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I. Introduction

There are no inherently correct criteria for determining whether regulations restricting uses of property violate the Takings Clause. The regulatory takings concept is a judicial construct that has the potential to be expansively applied. Justice Scalia underscored its judicial origins by explaining in *Lucas v. South Carolina Coastal Council* that "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's]

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possession.'"[1] And Justice Stevens warned about potential over-application of this judicial creation in his *Dolan v. City of Tigard*[2] dissent:

> The so-called "regulatory takings" doctrine that the Holmes dictum [ ] kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.[3]

Susceptibility for abuse exists where, in contrast to government's condemnation or physical appropriation of property, "a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident."[4]

Some scholars use this lack of precision to advocate an aggressive interpretation of the Takings Clause. Most notably, Professor Richard Epstein argues "that the eminent domain clauses and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, progressive taxation."[5] He asserts that when government "diminish[es] the rights of the owner in any fashion," there is a prima facie taking "no matter how small the alteration."[6]

This article, in contrast, suggests that Supreme Court decisions, as well as Constitutional and practical considerations, call for rules that limit regulatory takings to extreme situations. Those rules generally require,

1. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (citations omitted) (quoting Knox v. Lee (*Legal Tender Cases*), 79 U.S. (12 Wall.) 457, 551 (1871); Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879)). For a review of other Supreme Court decisions explaining that regulatory takings are a judicial creation, as well as how most, but not all scholars agree, see Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel As A Whole*, 36 VT. L. REV. 603, 615-17 (2012).

2. 512 U.S. 374 (1994).

3. *Id.* at 406-07 (footnote omitted). *See also* Nollan v. California Coastal Comm'n, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting) (criticizing the Court's use of a standard "that has been discredited for the better part of a century").

4. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002).

5. *See* RICHARD A. EPSTEIN, TAKINGS: FORWARD TO PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, at x (1985).

6. *Id.* at 57.

among other things, a showing that a regulation's economic impact on property is severe, counting direct benefits that the owner receives as part of the impact calculation, and evaluating that impact by including potential future uses of the property (the "parcel as a whole").

II. Non-Physical Takings Require a Major Diminution in Value

A. Supreme Court Opinions

In *Lingle v. Chevron* U.S.A. *Inc.*,[7] the Supreme Court explained that it analyzes regulatory takings claims by using one of four tests. Most are "governed by the standards set forth in *Penn Cent. Transp. Co. v. New York City*."[8] Others come within the "two relatively narrow categories" exemplified by *Loretto v. Teleprompter Manhattan* CATV *Corp*[9] (permanent physical occupation) and *Lucas v. South Carolina Coastal Council*[10] (denial of all economic value).[11] Finally, there is "the special context of land-use exactions."[12]

Two of these tests—those used in *Penn Central* and in *Lucas*—rely to a significant extent on the economic impact of the regulation on the owner's property. Under *Penn Central*, courts focus on (i) "[t]he economic impact of the regulation on the claimant;" (ii) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (iii) "the character of the governmental action."[13] Under *Lucas*, where the challenged restriction "permanently deprives property of all value," the economic impact is so severe that that there is usually a "per se" taking.[14]

7. 544 U.S. 528 (2005).

8. *Id.* at 538, referring to Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

9. 458 U.S. 419, 441 (1982).

10. 505 U.S. 1003 (1992).

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

12. *Id.*

13. 438 U.S. 104, 124.

14. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 332 (2002). A regulation that removes all value from property is not always a taking. Most notably, if "background principles of the State's law of property and nuisance already place" similar restrictions upon the property, the regulation is not a taking. *Lucas*, 505 U.S. at 1029.

Prior to *Lucas*, the Supreme Court addressed the level of economic impact needed to trigger a regulatory taking in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*.[15] While *Lucas* explained that a regulation that totally eliminates a property's value likely triggers a per se taking, *Concrete Pipe* addressed the other side of the coin by suggesting that impacts need to start approaching that level to be takings:

> [O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. See, *e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 117, 71 L.Ed. 303 (1926) (approximately 75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S.Ct. 143, 143, 60 L.Ed. 348 (1915) (92.5% diminution).[16]

Penn Central itself makes the same point: "Appellants concede that the decisions sustaining other land-use regulations . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' . . . ."[17] Justice Scalia's majority decision in *Lucas* includes a footnote furthering that point, but distinguishing regulations that render property valueless. It explains that "in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full."[18] Lower federal court decisions, as well as most decisions reviewing state takings provisions, follow a similar approach.[19]

15. 508 U.S. 602 (1993).

