5-5-2018

Murr-ky Waters: How Murr v. Wisconsin Creates Uncertainty in Attempting to Answer the "Denominator Question"

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Note

MURR-KY WATERS: HOW *MURR V. WISCONSIN* CREATES UNCERTAINTY IN ATTEMPTING TO ANSWER THE "DENOMINATOR QUESTION"

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In *Murr v. Wisconsin*,[1] the Supreme Court of the United States created a three-factor test for determining when two contiguous properties should be treated as one for the purpose of regulatory takings analyses: whether state and local law treat the land as merged; whether the physical characteristics of the land support merger; and whether merger unreasonably impacts the prospective value of the regulated land.[2] After applying the new factors to the two contiguous properties at issue, the Supreme Court held that the land should be analyzed as one property.[3] The Court had the opportunity to solve the denominator problem—how a court should determine the value remaining in a property compared to the value taken[4]—but failed to clarify the few categorical rules already available under the takings doctrine.[5] Further, the Court's new test gives too much deference to states by providing for consideration of state interests (at least) twice.[6] Finally, the Court created confusion by introducing narrow factors that ultimately will be meaningless in most takings inquiries, yet may mislead litigants to embark on an unsuccessful litigation strategy.[7] Ultimately, Chief Justice Roberts' dissent was more persuasive than the majority opinion because it provided a straightforward solution to the denominator problem—use of state lines to

* J.D. Candidate, 2019, University of Maryland Francis King Carey School of Law. The author wishes to thank Professor Michael Pappas for his guidance, suggestions, and comments; *Maryland Law Review* editors Alex Botsaris, Catherine Gamper, Gabby Phillips, Dan Scapardine, Jerri Shahverdi, Jonathan Tincher, and Collin Wojciechowski for their tireless and insightful work throughout the writing process and his family and friends who continually provide much needed support and distraction.

1. 137 S. Ct. 1933 (2017).
2. *Id.* at 1945–46.
3. *Id.* at 1948; *see infra* notes 96–107 and accompanying text.
4. *See infra* Part II.C.
5. *See infra* Part IV.A.1.
6. *See infra* Part IV.A.2.
7. *See infra* Part IV.B.

identify what property is subject to a takings analysis.[8] While the outcome for the Murrs was likely correct under modern jurisprudence, the Court fell short of clarifying the denominator problem and missed an opportunity to demystify a portion of the muddled regulatory takings doctrine.[9]

I. THE CASE

The Murr siblings own two contiguous parcels, Lots E and F, which were purchased by their parents in 1963 and 1960 respectively.[10] The Murrs' parents built a cabin on Lot F, but Lot E has remained vacant since its purchase.[11] Topographically, the roughly one-and-one-quarter-acre lots are very similar: they are located on the St. Croix River, each bisected by a steep, 130-foot bluff.[12] The lots have approximately .98 acres of "net project area"[13] between them.[14] The lots came under common ownership when the Murrs' parents transferred them to the Murr siblings in 1994 and 1995,[15] resulting in merger of the lots under a local ordinance.[16]

The ordinance has been in place since the mid-1970s and prohibits the sale or development "of adjacent, substandard lots under common ownership."[17] However, if commonly owned, contiguous lots do not contain the required net project area—one acre—"they may together suffice as a single, buildable lot."[18]

Years later, the Murrs sought a variance to move the cabin on Lot F and sell Lot E as a separate lot, but the St. Croix County Board of Adjustment denied the application.[19] The Wisconsin Circuit Court and Wisconsin

8. *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting); *see infra* notes 116–133 and accompanying text.

9. *See infra* Part IV.B.

10. Murr v. St. Croix Cty. Bd. of Adjustment (*Murr I*), 796 N.W.2d 837, 841 (Wis. Ct. App. 2011).

11. *Id.* The Murrs' parents owned title in Lot E but transferred title of Lot F to their plumbing company. *Id.* This explains why the lots were not technically under common ownership until they were transferred to the Murr siblings. *See id.*

12. *Id.*

13. "'Net project area' means developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." WIS. ADMIN. CODE NR § 118.03(27) (2017).

14. *Murr I*, 796 N.W.2d at 841.

15. *Id.*

16. Murr v. State (*Murr II*), No. 2013AP2828, 2014 WL 7271581, at *1 (Wis. Ct. App. Dec. 23, 2014); *see* ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE & DEVELOPMENT, § 17.36(I)(4)(a) (2005) (amended 2007 & 2014) [hereinafter ST. CROIX ORDINANCES].

17. *Murr II*, 2014 WL 7271581, at *1 (citing ST. CROIX ORDINANCES § 17.36(I)(4)(a)–(b)); *see* ST. CROIX ORDINANCES § 17.36(I)(4)(a).

18. *Murr II*, 2014 WL 7271581, at *1 (citing *Murr I*, 796 N.W.2d at 843 n.9); *see* ST. CROIX ORDINANCES § 17.36(I)(4)(a).

19. *Murr I*, 796 N.W.2d at 841.

