Within these limitations, it is unclear how a lower court should define the relevant parcel for determining if a regulation has gone too far.

C. Theoretical Underpinnings of Modern Regulatory Takings Jurisprudence

Before moving on to the possible applications of the parcel as a whole rule, this section briefly analyzes the purpose of the regulatory takings jurisprudence and the parcel as a whole rule based on the Supreme Court cases discussed above. Identifying the Court's purpose behind these rules is vital to determining which policies a lower court should consider in adopting a more specific rule for the parcel as a whole.

1. Protection of expectations, fairness and justice, not necessarily acreage

The purpose of the regulatory takings jurisprudence correlates with the view originally espoused by Professor Frank I. Michelman:

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56. *Id.* at 331–32 (citation omitted).

57. John Fee, Tahoe-Sierra *and the Takings Denominator*, *in* TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF *TAHOE-SIERRA*, *supra* note 23, at 39, 42.

> [T]he test poses not nearly so loose a question of degree; it does not ask "how much," but rather . . . it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.[58]

This characterization of regulatory takings focuses on the clear expectations of the owner, and thus has more to do with the equitable impact on the owner's psyche than on the size of the property interest the government has proscribed. As Professor Michelman pointed out, such a view rests on three assumptions:

> (1) that one thinks of himself not just as owning a total amount of wealth or income, but also as owning several discrete "things" whose destinies he controls; (2) that deprivation of one of these mentally circumscribed things is an event attended by pain of a specially acute or demoralizing kind, as compared with what one experiences in response to the different kind of event consisting of a general decline in one's net worth; and (3) that events of the specially painful kind can usually be identified by compensation tribunals with relative ease.[59]

If these assumptions are accepted, the goal is ro identify the especially painful kind of regulations that lead to the complete and demoralizing loss of property interests that the owner views as discrete "things." This view appears to best approximate the takings jurisprudence adopted by the Court to this point.

The Supreme Court has clearly stated the purpose it perceives in interpreting the Takings Clause. "While scholars have offered various justifications for [the Takings Clause], *we have emphasized* its role in 'bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[60] By emphasizing justice, fairness, and the burdens of individual property owners, the Supreme Court seems less interested in the total size of a particular property interest that the owner loses than in the burden that a regulation places on the

58. Michelman, *supra* note 27, at 1233.

59. *Id.* at 1234.

60. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)) (emphasis added).

property owner and the fairness of that burden in comparison with other owners in the public at large.[61]

Consider the possible solution that Justice Scalia mentioned in *Lucas* to the difficulty of the denominator problem: "[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property."[62] Notice how even this solution focuses on the reasonable expectations of the owner, rather than on the specific size of the property inrerest the government allegedly condemned. This correlates with Justice Kennedy's emphasis in his *Lucas* concurrence that "the means, as well as the ends, of regulation must accord with the owner's reasonable expectations."[63]

Similarly, consider the prongs of the *Penn Central* rest that look to the owner's expectations, the diminution in value of the property, and the character of the government action[64]—but where in that test does the Court isolate and analyze the actual property interest the government is alleged to have taken? The test fails to focus on the property interest because the purpose of the Supreme Court's regulatory takings jurisprudence is not to protect against the taking of specified size or type of property interest.

In short, the regulatory takings doctrine appears to be less of an absolute protection of specific property interests than a protection against violating the owner's clear expectations in extreme circumstances. Under the currenr legal regime, both large and small property owners bear the risk that they will not be able to use large portions of their property due to government regulation, but each has the assurance that if the government violates their investment-backed expectations under the *Penn Central* test or complerely deprives the property of all economic use under *Lucas* they will receive compensation.

61. *See* Stephen J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 922 (criticizing Justice O'Connor's decision in *Lingle* and recognizing that the Court placed "emphasis on the fairness principle, as opposed to property-based or other justifications for the Takings Clause").

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

63. *Id.* at 1035 (Kennedy, J., concurring).

64. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978).

2. Does this view make sense?

Of course, a general sense of logic dictates that application of the Takings Clause should focus on what the government has taken, not on what the property owner has left to use. "To use the analogy of a criminal expropriation, whether a mugger's victim had a large quantity of undiscovered cash in another pocket is not germane to the crime."[65] Similarly, the text of the Constitution states that the government cannot take "property"; it does not state that the government can take property, so long as the property it takes is not greater than a certain percentage of the property owner's other holdings.[66]

With regards to the Constitutional text, it is important to remember that for over a century, no court recognized that the Constitution required compensation for regulations of the use of property. Certainly, the plain text and history of the Takings Clause would not indicate that the government should compensate for restricting the use of any property interest over a certain size.[67] One rational view is that the judiciary has carved out a limited exception to the general prohibition on compensation for regulations takings, and like many other constitutional rights in the modern era, the limitation on government will only take effect in extreme circumstances.[68]

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65. Eagle, *supra* note 61, at 912.

66. U.S. CONST. amend. V.

67. *See* FRED BOSSELMAN ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 104 (1973) ("There is no evidence that the founding fathers ever conceived that the takings clause could establish any sort of restrictions on the power to regulate the use of land."); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1101 (2000) ("[T]he Takings Clause was originally understood as referring only to appropriation."); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1292 (1996) ("[T]he Takings Clause means what it says about land use regulation: nothing. The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking."); William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985) (the just compensation clause "was to apply only to the federal government and only to physical takings").

68. Consider, for example, the areas of substantive due process, Lemke v. Cass County 846 F.2d 469, 472 (8th Cir. 1987) ("Such [substantive due process claims] should, however, be limited to the truly irrational—for example, a zoning board's decision made by flipping a coin . . . ."), or equal protection, Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (requiring "proof that the cause of the differential treatment of which the plaintiff complains [is] a totally illegitimate animus toward the plaintiff by the defendant" in order to

From a policy perspective, as the *Mahon* Court noted, "[g]overnment hardly could go on" if private citizens could sue based on every regulation that affected their land values or ability to use their property.[69] Unlike physical invasion or taking of title, which are easy for the government to identify prior to giving compensation, almost any government action can result in a diminution of property value or a limitation of use in property. Thus, any form of regulatory taking necessarily involves drawing a difficult line so that government can "go on" without allowing the government to go "too far."[70]

Applying any set size of property that would determine a taking raises the risk that the government will either deprive small property owners of significant portions of their property without meeting the threshold limit, or the possibility that large property owners will be able to collect for reasonable restrictions on use, such as traditional setback ordinances. In short, the unique problem in deciding which restrictions the government should have to pay for provides some explanation for the Court's focus on burdens and expectations rather than pure "property."

III. POSSIBLE SOLUTIONS TO THE "DENOMINATOR PROBLEM"

In light of the relative scarcity of specific guidance in Supreme Court precedent on this issue, lower courts and commentators have attempted to structure possible solutions to the denominator problem on their own. This Part analyzes the viability of some of these solutions, including rules based on contiguous, commonly-owned property, the landowner's use or intent, multi-factored balancing, independent viable economic units, and the government regulation itself.[71]

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make a prima facie case under the Equal Protection Clause (quoting Olech v. Village of Willowbrook, 160 F.3d 386, 388 (7th Cir. 1998))).

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

70. *See id.* at 413, 415.

71. Professor John Fee has analyzed the problems with tests based on contiguous, commonly-owned property; the landowner's intent; and the scope of the government relation. *See generally* John Fee, *Of Parcels and Property*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 101 (2001) [hereinafter Fee, *Of Parcels and Property*]; Fee, supra note 57; John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994) [hereinafter Fee, *Unearthing the Denominator*]. This Comment attempts to briefly summarize the issues that Professor Fee has already established, while emphasizing additional analytical problems with these approaches and/or areas where the author disagrees with Professor Fee's analysis.

A. Contiguous, Commonly-Owned Property

One method for determining the relevant parcel is to look to the owner of the regulated property and include any other contiguous property held by the same owner. The Michigan courts have traditionally applied this rule ro determine the relevant parcel, and the U.S. Court of Claims has utilized this approach in some cases.[72]

This test appears to be the logical starting point for determining the relevant parcel. There are an infinite number of ways to divide a given property into discrete horizontal segments, and courts generally look to the contiguous property held by the same landowner as a logical alternative.[73] Similarly, in many cases it can act as a reasonable approximation of owner expectations—logically, a property owner will likely expect the government ro treat a contiguous body of property as a single unit.