16. *Id.* at 645.

17. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 131 (1978). The seed for this concept was planted by Justice Holmes in *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), where his majority opinion explains 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."

18. *Lucas*, 505 U.S. at 1075 n.8 (emphasis omitted).

19. For example, the Federal Court of Claims, which considers many regulatory takings cases, has explained that "several Supreme Court decisions suggest that diminutions in value approaching 85 to 90 percent do not necessarily dictate the existence of a taking. This court likewise has generally relied on diminutions well in excess of 85 percent before finding a regulatory taking." Brace v U.S., 72 Fed. Cl. 337, 357 (2006) (footnotes omitted). The Seventh Circuit Court of Appeals recently came to a similar conclusion in reviewing both the federal and Wisconsin takings clauses, explaining that to establish a claim, "the challenged government action must deprive a landowner of 'all or substantially all practical uses of the property.'" Bettendorf v. St. Croix County, 631 F.3d 421, 424 (7th Cir. 2011) (citation omitted). State court

Case law is not the only reason for requiring an extremely high economic impact to support a regulatory taking. It is also needed to be consistent with the regulatory taking doctrine itself, and to address other constitutional requirements and practical considerations.

B. Functional Equivalent to an Ouster

In *Lingle v. Chevron* U.S.A. *Inc.*,[20] the Court engaged in its most recent comprehensive analysis of the regulatory taking doctrine. The Court explained that the "paradigmatic taking" occurs when government directly appropriates or physically invades property.[21] However, a regulation can amount to a taking when it is "so onerous that its effect is tantamount to a direct appropriation or ouster."[22] Regulatory takings tests thus attempt to identify restrictions that are functionally equivalent to the classic taking in which government ousts the owner from her domain.[23]

Where government ousts the owner, the economic impact is not an issue, because the ouster itself "eviscerates the owner's right to exclude others from entering and using her property-perhaps the most fundamental of all property interests."[24] But for an economic impact to be so onerous that it is similar to eliminating a core property interest, the impact has to be huge. As the Federal Circuit has explained, a "severe economic deprivation" is therefore required by "the very nature of a regulatory takings claim."[25]

C. Separation of Powers

The major diminution requirement also promotes judicial adherence to the separation of powers principle that underlies the Constitution. As the

decisions similarly call for a remaining value that is "slightly greater than de minimus" (Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs, 38 P.3d 59, 67 (Col. 2001)), a deprivation that is "one step short of complete" (Noghrey v. Town of Brookhaven, 852 N.Y.S.2d 220 (App. Div. 2008)), or an impact that removes "all practical value" from the property. E. Perry Iron & Metal Co., Inc. v. City of Portland, 941 A.2d 457, 465 n. 7 (Me. 2008).

20. 544 U.S. 528 (2005).

21. *Id.* at 537.

22. *Id.*

23. *Id.* at 539.

24. *Id.*

25. Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1195 (Fed. Cir. 2004). *See also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985), explaining that "under extreme circumstances" a governmental regulation can constitute a taking.

Court points out, that doctrine "restrains each of the three branches of the Federal Government from encroaching on the domain of the other two . . . ."[26] The extreme economic impact requirement helps to prevent the judiciary from overstepping its constitutional bounds by using its regulatory takings creation as an "open-ended source[ ] of judicial power."[27]

The requirement is similar to the check that the Court imposed in *Lingle v. Chevron* U.S.A., *Inc.*,[28] where it cabined the breath of the Taking Clause by discarding the "substantially advance legitimate state interests" takings test. In doing so, the Court pointed to the "well established" reasons for deferring to legislative judgments regarding the need for regulations.[29] The Court's major diminution condition likewise respects the independent powers of the legislative (and executive) branches.