Court of Appeals affirmed the Board's decision.[20] Subsequently, the Murrs filed a complaint alleging that the merger ordinance resulted in an uncompensated taking of their property in which they were deprived of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot."[21] The Murrs asserted that the size, location, and terrain of Lot E limited its use to a single-family residence.[22] The Wisconsin Circuit Court determined "the applicable law required it to analyze the effect of the Ordinance on the Murrs' property as a whole, not each lot individually."[23] Accordingly, the court granted summary judgment to the State, holding that the property, taken as a whole, could be used for varying purposes.[24] Notably, a residence could be built "entirely on Lot E, entirely on Lot F, or could straddle both lots."[25] The Murrs' appealed the decision.[26]

The Wisconsin Court of Appeals affirmed the Circuit Court's ruling.[27] The court decided that the takings analysis "properly focused" on the ordinance's effect on the property as a whole.[28] The Court of Appeals added that the Murrs were "charged with knowledge of the existing zoning laws" when they acquired the lots, thus, their expectation that the lots be treated separately was unreasonable.[29] The Supreme Court of Wisconsin denied review,[30] but the Supreme Court of the United States granted certiorari to determine "the proper unit of property against which to assess the effect of [a] challenged [taking]."[31]

20. *Id.* at 840, 841, 845 (holding that the request to relocate the cabin was "simply a matter of convenience" and that "[p]ersonal inconvenience alone does not constitute the unnecessary hardship required to grant variances" (citing Snyder v Waukesha Cty. Zoning Bd., 247 N.W.2d 98 (1976))).

21. *Murr II*, 2014 WL 7271581, at *2.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The Wisconsin Circuit Court initially found that the Murrs' claim was time barred, but despite this conclusion, the court reached the merits of the claim. *Id.* The court also noted "the merger decreased the [Murrs'] property value by less than ten percent," thus retaining economic significance. *Id.*

26. *Id.*

27. *Id.* at *8.

28. *Id.* at *5. The Wisconsin Court of Appeals relied on United States Supreme Court jurisprudence, stating that the Court has "never endorsed a test that 'segments' a contiguous property to determine the relevant parcel." *Id.* at *4 (quoting Zealy v. City of Waukesha, 548 N.W.2d 528, 532 (Wis. 1996)).

29. *Id.* at *8 (citing State *ex rel.* The Markdale Corp. v Bd. of Appeals of Milwaukee, 133 N.W.2d 795, 798 (Wis. 1965)).

30. Murr v. State, 862 N.W.2d 899 (Wis. 2015).

31. Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017).

II. LEGAL BACKGROUND

Under the Fifth Amendment to the United States Constitution, private property shall not "be taken for public use, without just compensation."[32] The regulatory takings doctrine has its genesis in *Pennsylvania Coal Co. v. Mahon*,[33] which recognized that, although it is widely accepted that government may regulate property, when a "regulation goes too far it will be recognized as a taking."[34] However, the *Mahon* Court did not provide any expanded guidance as to when a regulation crosses the threshold from a permissible rule to an unconstitutional taking.[35] In general, Supreme Court jurisprudence in the century following *Mahon* included only ad hoc inquiries as to what was a regulatory taking, but generally did not delineate definitive rules.[36] Part II.A discusses what are arguably the only categorical rules developed by the Court—those found in *Loretto v. Teleprompter Manhattan CATV Corp.*[37] and *Lucas v. South Carolina Coastal Council*.[38] Part II.B discusses *Penn Central Transportation Co. v. New York City*,[39] where the Court set out complex factors to guide courts through takings inquiries.[40] Finally, Part II.C discusses modern takings objectives and the genesis of the denominator problem.[41]

A. Lucas *and* Loretto*: The Categorical Rules for Physical Intrusion and Complete Loss of Economic Benefit*

The Supreme Court has refused to adopt a strict rule for resolving regulatory takings inquiries. However, the Court has recognized two "categorical" regulatory takings that are compensable under the Takings Clause without a case-specific inquiry.[42] First, regulations that force a property owner to suffer a permanent physical intrusion, no matter how small, require compensation.[43] In *Loretto*, the Court held a New York law that required landlords to allow cable companies to affix cable boxes to the land-

32. U.S. CONST. amend. V.

33. 260 U.S. 393 (1922).

34. *Id.* at 415.

35. *See id* (describing that a regulation can go too far, but not clarifying how to determine when the regulation goes too far).

36. *See infra* Part II.A–B.

37. 458 U.S. 419 (1982); *see infra* notes 43–44 and accompanying text.

38. 505 U.S. 1003 (1992); *see infra* notes 45–50 and accompanying text.

39. 438 U.S. 104 (1978).

40. *See infra* Part II.B; notes 51–64 and accompanying text.

41. *See infra* Part II.C.

42. *Lucas*, 505 U.S. at 1015.