In addition, this approach has the advantage of a simple bright-line rule—it gives property owners and governmenrs clear notice regarding what property the court will look to when determining if a regulation has gone too far. By decreasing uncertainty between the parties regarding how the court will treat the relevant parcel, this rule should result in increased settlement, fewer trials and appeals, and ultimately in a decreased administrative burden on the courts.

Although the contiguous, commonly-owned property approach usually provides clarity to the litigants, it is subject to criticism because (1) contiguous, commonly-owned property is not always

72. Deltona Corp. v. United States, 657 F.2d 1184, 1191–94 (Ct. Cl. 1981); Jentgen v. United States, 657 F.2d 1210, 1213 (Ct. Cl. 1981); Animas Valley Sand & Gravel, Inc v. Bd. of County Comm'rs, 38 P.3d 59, 68 (Colo. 2001) ("The appropriate 'denominator' for determining the economic impact of a regulation is the contiguous parcel of property owned by the landowner . . . ."); Bevan v. Brandon Township, 475 N.W.2d 37, 43 (Mich. 1991) (holding that "contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances"); *see also* Rathka v. City of Troy, No. 256482, 2006 WL 120376 (Mich. App. Jan. 17, 2006) (holding that two contiguous, commonly-owned properties were categorically included in the parcel as a whole).

73. *See, e.g.*, Forest Props., Inc. v. United States, 177 F.3d 1360, 1365–66 (Fed. Cir. 1999) (refusing to sever submerged property adjacent to upland property); American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364, 372 (9th Cir. 1981) (finding that contiguous parcels should be considered one unit unless landowner proved different zoning under lots' respective development plans); Ciampitti v. United States, 22 Cl Ct. 310, 319, 320 (1991) (combining noncontiguous property where the property owner also owned the connecting lots); K & K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531, 537 (Mich. 1998) ("[C]ontiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis.").

easy to identify, (2) it produces arbitrary and unfair results in some circumstances, and (3) it promotes opportunistic behavior by landowners.

Identifying adjoining commonly held land is not a simple task in all cases. For example, two adjoining properties may be separated by property interests such as an easement, a roadway, or a canal.[74] The existence of these interests would technically sever the property into distinct parcels. Similarly, two properties separated by a large distance could be connected by a small easement or sliver of land. Consider a railroad company, where each railroad terminal is connected by train tracks owned by the same corporation. Logically, it seems unfair that the entire railroad system should be considered contiguous, commonly-owned property, even if the terminals happen to reside in different counties or even different states. Similarly, given that property can be owned by any number of entities—including corporations, partnerships, individuals, families, trusts, etc.—it is difficult to tell what type of ownership is sufficient for determining the relevant parcel under this rule.[75]

Some commentators have criticized this approach because it discriminates against large property owners.[76] For example, consider two individuals who own neighboring properties—one individual owns one-half acre of land, the other owns ten acres. The government institutes a regulation that, in effect, prohibits any

74. *See, e.g.*, Palm Beach Isle Assocs. v. United States, 208 F.3d 1374, 1381 (Fed. Cir. 2000) (discussing two properties on either side of a road); Brace v. United States, 72 Fed. Cl. 337, 349 (2006) (describing evidence of a road between properties as "meager evidence" of the parcel as a whole) *aff'd*, 250 Fed. App'x 359 (Fed. Cir. 2007); Sartori v. United States, 67 Fed. Cl. 263, 274 (2005) (denying a motion for summary judgment on the parcel as a whole issue based on the plaintiff's aversion that "[e]ach section is a free-standing parcel separated from every other section by canals and ditches"); City of Coeur D'Alene v. Simpson, 136 P.3d 310, 323 (Idaho 2006) (stating that the presence of a road is "one factor to consider").

75. Brace v. United States, 48 Fed. Cl. 272, 280 (2000) (The court denied a motion for summary judgment where two contiguous properties were held by an individual and a corporation respectively. "Since the ownership of the 600 acres is in dispute, and constitutes a material fact, the court cannot determine the economic impact of the regulation.").

76. Fee, *Of Parcels and Property*, *supra* note 71, at 113 ("[A] unity of ownership rule unreasonably discriminates in effect."); 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."); *see also* Machipango Land & Coal Co. v. Commonwealth Dep't of Envtl. Res., 719 A.2d 19, 27 (Pa. Commw. Ct. 1998) ("[T]here is a facial unfairness in this approach.").

economic use on one-half acre of each individual's property. The owner of the one-half acre lot would most likely receive compensation under the *Lucas* rule, whereas the owner of the ten-acre property would most likely not, despite losing the same property interest.[77]

However, this criticism merely begs the question: Is this really the type of discrimination that regulatory takings jurisprudence is intended to prevent? If the purpose of the regulatory takings doctrine is to provide a minimal guarantee to property owners in line with their reasonable expectations, the above result is hardly discriminatory at all. The owner of the smaller property has endured a complete deprivation of all economic use of the property, whereas the large property owner has lost the use of five percent of his lot. Such a result hardly seems discriminatory in the manner that appears to matter to the Supreme Court—the relative burden endured by property owners based on their reasonable expectations.[78]

The contiguous, commonly-owned property approach is also subject to criticism because it can produce arbitrary and unfair results.[79] For example, imagine a developer who purchases a large piece of property and constructs a retail shopping center. Ten years later, the developer decides to buy an existing home that happens to lie in the same neighborhood as this shopping center. By chance, ten feet of the back lot line of this home happens to overlap the back lot line of the shopping center. Under a strict contiguous, commonly-owned property rule, a regulation that deprives the property owner of all economic use of this residence would probably not constitute a taking, because the court would treat the shopping center and home, together, as the parcel in the denominator. If the property owner had purchased the house next door, a lot that did not have a bordering property line, there would certainly have been a taking under the *Lucas* test.

77. Of course, the property owner could allege a taking under the *Penn Central* test, but under these circumstances it does not appear that the property owner would likely prevail on such a suit. *See generally* 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 (2003).

78. See discussion in Part II.C regarding the apparent purpose of the Supreme Court's regulatory takings jurisprudence.

79. Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874, 880 (D.C. Cir. 1999) ("[M]ore should unite the property than common ownership by the claimant.").

These inequities seem to have prompted courts to abandon the strict application of this approach.[80] For example, in *Bevan*, the Michigan Supreme Court appeared to apply a strict, commonly owned, contiguous property rule in determining the relevant parcel.[81] However, in *K & K Construction, Inc. v. Department of Natural Resources* the court re-characterized its approach as a multi-factored balancing test with an end goal "to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."[82]

The common ownership approach also has the potential to induce wasteful, opportunistic behavior by landowners to ensure that they receive compensation in the event of a government regulation.[83] The problem with opportunistic behavior is perhaps most evident in wetlands permit applications. In this context, property owners can identify likely wetland areas prior to application, sell or develop non-wetland areas, and retain those portions of property most likely to be deemed wetlands. In this way, the property owner can effectively manufacture a parcel rhat will present a viable takings claim.[84] A strict application of the commouly owned, contiguous property approach is susceptible to this type of abuse.

B. Landowner's Actual or Intended Use

Another method for determining the relevant parcel is to look to the degree that the landowner used or intended to use the property in question as an integrated whole.[85]

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80. The Federal Circuit has generally adopted a flexible approach as described *infra*. *See, e.g.*, Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

81. Bevan v. Brandon Township, 475 N.W.2d 37, 43 (Mich. 1991) (stating that "contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances").

82. K & K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531, 536–37 (Mich. 1998) (quoting Ciampitti v. United States, 22 Cl. Ct. 310, 319 (1991)).

83. City of Coeur D'Alene v. Simpson, 136 P.3d 310, 320 (Idaho 2006) ("[A] rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis.").