D. Federalism

Boundless judicial authority would go beyond improperly intruding into the domain of the other federal branches of government. Due to the application of the Takings Clause to states through the Fourteenth Amendment,[30] it would also give the federal judiciary unprecedented powers over state affairs. As Professor Epstein has indicated, the Takings Clause could be used by the federal judiciary to override numerous areas that are traditionally governed at least in part by the States and their subdivisions, such as "zoning, rent control, workers' compensation laws, transfer payments [and] progressive taxation."[31]

Excessive authority over state actions, however, would clash with the Founding Fathers' recognition that "[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[32] That reservation goes to the core of our federal structure. Its expression in *The Federalist* was subsequently embodied in the Constitution's Guarantee Clause, under which the United States must "guarantee to every State in this Union a

26. Clinton v. Jones, 520 U.S. 681, 691 (1997).

27. Nollan v. California Coastal Comm'n, 483 U.S. 825, 842 (1987) (Brennan, J. dissenting).

28. 544 U.S. 528 (2005).

29. *Id.* at 545.

30. Palazzolo v. Rhode Island, 533 U.S. 606, 617, (2001) (citing Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226 (1897)).

31. *See* Epstein, *supra* note 5 Forward at x.

32. James Madison, *The Federalist No.* 45, *in* THE FEDERALIST 313 (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (1788).

Republican Form of Government."[33] It is further affirmed by the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[34]

The Court has explained, however, that an unrestricted interpretation of the Constitution would convert federal courts into a "superlegislature."[35] Federal judicial review of state property decisions could be particularly intrusive, and unwise, because as Justice Breyer has recognized, this is "an area of law familiar to state, but not federal, judges."[36] Yet by overseeing state and local decisions as "a super zoning board or a zoning board of appeals,"[37] federal courts would undermine the "strong policy considerations [that] favor local resolution of land-use disputes."[38] As Justice Alito explained while sitting on the Third Circuit, absent a high threshold for establishing a constitutional violation, courts would be "cast in the role of a 'zoning board of appeals.'"[39] A strong economic impact standard is therefore needed to respect federalism by avoiding an overly intrusive involvement of the federal judiciary into the affairs of the States and their subdivisions.

E. Indirect Benefits

In addition to constitutional reasons for requiring a major economic impact before a court can find a taking, that requirement takes into account the fact that government restrictions and other actions benefit property as well as burden it. Where government actions that are part of the regulatory structure directly benefit property, such as by allowing additional development densities or reduced fees, that benefit should be measurable,

33. U.S. CONST. art. IV, § 4.

34. U.S. CONST. amend. X.

35. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

36. Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.,130 S. Ct. 2592, 2619 (2010) (Breyer, J., concurring in part and concurring in the judgment). A unanimous Court made a related point in another takings decision, San Remo Hotel v. City & County of San Francisco, 545 U.S. 323 (2005), where it explained that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *Id*. at 347.

37. Raskiewicz v. Town of New Boston, 754 F.2d 38, 44 (1st Cir.1985).

38. Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1291 (3d Cir.1993).

39. United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA, 316 F.3d 392, 402 (3d Cir. 2003) (citations omitted) (explaining why the "shocks the conscience" standard should apply to due process land use challenges).

and therefore part of the economic impact calculation itself, as discussed further below.[40] Many governmental benefits, however, are more diffuse and thus difficult to calculate for a particular parcel.

A leading Takings scholar has grouped the various positive effects of regulations and other government actions on land values into three broad categories: the amenity effect, the scarcity effect, and the givings effect.[41] The amenity effect occurs where a regulation creates an environment that enhances the value of property for a particular use. This can at least partially offset the negative impact on a parcel. For example, while requiring that an owner leave a portion of her residential lot as open space might reduce the parcel's potential value, the lot's worth could at the same time be increased if the same restriction is imposed on neighboring parcels and thereby creates a more attractive neighborhood. Similarly, prohibiting industrial and commercial uses in residential neighborhoods can significantly enhance residential property values.