84. *See, e.g.*, *Ciampitti*, 22 Cl. Ct. at 319. In *Ciampitti*, a developer purchased forty-five acres containing fourteen acres of state wetlands and an additional four acres of federal wetlands. Ciampitti sold the non-wetlands areas, applied for a permit to fill the remaining wetland, and then sued for a taking when the permit was denied.

85. Norman v. United States, 429 F.3d 1081, 1091 (Fed. Cir. 2005) ("Here, the

This approach is perhaps most useful as an approximation of a landowner's reasonable expectations.[86] For example, a property owner who treats a large lot as a single unit in order to build a large home should hardly be surprised when the government treats the entire parcel as one unit for determining if government action has gone "too far."

However, despite the fact that this approach might help in approximating expectations, it has three major drawbacks: (1) there is no principled way for determining what types of uses are sufficient to unify or segregate a property; (2) application of the rule produces arbitrary and unfair results; and (3) property owners are apt to abuse the intended use.

First, it is difficult to enumerate a principled definition for what types of uses will sever a property and what uses are sufficiently linked such that a property will continue to serve as a single functional unit. Without a principled way of defining the unit, this approach effectively exchanges the parcel as a whole problem for the "unit as a whole" problem. For example, most courts have rejected the idea that individual lots in a housing sub-division qualify as a separate use even though they will be sold individually and used for distinct residences.[87] What if a property owner intends to create a mixed-use sub-division? Would the court integrate the commercial and residential properties, or treat them as separate properties because of their independent uses?

In addition to this difficulty in determining a principled way to distinguish between different uses, this approach can also produce arbitraty results. Consider a developer who has a large piece of vacant property with an expectation to merely sell the property and

record is clear that the appellants themselves regarded the 2280-acre parcel as a single economic unit."); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1346 (Fed. Cir. 2004) (holding that the court would consider two leaseholds combined as the relevant parcel because they were purchased as part of a "unified mining plan"); Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999) ("Where the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel."); Div. of Admin., State of Fla. Dep't of Transp. v. Jirik, 471 So. 2d 549, 552 (Fla. Dist. Ct. App. 1985) (utilizing the "unity of use" test as one factor for determining the parcel as a whole).

86. *Forest*, 177 F.3d at 1365 (recognizing that the district court correctly focused on the owners economic expectations in finding that the parcel was a single economic unit).

87. *See, e.g.*, Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993) (finding that the court would not recognize each individual lot in a planned development affected by wetlands as the relevant parcel).

make a reasonable return. If the developer chose to split the property into two distinct uses—commercial and residential or farming and industrial—a court applying the intended use test might divide the property, leading to a better takings claim for the owner under the *Lucas* test. On the other hand, if the developer decided to use the property for one use, the court would consider the entire holding as one parcel, and the developer would have a reduced chance of succeeding on a takings claim.

There does not appear to be a principled reason for the different results: in either circumstance the developer experiences the same burden and loses the same acreage; additionally, the developer sought the same objective from borh—a rerurn on his investment.

Finally, like the contiguous, commonly-owned property test, this approach is subject to abuse by the property owner. If a landowner has a parcel with both wetland and highland property, for example, the owner might develop the wetland and highland property with different uses prior to applying for a building permit or prior to the passing of a new wetlands regulation.

C. Multi-Factored Balancing Test

Most courts—including the Court of Claims and Federal Circuit—have rejected rigid application of the contiguous, commonly-owned property approach in favor of a multi-factored balancing test for determining the relevant parcel.[88] For example, in *Ciampitti v. United States* the court explained:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.[89]

Ciampitti outlined some of the predominant factors courts utilize for determining the relevant parcel under this approach;

88. *See* Fee, *Of Parcels and Property*, *supra* note 71, at 101 n.67.
89. *Ciampitti*, 22 Cl. Ct. at 318–19.

however, any number of facts under this approach could influence a court's decision. One commentator identified at least the following factors in his review of the law applicable to horizontal divisions of the relevant parcel: contiguity, time of acquisition, extent of public regulation, extent of private regulation, scope of government plans, government taxing of the property, plans by the owner, how other government restrictions benefit the owner's holdings, the owner's investment-backed expectations, "size and character of properties commercially traded in the community," common ownership, and common use.[90]

This approach to the parcel as a whole problem has the benefit of flexibility and fairness that the contiguous, commonly owned approach lacks. It allows the court to review all the facts and, under the totality of the circumstances, determine which approach is fair.

Unfortunately, what the test gains in flexibility it necessarily loses in uniformity and predictability.[91] As Justice Scalia noted, "[W]hen we decide a case on the basis of what we have come to call the 'totality of the circumstances' test, it is . . . effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue."[92] As another commentator noted, "This has resulted in a body of law so arbitrary and rudderless that a government attorney recently argued that no conflicts among the lower courts can possibly arise—since each case is decided on its own facts, no decision has any bearing on the outcome of any other claim."[93]

The test also has the added danger of giving so much leeway to judges that the balancing test actually hides discriminatory or biased decision making. The multiple factors in the test will often conflict, resulting in a situation where it is not clear exactly what fairness and

90. Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 414 (2003).

91. Machipango Land & Coal Co. v. Commonwealth Dep't of Envtl. Res., 719 A.2d 19, 27–28 (Pa. Commw. Ct. 1998) ("Just like any test that balances various considerations on an ad hoc basis, the multi-faceted approach fails to offer either regulators or property owners any certainty as to whether a regulation will result in a taking.").

92. Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

93. R.S. Radford, *Instead of a Doctrine:* Penn Central *as the Supreme Court's Retreat from the Rule of Law* 8 (Program for Judicial Awareness, Working Paper No. 07-001, 2007) (referencing Reply to Opposition to Petition for Writ of Certiorari at 8–13, Giovanella v. Town of Ashland, 127 S. Ct. 1826 (2007) (No. 06-972)(mem.) (denying certiorari)).

justice require.[94] For example, in *District Intown Properties Ltd. Partnership v. District of Columbia*, the landowner had purchased an apartment building with surrounding landscaped lawns.[95] The lawn areas were taxed as developable property by the District of Columbia.[96] The owner divided the property into nine lots, submitted plans for zoning approval for construction, and five days prior to receiving approval, a community group signed a landmark petition for the entire property.[97] The lots were contiguous and commonly owned, they had been treated as one parcel for over twenty-five years, and had been treated the same for accounting and maintenance purposes up until the land marking petition was signed.[98] On the other hand, the government had taxed the properties as developable units, the owner had subdivided the lots, and intended to begin separate construction projects.

What does fairness require in such a situation? Using the multi-factored balancing test, it appears the judge has broad leeway to decide in circumstances where evidence of fairness weighs in both directions. A test that gives such leeway to judges has the potential danger of merely disguising judicial prejudice or error and can result in conflicting or logically inconsistent judgments that have the appearance of abandoning the rule of law.

The flexibility the balancing test provides also strips governments and litigants of any certainty regarding how the court will characterize a property for the takings analysis. On the one hand, this could have a beneficial result. It is possible that neither the government nor property owners will have an incentive to engage in opportunistic or wasteful behavior because neither party knows how a court will actually apply the multi-factored balancing test to a particular landowner.

On the other hand, this lack of certainty will most likely encourage additional litigation and administrative court costs. In settlement negotiations between governments and landowners, both

94. *See, e.g.*, Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874, 880 (D.C. Cir. 1999) (deciding that the relevant parcel included all contiguously owned property despite the fact that the owner had divided the property into eight lots, was scheduled to receive construction permits on the lots five days prior to the regulation, and the eight lots had been taxed as separate developable property prior to the enactment of the regulation).

95. *Id.* at 878.

96. *Id.* at 882.

97. *Id.* at 877.

98. *Id.* at 880.

parties can come to the table with case law supporting their respective positions. After all, some cases focus on the property owner's intended use, other cases focus on the contiguous, commonly-owned property, and some cases focus on the zoning or tax treatment of the property. This uncertainty encourages both parties to approach trial with mutual optimism and push forward with costly litigation.[99]

D. Viable Economic Unit

Some commentators have argued for the adoption of a test that identifies the size of the parcel based on commercial market forces rather than on the personalized factors of the given property owner.[100] Professor John Fee argues that "a taking has occurred when any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation."[101] "In other words, a whole parcel is one that is large enough that even if it were the owner's only real property, it would be feasible and profitable to use for some independent enterprise."[102] This test would allow the plaintiff in an inverse condemnation action

99. RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 568–69 (6th ed. 2003) ("[L]itigation will occur only if both parties are optimistic about the outcome of the litigation"); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 762 (1975) ("[L]itigation should be more frequent the greater the stakes in the dispute or the uncertainty of the outcome.").

100. STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(e)(5) (3d ed. 2005); Fee, *Unearthing the Denominator*, *supra* note 71. This Comment will focus on Professor Fee's approach because it does not facially require the abandonment of Supreme Court precedent. Professor Steven Eagle argues for a commercial definition of the relevant parcel based on the UCC concept of a "commercial unit":

> [S]uch a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article . . . or a set of articles . . . or a quantity or any other unit treated in use or in the relevant market as a single whole.

EAGLE, *supra*, § 7-7(e)(5) (quoting U.C.C. § 2-105(6) (2003)). It appears that Professor Eagle's "commercial unit" would overrule *Penn Central* because the court refused to segment air rights in that case—a property interest that would surely fall within the definition of a commercial unit since it had already been leased for millions of dollars. Although Professor Eagle's approach will not be directly analyzed here, the criticisms mounted against Professor Fee's approach apply with equal, if not greater force to the commercial unit test.

101. Fee, *Unearthing the Denominator*, *supra* note 71, at 1537.

102. Fee, *Of Parcels and Property*, *supra* note 71, at 117.

to define the relevant parcel in the complaint.[103] So long as that parcel constituted a viable, independent economic unit, the court would proceed to the takings analysis for that parcel.[104] Professor Fee limits this approach in two main ways: "1) the identified parcel must contain at least one economic or productive use independent of the surrounding land interests; and 2) the property may not be divided into uses, functions, or vertically defined interests."[105]

This approach has a number of promising attributes. First, the court can define the parcel quickly at the beginning of litigation merely by looking to the property owner's complaint. Instead of balancing a wide variety of factors, the court can consider evidence regarding the existence of a market for the property. If a market, exists then the court can move on to the takings analysis. This approach also promises to eliminate the arbitrary results of a contiguous property owner rule because the amount of adjacent property an owner holds would not enter into the equation for determining the relevant parcel. Similarly, focusing on the parcel as a viable economic unit will avoid the inherent lack of certainty that has resulted from a multi-factored balancing approach.

However, adopting this standard has three major drawbacks: (1) it allows property owners to succeed on takings where the Supreme Court has opined that the Takings Clause does not apply, and it goes against some of the logical implications of Supreme Court precedent; (2) it is potentially discriminatory in a manner that matters—it allows large property owners to collect for reasonable, generally applicable laws where small property owners would not; and (3) it is subject to abuse by property owners that bring multiple claims for the same regulation.

Firsr, the viable economic unit approach allows owners to define the relevanr parcel in a manner that goes against the guidance given by the Supreme Court. In *Keystone*, for example, the Court explicitly noted that reasonable setback ordinances and open-space requirements would generally not constitute takings.[106] Similarly, in

103. Fee, *Unearthing the Denominator, supra* note 71, at 1557.

104. *Id.*

105. *Id.* at 1538.

106. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987). Of course, setback ordinances or open space requirements are not categorically untouchable. Unreasonable or excessive restrictions even in the form of a setback ordinance could be called into question. For an example of an ordinance that could have takings implications, see

Penn Central, the Court stated, "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."[107] In making this statement, the Court cited to *Gorieb v. Fox*,[108] a case upholding the constitutionality of a setback ordinance. However, under the approach advanced by Professor Fee, so long as a setback ordinance affects a property interest that has independent economic value it is possible that these types of regulations would be considered takings.

Professor Fee argues that the viable economic unit test would not allow property owners to collect for setback ordinances because "the land area has no *independent* economic potential."[109] However, this is not necessarily the case. Consider a municipal residential zoning plan with a reasonable setback ordinance that prohibits building within ten feet of a property line. The owner of a large tract of land submits an inverse condemnation complaint and identifies a twenty-foot-wide parcel adjoining an existing home where the property owner claims he intended to build a town home.[110] The twenty-foot-wide piece of property certainly has an independent economic potential as the site of a town home,[111] and a ten-foot setback ordinance applied to *both sides* of a twenty-foot-wide piece of property prohibits the owner from constructing any building on the premises. In this scenario, the viable economic unit test would define a parcel from a reasonable setback ordinance that would allow for a legitimate takings claim.

Thus, although the viable economic use test purports to place a meaningful lower limit on properties that constitute a parcel as a whole, that floor seems to be set much lower than the Supreme

Cherrystone Inlet, L.L.C. v. Bd. of Zoning Appeals of Northampton County, 628 S.E.2d 324 (Va. 2006) (involving a 110-foot setback from a beach and a 60-foot setback from a road which, applied to the same property, had the result of prohibiting all construction on a lot).

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

108. 274 U.S. 603 (1927).

109. Fee, *Of Parcels and Property*, *supra* note 71, at 118.

110. The facts of this hypothetical are not extraordinary—the Michigan Supreme Court had to address a challenge to the validity of a residential zoning ordinance because the property owner owned thirty-four lots that were twenty feet in width and one hundred feet deep. Korby v. Township of Redford, 82 N.W.2d 441 (Mich. 1957).

111. As a point of reference, the author's own town home is less than twenty feet in width.

Court has implicated. There is a risk that this test would require compensation in almost every instance. It is this danger that has most likely led the courts to refuse to adopt this approach. Consider the response of the Federal Circuit to an argument that an owner should receive compensation for individual lots affected by wetlands regulations (where the lots presumably would have had a viable independent economic use).

> Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority.[112]

Professor Fee attempts to limit this problem by rejecting "speculative or merely feasible" uses of property.[113] It is not exactly clear how this limitation would apply in practice. Professor Fee recommends that courts look to whether "similarly sized units of property are regularly traded and developed for similar projects in the vicinity."[114] However, this approach will make the takings analysis dependent upon how neighboring property owners utilize their property. If a property owner happens to live in an area where another property owner has created a town home development, then a homeowner can define the parcel narrowly, while a property owner that lives in an area that has not had a town home development will not. This limitation has the anomalous result of refusing to recognize innovative uses of land that perhaps would be the most valuable to an emerging consumer market. Professor Fee does acknowledge that "owners at least ought to be given the chance to prove independent economic viability;" but if property owners can make such a showing, then the test would allow landowners to collect for reasonable setback ordinances as discussed above.[115] In short, the economic viability standard as portrayed by Professor Fee purports to provide a clear limitation on the size of the relevant parcel; however, the test does not actually provide a substantive floor in line with

112. Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993) (italics omitted).

113. Fee, *Of Parcels and Property*, *supra* note 71, at 119.

114. *Id.*

115. *Id.*

Supreme Court precedent unless arbitrary limitations on economic feasibility are utilized.

In addition, this test appears to contradict the logical implications of the Supreme Court's test. For example, in *Penn Central*, the Court stated 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."[116] In applying the independent economic viability standard, the court effectively allows just that. Consider a ten-acre parcel that the owner uses as a residential estate. The entire parcel is used for this single purpose, the parcel was sold as a unit, the parcel is taxed as a unit, zoned as a unit, and owned by one individual. If a regulation limits the use of one-fourth of an acre of that property and the owner can show some viable independent economic use, then the property owner could collect. That result is merely "dividing a single parcel into discrete segments and attempting to determine whether rights in a particular segment have been entirely abrogated."[117]

In addition to the problems with Supreme Court precedent, this test also discriminates in a sense that should matter—it gives large property owners a greater opportunity to sue for neutral, reasonable regulations. For example, consider an open-space ordinance that prohibits building on fifty percent of a residential lot. The owner of a one-quarter acre lot would be prohibited from building on one-eighth of an acre dispersed around the perimeter of the property. It seems likely thar such a property owner would not be able to show an independent economic use for this size of a property dispersed around an existing home. On the other hand, a property owner that owns a five-acre residential lot will be prohibited from using two-and-one-half acres of property. Even if dispersed around the perimeter of the property, this owner will likely be able to identify a number of one-fourth acre-sized lots that have independent economic viability. The large property owner had no greater expectation for the use of those lots than the small property owner,

116. 438 U.S. 104, 130 (1978).