An amenity effect can also occur in an agricultural community. Protecting farmland can promote the existence of the critical mass of farms needed for farm support activities, such as food processing plants, farm good suppliers, and transportation facilities.[42] It can likewise prevent incompatible land uses, such as residential subdivisions whose inhabitants would likely object to and possibly bring nuisance suits due to the noise, odor, dust, and fumes that are often created by farming and livestock activities.[43]

A regulation's scarcity effect increases property values by limiting supply. Regulations imposed in the Lake Tahoe Basin, for example, strictly limit the amount of new residential, tourist and commercial development in the region.[44] That limitation creates a market scarcity, which in turn

40. *See infra* text accompanying notes 70-86.

41. *See* JOHN D. ECHEVERRIA, PROPERTY VALUES AND OREGON MEASURE 35, GEORGETOWN ENVIRONMENTAL LAW & POLICY INSTITUTE, GEORGETOWN UNIVERSITY LAW CENTER (2007), *available at* http://www.vermontlaw.edu/Documents/102009propertyValuesAndOregonMeasure37.pdf. For a similar grouping, *see* Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 64-68 (2004).

42. ECHEVERRIA, *supra* note 41, at 9-10.

43. *See* Bormann v. Bd. of Sup'rs In & For Kossuth County, 584 N.W.2d 309, 314, 322 (Iowa 1998), explaining the justification for statutory provisions that immunized farms in designated areas from certain nuisance suits, but nevertheless ruling that the immunity was unconstitutional.

44. *See* TRPA Code of Ordinances, Chapter 50 (Allocation of Development), *available at* http://www.trpa.org/documents/docdwnlds/ordinances/TRPA_Code_of_Ordinances.pdf.

increases the value of properties that are developed, are potentially eligible for development or have Transferable Development Rights.[45]

Finally, government expenditures and other actions can amount to "givings."[46] Using Lake Tahoe again as an example, between 1997 and 2010, the federal, state, and local governments spent over one and one quarter billion dollars on projects designed to improve the Lake Tahoe environment.[47] This has not only included projects aimed at protecting the Lake's spectacular clarity; it has also included adding many miles of bicycle and pedestrian trails, and a significant amount of new public access to the Lake.[48] These enhancements greatly increase the desirability of living in and visiting Lake Tahoe, which in turn no doubt significantly boosts property values.

The list of other ways in which government enhances property values and provides subsidies is virtually endless. New highways and other transportation facilities can greatly increase land values by making property accessible for residential or commercial development, or by increasing consumer access to existing businesses. Government's redevelopment of an area can have a similarly positive impact on surrounding property values. The National Flood Insurance Program, combined with numerous federal, state, and local flood control actions, greatly enhance the value of flood plain properties.[49] Agricultural subsidy programs significantly increase the value of agricultural lands.[50] Property rights advocate Gideon Kanner colorfully summarizes givings as follows:

> The baker relies on roads that permit his suppliers and his customers to reach his shop, on maintenance of public safety that encourages people to go about their business that includes the patronage of his shop and the purchase of his baked goods, on regulation of utility rates that enable him to operate his baking ovens profitably, and on government food regulations

45. See *infra* text accompanying notes 72-75 for a discussion of Transferable Development Rights.

46. For an extensive discussion of these types of governmental activities, *see* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001).

47. *See* TAHOE REGIONAL PLANNING AGENCY, ENVIRONMENTAL IMPROVEMENT PROGRAM: HIGHLIGHTS AND ACCOMPLISHMENTS (2011), *available at* http://www.trpa.org/documents/docdwnlds/EIP/Update/EIP_4PG_ 2011_FNL.pdf.

48. *Id*.

49. *See* Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 296-97 (2003).

50. ECHEVERRIA, *supra* note 41, at 28-29.

> that assure him and his customers of wholesome ingredients that go into his baked goods.[51]

Although some of these and other governmental activities are in part supported by a property owner's taxes, benefits are often far out of proportion to the taxes owners pay. It is doubtful, for example, that taxes paid by Lake Tahoe property owners pay for the one and one quarter billion dollars that governments have paid to improve the Tahoe environment. Quantifying the increased value of individual properties due to these amenity, scarcity, and givings benefits, however, is generally very difficult.[52] That value is therefore best captured by simply requiring the plaintiff to establish a large economic impact.