117. *See Tabb Lakes*, 10 F.3d at 802 (refusing to recognize individual lots as parcels because it violates the language from *Penn Central*); Brace v. United States, 72 Fed. Cl. 337, 349 (2006) ("While plaintiff undoubtedly desires to shrink the acreage at issue so as to magnify the impact of the regulation here, a legion of cases makes clear that a property holder cannot carve up his property simply to maximize the likelihood that a taking will be found.").

the large property owner experienced no greater burden on the use of property than the small property owner, and yet the large property owner has a significantly better takings claim. Takings jurisprudence should not discriminate between large and small property owners for generally applicable regulations that create equal burdens.

Finally, this test could lead to opportunistic behavior from property owners. Consider a landowner with a ten-acre piece of property. The local municipality zones the property as residential with a ten-foot setback requirement. The property owner brings an inverse condemnation action defining the relevant parcel as multiple twenty-foot wide, one-hundred-foot-deep pieces of property intended for town homes. Under this test, the owner can define the relevant parcel, and it appears that each parcel before the court represents a viable independent economic unit that has been deprived of all economic use. Thus, the owner of the ten-acre lot could turn a setback ordinance into a takings claim for a large portion of, if not the entire, ten-acre property.

E. Scope of the Government Regulation

Some courts have defined the parcel by looking to the scope of the government regulation.[118] This approach has the benefit of clearly defining the scope of the affected property at the outset of the relationship between the parties as well as providing the government and citizenry with notice of what properties will be subject to takings at the time of regulation. Most courts have not applied this test strictly, because of the significant problems it could potentially impose.

The most obvious drawback is that the government could abuse the process by defining the parcel in a self-interested manner. For example, the government could enact a regulation of property that "applies" to all property held by any given landowner within a certain area, but merely restricts the use of a certain portion of the property. This approach would merely test the creativity of the legislative staff in drafting ordinances to avoid defining the parcel too narrowly.

118. *See* Twaine Harte Assocs., Ltd. v. Tuolumne County, 265 Cal. Rptr. 737, 744 (Cal. Ct. App. 1990) (recognizing that the government regulation might have the effect of "creating separate parcels for 'taking' purposes").

In addition, if the courts attempted to limit the legislature's creativity by narrowly interpreting the scope of a regulation, then almost any regulation could require compensation.[119] This approach appears to violate the Supreme Court's guidance in *Tahoe-Sierra*: "defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [restriction] would become a total ban. We have consistently rejected such an approach to the 'denominator' question." [120] As Professor Michelman pointed out, "It might thus appear that the scope of the 'thing' subject to devaluation is to be defined by the incidence of the measure itself. But if that is so, will it not begin to seem as though *all* use restrictions are totally destructive of value?"[121]

The court in *Machipango Land and Coal Co., Inc. v. Commonwealth Department of Environmental Resources* utilized the scope of the regulation as an approach to the relevant parcel problem, but in a more moderate fashion. The court combined the regulation approach with the independent economic unit approach to limit some of the problems discussed above. The court proposed the following test:

> [T]he regulated land would first be considered . . . [but] to determine whether it actually would be the denominator would depend on the answers the courts received to the following questions: . . . whether the regulated land has a separate use from the non-regulated contiguous parcel(s) . . . [and] whether all of its economic benefit is gone.[122]

This approach does address one of the problems of the independent economic unit approach in that the landowner cannot manipulate the property to manufacture a taking. The scope of the regulation itself defines the relevant parcel so long as the property

119. Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs, 38 P.3d 59, 69 (Colo. 2001) ("Were we to accept AVSG's position that a court should evaluate the effect of a regulation with respect to only one segment of the parcel, virtually any land use regulation would effect a taking if the landowner defined the relevant parcel small enough. For example, were partitioning allowed, a zoning ordinance that required a setback would effect a taking of the land between the lot line and the building line. Such a regime would defeat the balance of interests reached in takings jurisprudence.").

120. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331 (2002).

121. Michelman, *supra* note 27, at 1193.

122. Machipango Land & Coal Co. v. Commonwealth Dep't of Envtl. Res., 719 A.2d 19, 28 (Pa. Commw. Ct. 1998).

affected constitutes an economic unit. However, this approach still relies on how the statute drafters decide to frame the relevant parcel, which could be abused by the government.

In addition, this test could still result in compensation for almost any regulation. For example, a fifty percent open space requirement would still provide a large landowner with a viable takings claim, and almost all wetlands regulations would require compensation. This approach also does not address the discriminatory result with regards to large and small property owners and the logical conflict with Supreme Court precedent that the independent economic unit test contains.

It is perhaps these problems that prompted the Pennsylvania Supreme Court to reject this approach on appeal.[123] The court decided that the test adopted by the lower court was "overly restrictive."[124] Instead, the court adopted a "flexible approach" in line with the multi-factored balancing test adopted by the Federal Circuit.[125]

IV. A STRUCTURAL APPROACH: *GIOVANELLA* AND A PRESUMPTION FOR THE RELEVANT PARCEL

The existing tests proposed for applying the parcel as a whole rule all have significant limitations. The commonly-owned, contiguous property approach is subject to abuse and can produce arbitrary results. Defining the property based on landowner use makes it difficult to distinguish between separate uses and is also subject to criticism based on its arbitrary results and the potential for abuse by landowners. The multi-factored balancing approach fails to provide guidance to litigants and makes each case a rule unto itself. The viable economic unit test allows property owners to collect for reasonable, generally applicable setback ordinances, discriminates

123. Machipango Land & Coal Co. v. Commonwealth Dep't of Envtl. Res., 799 A.2d 751 (Pa. 2002).

124. *Id.* at 768.

125. *Id.* at 768–69 ("Pursuant to this approach, a variety of factors for defining the relevant parcel should be considered, without making one factor more important than any other. These factors would include, but would not be limited to: unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and, the landowner's plans for development.").

against small property owners, and allows for abuse by landowners in defining the relevant parcel. Finally, defining the parcel based on the government regulation bases takings law on the ability of the legislature to craft ordinances in a broad manner and engages in the "circular reasoning" that was rejected by the Supreme Court because it defines the taking based on the property affected. In 2006, the Massachusetts Supreme Court decided *Giovanella v. Conservation Commission of Ashland* and utilized a slightly different method for approaching the parcel as a whole problem.[126]

A. Giovanella*'s Structural Approach*

1. Facts

In 1999, John Giovanella purchased a piece of property in Ashland, Massachusetts.[127] After purchasing the property, he discovered that the prior owner had actually divided the property into two equal lots—one lot had an existing house and the other was vacant.[128] Each lot had a different tax assessment and a separate address.[129] Giovanella decided to construct another home on the second lot.[130] Nine months after Giovanella purchased the property, the town adopted a wetlands protection measure that prohibited construction or disturbance within twenty-five feet of a wetland.[131] The vacant lot where Giovanella planned to build his home

126. Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451 (Mass. 2006), *cert. denied*, 127 S. Ct. 1826 (2007). *Giovanella* is not the only court to adopt a presumption approach based on contiguous, commonly-owned property. *See, e.g.*, City of Riviera Beach v. Shillingburg, 659 So. 2d 1174 (Fla. Dist. Ct. App. 1995); State v. Dep't of Envtl. Regulation, 604 So. 2d 565, 567 (Fla. Dist. Ct. App. 1992) ("Appellees have not rebutted the presumption that physically contiguous parcels are one unit, except by stating that the submerged land is separate for purposes of this action merely because the land is submerged."); Div. of Admin., State of Fla. Dep't of Transp. v. Jirik, 471 So. 2d 549, 553 (Fla. Dist. Ct. App. 1985) ("We think that, where it is established that the parcels in question are physically contiguous, a presumption arises that the parcels are one unit. However, this presumption can be rebutted by evidence that the parcels are otherwise "separate "). This Comment focuses on the *Giovanella* case because it is the first case in fifteen years to apply the presumption and the first state Supreme Court to officially adopt this approach.