The difficulty in separately evaluating indirect benefits, rather than just accounting for them by setting a high economic impact bar, can be seen by looking at the Lake Tahoe development restrictions discussed in cases such as *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*.[53] Lake Tahoe's "exceptional clarity" was being threatened by an "upsurge of development."[54] In response, the States of California and Nevada established the Tahoe Regional Planning Agency, which over time significantly restricted new development.[55] In this type of situation, how should courts measure the economic impact on the owner's property?

Courts generally evaluate economic impact by comparing the value of a parcel subject to the challenged regulation, to the value of a comparable parcel that is not subject to that regulation.[56] The problem is that determining the value of a comparable but unregulated Lake Tahoe parcel is purely hypothetical. To accurately reflect the impact if the regulation had not existed, the analysis needs to assume that the regulation does not apply to *any* parcel in the regulated jurisdiction, i.e., that there potentially could

51. Gideon Kanner, *Making Laws and Sausages*: A *Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 754 (2005). *See also* William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: "Magic Words" or Economic Reality-Lessons from Palazzolo*, 39 URB. LAW. 319, 364 (2007), where property rights advocates characterize scarcity and amenity effects as "conceptually correct" but assert that due to other market forces, those "effects do not automatically undermine appraisal values."

52. *See also* discussion in Schwartz, *supra* note 41, at 64-68.

53. 535 U.S. 302 (2002).

54. *Id.* at 307-08.

55. *Id.* at 312.

56. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("compare the value that has been taken from the property with the value that remains in the property").

be unlimited development throughout the area. Moreover, the analysis would need to account for the scarcity and amenity effects by determining the impact that unlimited development's impacts would have on the parcel's price. Unlimited development would eliminate the scarcity effect by increasing the supply of competing properties, and thereby reducing the property's value. It would also eliminate the amenity effect. Unlimited development would cause environmental degradation that would make the parcel less attractive, such as in this example, a polluted Lake Tahoe,[57] along with major increases in traffic, air pollution, and other impacts that would suppress the hypothetical parcel's value. Determining the value of that hypothetical parcel would involve extensive theory and relatively little empirical evidence. A major diminution requirement helps to account for this uncertain nature of the economic evaluation. It also acknowledges the existence of givings.

The Court recognized the benefits concept in numerous regulatory takings cases, going back to *Pennsylvania Coal Co. v. Mahon*.[58] In creating (perhaps inadvertently) the regulatory takings doctrine, Justice Holmes thus explained that the Court's previous decision in *Plymouth Coal Co. v. Com. of Pennsylvania*[59] held that a statute requiring coal mine owners to leave a pillar of coal along the border with a neighboring coal mine was not a taking because the statute "secured an average reciprocity of advantage that has been recognized as a justification of various laws."[60] The Court expanded upon that point in *Penn Central*, stating as follows:

> Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law. Doubtless appellants believe they are more burdened than benefited by the

57. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 341 (2002), explaining that property values throughout the region will increase if the regulations preserve the Lake's "pristine state."

58. 260 U.S. 393 (1922).

59. 232 U.S. 531 (1914). Even before *Plymouth Coal*, the Court expressed this concept. In Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911), the Court explained that "it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

60. *Pennsylvania Coal*, 260 U.S. 393, 415 (1922).

> law, but that must have been true, too, of the property owners in *Miller*, *Hadacheck*, *Euclid*, and *Goldblatt*.[61]

The Court's subsequent decisions continued to recognize the importance of including indirect benefits in analyzing takings claims. In *Andrus v. Allard*,[62] for example, the Court stated:

> It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing business in a civilized community." *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S., at 422, 43 S.Ct., at 163 (Brandeis, J., dissenting). We hold that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment.[63]

The court reiterated that point in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[64] explaining:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.[65]

And writing for the majority, Justice Scalia reinforced this point in *Lucas v. South Carolina Coastal Council*:[66]

> Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," *Penn Central Transportation Co.*, 438 *1018 U.S., at 124, 98 S.Ct., at 2659, in a manner that secures an "average reciprocity of advantage" to everyone concerned, *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 415, 43 S.Ct., at 160.[67]

61. 438 U.S. 104, 134-35 (1978).
62. 444 U.S. 51 (1979).
63. *Id.* at 67-68.
64. 480 U.S. 470 (1987).
65. *Id.* at 491.
66. 505 U.S. 1003 (1992).
67. *Id.* at 1017-18.

By implication, *Lucas* affirmed that in a *Penn Central* analysis, which does not involve the extraordinary circumstance in which a regulation rendered land "valueless,"[68] the Court should engage its normal assumption concerning reciprocity of advantage.

In a *Penn Central* evaluation, the usual assumption that landowners indirectly benefit from numerous governmental actions is captured by requiring a very high economic impact. Absent that requirement, property owners could use the Takings Clause to obtain windfalls. In addition, as previously reviewed, the high impact is needed to avoid the federal judiciary overstepping the Constitution's separation of powers constraint and its respect for State sovereignty.

III. Direct Benefits

In contrast to indirect benefits, which as just discussed are difficult to measure and are therefore accounted for by the major diminution in value requirement, direct benefits can be reasonably quantified. As such, they should be part of the calculation of the property's value of the property with the regulation in place. The need to account for direct benefits in a *Penn Central* analysis is supported by *Penn Central* itself. In that case, owners were restricted in their ability to develop historic properties, but in exchange local zoning laws gave them the right to increased development on nearby parcels that they already owned. The Court explained that these benefits "undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation."[69] The Federal Circuit, which sees a large volume of takings cases, thus explains that in evaluating whether a governmental action amounts to a taking, "available offsetting benefits must be taken into account generally, along with the particular benefits that actually were offered to the plaintiffs."[70]

There is some uncertainty, however, about exactly which direct benefits are relevant in determining whether a taking has occurred. Most notably, in *Suitum v. Tahoe Reg'l Planning Agency*,[71] the Court reviewed Transferable Development Rights (TDRs). *Suitum* involved Tahoe Regional Planning Agency regulations that prohibited development on Ms. Suitum's lot, but which provided allegedly valuable "Transferable Development Rights" (TDRs) that she could sell to other landowners. Suitum sued TRPA for an alleged taking, but did not first attempt to sell her TDRs. TRPA therefore asserted that Suitum's claim was not ripe. The Court disagreed. It

68. *Id.* at 1020.

69. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978).

70. Cienega Gardens v. United States, 503 F.3d 1266, 1287 (Fed. Cir. 2007).

71. 520 U.S. 725 (1997).

held that no further discretionary act by TRPA was needed for there to be a "final decision," because the particular TDRs available to Suitum were already known.

The *Suitum* majority expressly avoided deciding whether TDRs that could be sold to a third party should be considered in determining whether government took property, as opposed to whether government provided just compensation for a taking.[72] However, Justice Scalia, joined by two other justices, concurred in the judgment, opining that where the value of TDRs stems from their marketability to third parties, as opposed to the original owner's ability to use them on property she owns, they are only relevant to the just compensation calculation.[73] It is unclear, however, why TDRs should not be relevant to a taking analysis just because they are used by a third party. They are marketable property interests that are part of a landowner's bundle of sticks. Where a court is evaluating a regulation's economic impact, it should not matter that value exists because certain uses are permitted as opposed to the same value existing because the owner has TDRs. The economic impact is identical.[74]

Besides the question of exactly what direct benefits should be considered in the takings analysis, another unresolved issue is who has the burden of proof concerning those benefits. There is no question that the claimant has the burden of proof concerning the economic impact of a regulation in general.[75] A debate exists within the Federal Circuit, however,

72. The Court specifically stated as follows:

> While the pleadings raise issues about the significance of the TDR's both to the claim that a taking has occurred and to the constitutional requirement of just compensation, we have no occasion to decide, and we do not decide, whether or not these TDR's may be considered in deciding the issue whether there has been a taking in this case, as opposed to the issue whether just compensation has been afforded for such a taking. The sole question here is whether the claim is ripe for adjudication, even though Suitum has not attempted to sell the development rights she has or is eligible to receive. We hold that it is.

Id. at 728-29.