127. *Giovanella*, 857 N.E.2d at 453.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

contained property defined as wetlands under the regulation,[132] and the conservation commission refused to grant permission to build on the lot.[133]

A year after the commission denied Giovanella's construction plan, he sold the lot containing the existing home for over $300,000.[134] Giovanella hired an appraiser who concluded that the remaining vacant lot had no independent value due to the regulation.[135] Giovanella brought an inverse condemnation suit.[136]

2. Determining the parcel as a whole—a presumptive approach

The court surveyed the wide variety of factors that courts have considered in making a determination of the relevant parcel and, ultimately, decided on a modified approach for analyzing the parcel as a whole. Looking to recent case law, the court noted that "[t]he intuitive starting point for determining the boundary of the property under a Takings Clause analysis is to consider as one unit all contiguous property held by the same owner at the time the taking occurred."[137] Thus, it concluded, "the extent of contiguous, commonly-owned property gives rise to a rebuttable presumption defining the relevant parcel."[138]

The court recognized that litigants could overcome the presumption "to either increase or decrease the size of the parcel by the application of additional factors."[139] Of these factors, "[a]n owner's treatment of property as a distinct economic unit is the most significant factor to consider in overcoming the presumption in favor of contiguous property," while other factors such as the division of lot lines, separate tax treatment, or a separate address will play a minimal role in the court's analysis.[140]

Effectively, the *Giovanella* court developed a two-pronged test. First, the court analyzed the contiguous, commonly-owned property at the time of the taking to determine a presumption for the relevant

132. *Id.*
133. *Id.* at 454.
134. *Id.*
135. *Id.*
136. *Id.* at 453.
137. *Id.* at 457.
138. *Id.* at 458.
139. *Id.*
140. *Id.* at 458–59.

parcel. Next, the court applied a multi-factored test to determine if these factors weighed in favor of adjusting the presumption. Of the factors, the court felt the most important was the owner's actual or intended use of the property as a separate economic unit.

Applying this test to Giovanella, the court determined that the two lots were contiguous and commonly owned and, thus, presumed to constitute the relevant parcel.[141] With regard to the other factors, the court found "insufficient evidence to sever the two parcels" because they were purchased at the same time, they were both intended for single family residential use, and the owner did not treat them "as separate economic units."[142] The separate addresses and tax treatment were insufficient evidence to show distinct economic use.[143]

In dicta, the court explained that in some instances it would be willing to separate contiguous lots—specifically, "when an owner can show separate business plans or financing for the two lots, or when they are developed for substantially different uses."[144] Under the court's view, Giovanella failed to meet his burden in this regard and thus failed to overcome the presumption of the relevant parcel.

3. *Viability of* Giovanella*'s approach—does it change anything?*

The *Giovanella* approach did not establish different factors for determining the parcel as a whole, but it did adopt a unique structure for analyzing the parcel as a whole in an attempt to address the strengths and weaknesses of the existing tests and to make explicit what courts are already doing implicitly.[145] Applying an explicit presumption allows the court to take advantage of a commonly-owned contiguous parcel rule: it is the easiest to apply, it gives the parties notice and thus reduces litigation, and it acts as a reasonable approximation of owner expectation in many cases. Thus, *Giovanella* pointed out:

> Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property. In addition to identifying the unit of property "as realistically and fairly as

141. *Id.* at 460.
142. *Id.*
143. *Id.*
144. *Id.* at 460–61.
145. *See supra* note 73 and accompanying text.

possible," contiguity is also the most easily measured of the many factors courts have used for this inquity.[146]

The presumption also attempts to achieve the benefits of the multi-factored balancing test by applying fairness factors in rebutting the presumption. If the contiguous commonly owned test will have an unfair result, the court is at liberty to apply additional factors to ensure justice and fairness. "Instead of a continued attempt at balancing undifferentiated factors, or a bright-line rule, we consider it a fair and practical approach to emphasize the importance of contiguous, commonly-owned property."[147]

In addition, it appears this is a test that most courts already implicitly employ. As *Giovanella* noted, "While few courts explicitly employ this presumption in favor of contiguous, commonly-owned property, we believe that the analysis used by many courts follows this pattern."[148] Because courts already apply this presumption implicitly, they should make it clear to property owners and governments that the court will start its analysis with contiguous, commonly-owned property. Such an approach would at least focus the pleadings and arguments in accordance with how the court already approaches the problem and provide additional clarity to parties deciding whether or not to settle prior to litigation.

Unfortunately, it is unclear whether the structural approach used in *Giovanella* actually makes any difference in resolving the problems of the existing tests. The court does succeed in making an implicit assumption explicit, but if courts are already applying the presumption, it does not appear likely that an explicit presumption will solve the problems associated with the multi-factored balancing test because the presumption is so easily rebutted where the factors are mixed. The presumption is unlikely to stand except in cases where the factors are so one-sided that the result under the balancing test would have an obvious result anyway.

For example, consider the facts of *District Intown*, where a property owner had divided a property into nine lots and was five days away from rezoning for construction when a landmark petition

146. *Giovanella*, 857 N.E.2d at 458 (quoting Ciampitti v. United States, 22 Cl. Ct. 310, 319 (1991)).

147. *Id.* at 459.

148. *Id.*

halted the project.[149] Because all nine separate lots were contiguous and commonly owned, the presumption would include all of the property. However, the presumption would mean little, because a number of other factors point towards severing the properties, thus rebutting the presumption. The undeveloped lots had been taxed as developable property, they were divided into separate lots, and the owner intended to develop them as individual economic units.[150] Thus, in this case, the *Giovanella* presumption would immediately revert to the multi-factored balancing test upon a showing of some evidence indicating the result would be unfair. As a result, even under this presumptive approach the court would be in the same position as the original court in *District Intown*. In most cases, the defendant can provide some evidence of injustice, and thus, in most cases this approach will boil down to the existing multi-factored approach—it merely looks to the easiest factors first. Thus, the problems associated with the multi-factored balancing approach will also arise in most applications of this presumptive approach.

Similarly, the *Giovanella* approach incorporates the problems associated with defining the relevant parcel based on the landowner's actual or intended use. The court states that the most important factor to consider after contiguous, common ownership is the actual or intended use of the property owner, but the court fails to explain why the owner's intended use of the two parcels was not a distinct economic use.[151] Giovanella intended to use the property as a separate residential unit, but the court flatly states that "[p]roperty intended for residential development by a single owner has been considered as one economic unit, and we see no reason to depart from that treatment here."[152] Thus, the *Giovanella* court does not enumerate how to principally determine which uses are sufficient to sever the parcel and which are not, beyond a blanket assumption that separate residential uses are categorically insufficient.

149. Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 877–80 (D.C. Cir. 1999).

150. *Id.* at 877–82

151. *Giovanella*, 857 N.E.2d at 460.

152. *Id.*

B. A Structural Modification to Giovanella

Giovanella's presumptive test offers a structural approach to the relevant parcel. Unfortunately, it appears that each case will boil down to the same multi-factored balancing test, and therefore, incorporare the same problems that exist with other approaches to the problem. The presumption shows promise, in that it could allow courts to take advantage of the relative strengths of the contiguous, commonly-owned property approach and the multi-factored balancing approach, if the two inquiries were utilized in situations that would limit their respective weaknesses. The contiguous, commonly-owned property approach provides relative clarity in mosr instances, but can produce unfair results, while the multi-factored approach focuses on fairness, but applied in every situation undermines certainty.

1. Introduction to the modified presumption

This Comment proposes a few modifications to *Giovanella*'s presumption to help exploit these relative strengths and weaknesses. First, courts should strengthen the presumption in favor of contiguous, commonly-owned property and only rake the multi-factored test into account when the presumption will clearly lead to unfair or unjust results. Thus, when considering the circumstances of the case, a court should not allow parties to rebut the presumption absent clear and convincing evidence that the presumption will upset the reasonable expectations of the property owner. The expectations of the owner should be approximated by the factors courts have already looked to in applying the multi-factored test: the owner's intended or actual use of the property, the time and manner of acquisition, government taxation, zoning, etc.