73. *Id*. at 747-49 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia contrasted the use of TDRs by a third party to the situation in *Penn Central*, where the landowners "owned at least eight nearby parcels, some immediately adjacent to the terminal, that could be benefited by the TDRs." *Id*. at 749.

74. For a review of other reasons for considering TDRs in evaluating economic impact, *see* Paul Merwin, *Caught Between Scalia and the Deep Blue Lake: The Takings Clause and Transferable Development Rights Programs*, 83 MINN. L. REV. 815 (1999).

75. *See*, for example, Cienega Gardens v. United States, 503 F.3d 1266, 1288 (Fed. Cir. 2007) ("the burden is on the owners to establish" the *Penn Central* factors).

concerning whether offsetting benefits are part of that burden. In *Cienega Gardens v. United States*, writing for the majority in a six to one decision (involving an enlarged, but not en banc panel[76]), Judge Dyk suggested that the owner's burden includes the need to address regulatory provisions that are "specifically designed to ameliorate the impact of the" challenged regulation.[77]

Subsequently, in a two to one decision, the majority in CCA *Associates v.* U.S. placed the burden on the government, stating that "[o]nce CCA came forward with evidence of an economic impact, the government then had the burden to establish any offsetting benefits which would mitigate or reduce the impact."[78] Dissenting in part, however, Judge Dyk emphatically pointed to his *Cienega Gardens* decision and to other opinions and asserted that owners have the burden of addressing offsetting benefits that are intended to mitigate a regulation's economic impact, because that is part of the owners' establishment of the *Penn Central* economic impact element.[79] Judge Dyk contrasted the direct benefit situation from the indirect benefits in *Rose Acre Farms, Inc. v.* U.S.[80] In *Rose Acre*, the government had "urge[d] that 'common sense' dictates some consideration of the beneficial effects which the [Salmonella bacteria] regulations had on Rose Acre's business and the egg industry as a whole."[81] But the government did not provide evidence of those effects. The Federal Circuit rejected the argument, stating that while "[u]nder certain circumstances, regulatory action may confer an economic benefit on a party subject to the regulation . . . . [h]ere, the government points to no economic data in the record to support its assertion of offsetting benefits."[82] Judge Dyk explained that "*Rose Acre* involved indirect benefits flowing from the solution to the regulatory problem, rather than specific benefits provided to those affected by government regulation which were designed to ameliorate the impact of the regulation."[83]

A variation of Judge Dyk's approach makes sense. Judge Dyk might be interpreted as saying that absent proof, indirect benefits should be ignored. As previously explained, however, indirect benefits are very pervasive and real, and need to be accounted for in the economic impact analysis.[84] The

76. *Id.* at 1294, n.1.

77. 503 F.3d 1266, 1283 (Fed. Cir. 2007).

78. 667 F.3d 1239, 1245 (Fed. Cir. 2011).

79. *Id.* at 1251-54.

80. 559 F.3d 1260, 1275 (Fed. Cir. 2009).

81. *Id.*

82. *Id.*

83. CCA *Associates* at 1254 (Fed. Cir. 2011) (Dyk, J., dissenting in part; internal quotation marks and brackets omitted).

84. *See* text *supra* accompanying notes 40-68.

fact that they are difficult to quantify should be taken into account generically by setting a high economic impact threshold. Judge Dyke is correct, however, that where benefits are direct they should be part of the impact calculation itself, and like other takings elements, owners have the burden of establishing that impact.

IV. Parcel as a Whole

Simply requiring a high economic impact and an accounting for direct benefits, however, provides insufficient guidance for a court to make an economic impact determination. Before a court can ascertain the degree to which a regulation diminished a property's value, it must decide *what* property will be analyzed in the first place. If that "denominator"[85] is limited to the regulated portion of one's property, a taking will often be likely even with a high impact requirement. The Supreme Court, however, has prevented that outcome with its "parcel-as-a-whole" rule. The Court first articulated the rule in its pivotal *Penn Central* decision.[86] The Penn Central Transportation Co., which owned Grand Central Terminal, asserted that New York City prohibited it from building an office structure above the Terminal and thereby took "a valuable property interest," namely, Penn Central's "'air rights' above the Terminal."[87] The Court, however, rejected that argument, famously explaining:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather . . . on the nature and extent of the interference with rights in the parcel as a whole . . . .[88]

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

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

87. *Id.* at 130.