The object of strengthening the presumption is to ensure that the rule does not revert to a multi-factored balancing test in every case. This gives the analysis at least some sense of certainty—property owners and governments should be able to make a preliminary determination regarding what property the court will look to in determining the relevant parcel. The only times this determination will be undermined is where clear considerations of fairness require it.

In addition, the court should nor look to actual or intended use as the *sine qua non* of factors weighing in favor of rebutting the

presumption. As noted earlier, the distinct economic use or distinct economic purpose test is useful in approximating landowner expectations in some circumstances. However, in many instances the landowner's intended use is unclear or fails to provide any meaningful guidance regarding the landownet's expectations for the property. Similarly, courts have continually struggled to make meaningful distinctions between uses that are sufficiently separate or distinct as to warrant severing a parcel for the denominator analysis. Thus, although this factor can provide some guidance, the court should not always look to this as the determinative factor unless it evinces clear and convincing evidence regarding the fairness of the parcel.

In addition, the court should be wary of the other significant weakness of the contiguous, commonly-owned property rule—abuse by landowners. In cases where the risk for landowner abuse is heightened, a court should carefully scrutinize transfers of property prior to bringing the suit. Thus, where a property owner has notice of a regulation, there is a clearly identified area of land that will be subject to the regulation, and there is sufficient time for parties to transact before the regulation comes into effect, the court should ignore sales prior to the enactment of the regulation that decrease the size of the relevant parcel.[153] Similarly, the court should not allow the sale or transfer of property to affect the size of the presumptive parcel if a transfer occurs after there is a readily identifiable piece of property that will likely fail a permit application process.[154]

Of course, difficulty might also arise in determining what property is contiguous and commonly owned. In most cases, determining common ownership and adjoining property should be a straightforward task of looking to surrounding property titles and determining which are owned by the property owner bringing the

153. When none of these factors are present, the court should allow transfers to affect the relevant parcel. *See* Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 240 (1996), *vacated*, 121 F.3d 727 (Fed. Cir. 1997) ("Phase II development was complete soon after plaintiff's purchase, and was sold in the regular course of business a year before the Corps became involved in this matter. We have no indication that plaintiff disposed of the property in anticipation of a takings claim. It would not realistically reflect plaintiff's property interest to charge it now for property it did not own at the time of the taking.").

154. City of Coeur D'Alene v. Simpson, 136 P.3d 310, 320 (Idaho 2006) ("We cannot endorse a rule that turns a blind eye to all the relevant factual circumstances, including the purpose, character and timing of any transfer, especially one made during the course of a takings case.").

inverse condemnation suit. However, in more unique factual circumstances, additional rules might be necessary to avoid joining or severing property in a way that upsets owner expectations.[155]

2. Applying the modified presumption

In many cases, the presumption will not necessarily alter the result, but it should clarify how the court will approach the problem. For example, in *District Intown*, where the property owner had divided the property into nine lots, the test would most likely produce the same result. The court would look to all nine lots as adjacent, commonly-owned property establishing a presumption for the relevant parcel. The facts of the case relating to fairness were mixed, so the court would merely state that no clear and convincing evidence exists that the presumption would upset the expectations of the property owner and the court would then move on to the substantive takings analysis.

In some cases, however, the presumption would alter the result under the multi-factored balancing test—where the fairness factors do not produce clear and convincing evidence, the presumption will remain in place even if fairness slightly weighs in favor of altering the relevant parcel. One such instance might occur when a landowner has already sold individual lots in a large residential development. The government might argue that all property originally held by the

155. In these circumstances, courts should adopt rules that will approximate the expectations of the owner. For example, consider two separate properties that are connected by a small easement or a small sliver of land held by the same owner. In determining what constitutes contiguous property, one possible approach is to only include land interests that are owned in fee that have viable, independent economic uses. Thus, an easement or sliver of land connecting two separated properties would not be included in the contiguous land calculation for determining the relevant parcel. This approach would ensure that insignificant interests will not connect pieces or property in a manner that would violate the owner's expectations. Similarly, property separated by public or private roads, canals, ditches, or strips of land so narrow that they have no independent use should not sever property from the presumptive parcel as a whole. Of course, the existence of such a separating interest in property could come into play in determining whether clear and convincing evidence of fairness weighs in favor of reburting the presumption.

In addition, ownership can cause a difficult factual issue if individuals, corporations, families, trusts, or other groups own adjacent properties but are comprised of some of the same individuals. One approach to this problem is to analyze whether the owner has a substantial individual interest in the property—if so, that property will be included in the presumption. These determinations are admittedly not bright-line rules, but they provide some guidance for courts in determining contiguity and common ownership, and in most cases finding the contiguous, commonly-owned property should not require significant fact finding.

developer should be included in the relevant parcel calculus—especially if all of the property was originally purchased with the intent to create a large, master-planned community or some other unified development. Fairness might weigh in favor of including all of the properties originally included in the developer's economic scheme.

However, the presumption would only include contiguous, commonly-owned property at the time of the regulation; thus, any lots that had already been sold would not be included (so long as there was no evidence of gerrymandering the property to manufacture a takings claim). In addition, under these circumstances, clear and convincing evidence should not exist such that fairness requires the previously owned property to be included in the relevant parcel. The landowner's intended use for the individual property units was sufficiently succinct that the owner was willing to sell the property, the subdivided lots indicate an intent for separate use, and the lots will most likely have separate addresses, tax treatment, and deeds. Of course, the developer might have a unified development scheme for the property, the property might have been purchased in one lump sum, and might have been treated as one unit up until subdivision, but these factors should not amount to clear and convincing evidence of fairness in light of these other counter-balancing considerations.

Without applying this test to an endless number of scenarios, it suffices to say that in most circumstances the presumption will sufficiently approximate the reasonable expectations of the owner and the multi-factored test will not determine the result. There are some instances when the presumption should be rebutted. For example, consider a property owner who purchases a home that happens to abut an existing commercial market held by the same property owner. The presumption would be that both the home and commercial market together constitute the relevant parcel because they are contiguous and commonly owned. However, the properties were purchased and developed ar different times, have completely separate uses, have different addresses, are taxed differently, zoned differently, and have nothing in common other than common ownership and adjoining boundaries. Under these circumstances, clear and convincing evidence shows that the presumption upsets a reasonable owner's expectations.

3. Muddying the waters even further—subdivision as another presumption?

Some courts have applied a secondary presumption in addition to the presumption based on contiguous, commonly-owned property.[156] Under this approach, given a property "which appears to have been platted or divided into blocks and lots, nothing more being shown, the property should be treated as lots or blocks, intended for use as such, and not as one entire tract."[157] This view of the relevant parcel has even received attention in Congress. One recent bill proposed that all regulatory takings claims "shall be decided wirh reference to each subdivided lot, regardless of ownership, if such a lot is taxed, or is otherwise treated and recoguized, as an individual property unit by the State, territory, or the District of Columbia."[158]

This Comment rejects the application of the subdivision presumption under the current legal regime. First, the recognition of the relevant parcel as "an individual property unit [recognized] by the State"[159] contradicts the Supreme Court's holding in *Keystone*. In that case, the plaintiff alleged that any estate recognized as a separate property interest under Pennsylvania law should constitute the relevant parcel.[160] The Court responded, "It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights."[161] In short, the mere recognition of a separate estate under state law was insufficient for the *Keystone* Court to divide an interest in property from other contiguous, commonly-owned property. It seems contradictory to

156. City of Riviera Beach v. Shillingburg, 659 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1995); State Dep't of Envtl. Regulation v. Schindler, 604 So. 2d 565, 567 (Fla. Dist. Ct. App. 1992); Div. of Admin., State of Fla. Dep't of Transp. v. Jirik, 471 So. 2d 549, 554 (Fla. Dist. Ct. App. 1985).

157. *Jirik*, 471 So. 2d at 554 (citing Wilcox v. St. Paul N.P. Ry. Co., 29 N.W. 148, 150 (1886)) (internal quotation marks omitted).