88. *Id.*

Since *Penn Central*, the Court has emphatically embraced this parcel-as-a-whole rule, although along the way it has hinted twice that it might have wanted to revisit the requirement.[89] The Court voiced its last and presumably final word on the rule in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[90] The *Tahoe-Sierra* Court held that a regional planning agency's temporary moratorium on development did not impose a categorical taking under *Lucas* because the properties in question retained value as a result of their potential for use in the future.[91] The Court based its holding on the parcel-as-a-whole rule, explaining that the rule not only has a "geographic" ("metes and bounds") dimension but also a "temporal" dimension (period of time covered by the ownership interest in property).[92] Courts must look to the entirety of those interests in evaluating the effect of a challenged regulation.[93]

In at least one case, however, property owners have asserted that the temporal dimension of the parcel-as-a-whole rule should not apply to *Penn Central* challenges. In an unsuccessful petition to the U.S. Supreme Court, the owners in CCA *Associates v.* U.S. argued that certain dicta in *Tahoe-Sierra* suggests that the Court's emphatic statement that the parcel-as-a-whole rule applies temporally is limited to *Lucas* challenges.[94] In *Tahoe-Sierra*, the Court stated that had the plaintiffs in that case pursued a fact specific as-applied *Penn Central* claim, as opposed to a facial *Lucas* challenge (asserting that the moratorium automatically removed all value from hundreds of parcels), "some of them might have prevailed."[95] The Court did not expand on that statement, and more significantly nowhere hinted that it was meant to alter its forceful statement that courts have a duty to follow "*Penn Central's* admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"[96] The unexplained dicta might have referred to situations such as where the use of property is time sensitive—for example, to provide housing for a limited term event like the Olympics. In such a case, the inability to use the parcel during its most productive period could have an enormous economic impact and thereby support a *Penn Central* claim. The restriction

89. For a more in depth discussion, *see* Siegel, *supra* note 1.

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

91. *Id.* at 332.

92. *Id.* at 331-32.

93. *Id.* at 332.

94. Petition for a Writ of Certiorari at 26-27, CCA Associates v. U.S., (No. 11-1352) (May 8, 2012), 2012 WL 1636907 (U.S.), 26-27 (2012), *petition denied*, 133 S. Ct. 422 (2012), *reh'g denied*, 11-1352, 2012 WL 5989807 (U.S. Dec. 3, 2012).

95. *Tahoe-Sierra*, 535 U.S. 302, 334.

96. *Id.* at 332.

would not support a facial *Lucas* challenge, however, because some value would remain.

The application of the parcel-as-a-whole approach to temporary takings is not only required by caselaw but is supported by the same Constitutional and practical considerations that necessitate a high economic impact requirement. For example, like the major diminution requirement, the parcel-as-a-whole rule is needed because regulatory takings are a judicial construct, closely akin to substantive due process, that goes far beyond anything contemplated when the Takings Clause was drafted. As such, applying it expansively would mark a return to the excessive judicial activism of the *Lochner*[97] era using the Takings Clause rather than the Due Process Clause.[98]

V. Conclusion

Some elements of the Court's economic impact analysis are unsettled. In particular, the Court has yet to decide whether Transferable Development Rights should be a part of that analysis, or are only relevant to whether government has provided adequate compensation. The basic contours of a *Penn Central* and *Lucas* economic impact analysis, however, are established. The Court has set the *Penn Central* impact bar very high, and requires a parcel to be rendered valueless under *Lucas*. Moreover, the separation of powers and federalism principles underlying our Constitution reinforce the propriety of the Court's approach. Without the high bar, the federal judiciary would have almost unrestrained powers to second guess a wide range of legislative and executive decisions, as well as numerous actions of the States and their subdivisions. That high threshold also helps to take into account the numerous indirect, difficult to quantify benefits that governmental actions provide to regulated properties.

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

98. For a more comprehensive discussion of the need for a robust parcel-as-a-whole rule, see Siegel *supra* note 1.