158. Private Property Rights Implementation Act, H.R. 4772, 109th Cong. §§ 5, 6 (2006). The Bill passed the House in September 2006, but has not yet received a vote in the Senate. *See* H.R. 4772 [109th]: Private Property Rights Implementation Act of 2006, http://www.govtrack.us/congress/bill.xpd?bill=h109-4772 (last visited Mar. 19, 2008). The analysis of this Comment would obviously change drastically if this bill were passed into law. An analysis of the exact provisions of how this bill will effect takings analysis falls outside the scope of this Comment.

159. H.R. 4772 §§ 5, 6.

160. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 500 (1987).

161. *Id.*

this approach to automatically recognize horizontal divisions of property based purely on a legalistic distinction—whether the property is recognized as an individual unir under state law.

In addition, the subdivision of property fails to approximate landowner expectations in a wide variety of circumstances. For example, consider *Giovanella* itself. There the property owner purchased a property and only learned three to six months later that the previous owner had divided the property into two lots.[162] Giovanella had no expectation for separate property uses when he purchased the property. Similarly, consider a property owner who purchases two adjoining lots in a subdivision to create one large lot. That owner could treat the large property as one individual parcel, view the property as if it were one individual parcel, and yet the court would automatically presume that each individual subdivided lot constitutes a single parcel for the takings analysis. In such instances, the subdivision will not reasonably reflect any owner's expectations.

In addition to the problem of reasonable expectations, subdivision does not necessarily reflect a permanent, immediate, or final decision regarding the intended use of the property. A property owner can purchase and subdivide a property and let it sit for extended periods of time without ever taking additional steps to develop the property. In fact, subdivided property can easily be reunited by the property owner and used for a completely separate purpose. Unlike a sale of property, the property owner would not have to negotiate with a separate property owner or provide any compensation to reconnect a once-severed property.

Applying this presumption will also further muddy the waters of regulatory takings doctrine. First, applying a straight presumption based on subdivision will result in the same problem as the *Giovanella* presumption—with the introduction of any additional evidence, the approach will boil down to multi-factored balancing in almost every instance. Of course, the court could strengthen the presumption to ensure that fairness only influences the decision in extreme circumstances; however, as noted above, the subdivision presumption fails to clearly approximate landowner expectations in

162. Giovanella v. Conservation Comm'n of Ashland, 857 N.E.2d 451, 453 (Mass. 2006), *cert. denied*, 127 S. Ct. 1826 (2007).

many instances, and, thus, does not deserve a heightened presumption when defining the relevant parcel.

Another approach might be to apply the subdivision presumption in addition to the contiguous commonly owned presumption. However, this test would result in an almost incomprehensible approach to the problem. If the subdivision presumption automatically rebuts the contiguous, commonly-owned property presumption, what factors should be weighed in rebutting the subdivision presumption? Indeed, the court would be "hard-pressed to follow the rapid shifting of 'presumptions'—in which the bubble bursts and then miraculously reconstitutes itself— . . . from the presumption that physically contiguous parcels constitute a single unit to the contrary presumption that they are separate (thereby rebutting the previous presumption?) when they are platted as such."[163]

In short, the existence of some subdivision of the property does not necessarily correspond with owner expectations such that it warrants a presumption. As one judge has noted, "the mere drawing of lines on an ancient and unused document cannot, without more, be sufficient to establish anything."[164] Thus, subdividing lots should be balanced like any other factor, as an approximation of owner expectations that can indicate whether clear and convincing evidence exists that the contiguous, commonly-owned property would upset the owner's reasonable expectations.

4. Analysis of the modified presumption: Problems remain, but still the best approach

Admittedly, the presumptive structural approach is not a wholesale solution to the problems that plague the parcel as a whole inquiry. The clear and convincing standard for applying the fairness factors still gives lower courts significanr leeway in defining the parcel as a whole. It would be foolish to think that this heightened standard will strike a perfect balance between clarity and justice, and uncertainty will still exist among litigants regarding how a court will apply the factors after the presumptive parcel has been established. In fact, even under this heightened presumption standard, it is still

163. Div. of Admin., State of Fla. Dep't of Transp. v. Jirik, 471 So. 2d 549, 556 n.1 (Fla. Dist. Ct. App. 1985) (Schwartz, J., dissenting).

164. *Id.*

difficult to take specific factual scenarios and definitively state which scenarios will constitute clear and convincing evidence for overriding the presumption and which would not. Correspondingly, it is still difficult to state conclusively what the relevant parcel will ultimately be in a given case prior to litigation. As a result, there will still be room for mutual optimism and thus we should expect litigation to follow.

Similarly, the test will, in some instances, place the burden of rebutting the presumption arbitrarily based on the difficulties associated with the contiguous, commonly-owned property approach. Consider for example, a homeowner who purchases a neighboring home to rent out as an investment. For the purposes of the presumption, both of these homes are contiguous, commonly-owned property and, thus, presumptively constitute the relevant parcel. Depending on the entire factual context, clear and convincing evidence might exist that these properties should be treated separately. The properties were purchased ar separate times for separate uses (renting versus living), the properties have separate addresses, and will most likely have separate tax treatment—the homeowner would have the burden of establishing this case. However, if the homeowner had purchased a property down the street for a rental property instead of the property next door, the presumptive parcel would not include both properties. The burden of establishing clear and convincing evidence thus shifts depending on where the property owner purchases the second property—a factor that has little relevance on this property owner's expectations for the property.

Despite its flaws, however, this approach is the best option under the currenr legal regime. The presumption approach clarifies how courts are actually addressing this issue and will clarify the pleadings and arguments for litigants. Heightening the standard for equitable factors, even nominally, will force lower courts to justify their use of fairness factors in their opinions and give reviewing courts the ability to police decisions more carefully. Indeed, before basing any decision solely on these factors of fairness, the approach suggested in this Comment would require the court to satisfactorily explain why the factors show clear and convincing evidence of unfairness; otherwise, the court should apply the presumption and move on ro the takings analysis. Parties should have somewhat greater clarity prior to trial in predicting how the court will define the relevant parcel. Despite this

clarity, the court has some leeway to ensure that the contiguous, commonly-owned parcel rule will not produce unjust results in extreme circumstances.

The test also comports with Supreme Court precedent. Under the facts of *Penn Central*, a court would not look to the entire aggregate of property held by the landowner in the vicinity, nor would it divide the contiguous property into separate legal interests. On the other extreme, with regard to reasonable setback and open-space ordinances, the test would not allow for a taking. For a given lot, the presumption would include the entire commonly-owned property to which the setback ordinance applies. It is difficult to imagine any circumstances where a smaller area of land affected by reasonable setback or open-space requirement would rebut the presumption.

This approach also places emphasis on what the court appears to view as the role of the regulatory takings doctrine: a protection for extreme circumstances that clearly upset owners' reasonable expectations. The commonly owned, contiguous property rule in most cases approximates property owners' expectations for how the government will view and treat their property. In circumstances where neither the fairness factors nor the presumption clearly approximates these expectations, then rhe presumption will stand, and at least provide clarity to property owners and government regarding how the court will treat the property. However, in circumstances where the presumption clearly violates principles of fairness such that the treatment of the property clearly upsets the owner's expecrations, the factors provide an equitable rebuttal to the presumption to ensure the government does not go "too far" by placing an undue burden on any individual member of society.

V. CONCLUSION

Ever since the Court boldly announced in *Penn Central* that regulatory takings analysis requires a determination of the "parcel as a whole," courts have attempted to fashion an approach that equitably and fairly defines what that property is without requiring the government to pay compensation for the expected and reasonable impacts of government regulations. This Comment posits that under the regime that the Supreme Court has laid out, the best approach to find this balance is to look to the commonly owned, adjacent landholdings of a property owner for a presumption of that

relevant parcel. That presumption should only be rebutted based on clear and convincing evidence that the presumption would upset the reasonable expectations of the landowner, approximated by factors already applied by the majority of courts. This approach gives property owners and government the greatest clarity for how the courts will police their activities and provides sufficient flexibility to take account for extreme circumstances, while also following the somewhat cryptic trail left by the Supreme Court regarding how to apply this standard. Hopefully, practitioners and courts will use this approach to equitably and clearly derermine "into how many parts a thing has been divided."

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