43. *Id.*

lords' buildings constituted a compensable taking even though the boxes occupied less than two cubic feet of space.[44]

Second, regulations that "den[y] all economically beneficial or productive use of land" require compensation.[45] In *Lucas*, the Court determined that a South Carolina regulation that barred the property owner from developing any permanently habitable structures rendered the land valueless and required compensation.[46] However, the Court limited this category of economic takings, noting that complete deprivation will not require compensation if the regulation merely duplicates the result of state property or nuisance laws, or if the regulation inheres in the power of the state to abate public nuisances.[47] In other words, if a government can prohibit one from building on their property by calling such building a public nuisance, then compensation is not required.[48] Justice Scalia, writing for the Court, recognized the inherent issue with this "categorical" rule: "the rhetorical force of our 'deprivation of all economically feasible use' rule . . . does not make clear the 'property interest' against which the loss of value is to be measured."[49] Here, the Court set the table for the denominator problem, discussed below in Part II.C, but did not resolve the issue.[50]

B. Penn Central*'s Ad Hoc Inquiry Factors and the "Parcel as a Whole"*

Even if a regulation does not generate a physical intrusion or completely deprive economic benefit, a regulatory taking may be found based on the following factors: (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 governmental action."[51] The analytical result of these factors necessarily depends on how the prop-

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44. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–40 (1982). The Court remanded the case to the state court to determine the amount of compensation. *Id.* at 441.

45. *Lucas*, 505 U.S. at 1015.

46. *Id.* at 1019–22, 1032.

47. *Id.* at 1029. The court enumerated factors for the determination of whether a regulation duplicates the effect of other state laws stating:

> [T]he degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike.

Id. at 1030–31 (citations omitted).

48. *See id.* at 1029 (describing the public nuisance exception to the *Lucas* rule).

49. *Id.* at 1015, 1016 n.7.

50. *See id.* (identifying the denominator problem but avoiding how to solve it); *infra* Part II.C.

51. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

erty is defined[52]—if only part of the property is impacted, is that the relevant portion? Or is the whole property the relevant portion? The Court answered that question in *Penn Central*, where a real estate developer sought to establish a taking when a New York landmark preservation law prevented the developer from building an office building on top of Grand Central Terminal.[53] The developer argued that the regulation deprived them of any gainful use of their "air rights" because they were unable to build vertically.[54] Thus, the developer insisted that, irrespective of the value remaining in the parcel, the city had taken their "right to this superadjacent airspace."[55] Instead of dividing the single parcel into discrete segments—so that the parcel's air rights were distinct from the parcel's land rights—and attempting to determine whether the regulation abrogated a particular segment, the Court determined that it must focus on the "parcel as a whole."[56] Then, using the three factors listed above, the *Penn Central* Court determined that the developer could not establish a taking simply because they were unable to exploit an airspace property interest.[57] The Court did not expand on how to determine what constitutes a "parcel as a whole."[58]

The Court applied the "parcel as a whole" test in *Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency*,[59] where the petitioners had purchased land overlooking Lake Tahoe to develop as vacation/retirement homes.[60] The Court held that the regulation, which prevented development for a temporary period of time, was not a per se taking because the moratorium was only temporary, and thus, residual value remained in the land.[61] Thus, the Court determined that it was proper to consider the parcel as a whole, meaning that the petitioners' temporary interest would not be separated from their residual interest.[62] The Court made clear that the "parcel as a whole" test focuses on the division of property *in-*

52. *See id.* at 130–31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather on the . . . parcel as a whole . . . .").

53. *Id.* at 115–22.

54. *Id.* at 130.

55. *Id.*

56. *Id.* at 130–31.

57. *Id.* at 130. In this case, the Court determined that the "parcel as a whole" had not been completely abrogated. *Id.* at 130–31.

58. *See id.* at 130–31 (failing to expand upon what constitutes a "parcel as a whole").

59. 535 U.S. 302 (2002).

60. *Id.* at 312–13.

61. *Id.* at 332 ("Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.").

62. *Id.* at 319–20.

terests and not the physical division of parcels of land.[63] However, what constitutes a "parcel as a whole" has yet to be determined.[64]

C. Modern Takings Objectives and the Denominator Problem

Even with the *Lucas*, *Loretto*, and *Penn Central* guidelines in place, the central dynamic of regulatory takings jurisprudence is its flexibility. Since *Mahon*, flexible, case-by-case inquiries have attempted to square two competing objectives: (1) the individual's right to retain interest in private property,[65] and (2) the government's power to adjust rights for the public good.[66] No matter the case, the Court has balanced these interests based on the specific facts of each dispute.[67]

The flexibility of the takings analysis presents at least one major flaw: because it requires a court to compare the value taken from property (the numerator) with the value remaining in property (the denominator); it begs the question, "[W]hose value is to furnish the denominator of the fraction[?]"[68] In *Lucas*, Justice Blackmun pointed out that the issue is necessarily subjective because "whether the owner has been deprived of all economic value of his property will depend on how 'property' is defined."[69] Justice Blackmun continued:

> We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencum-

63. *See id.* at 331 ("[D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute categorical takings.").

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

65. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001); Armstrong v. United States, 364 U.S. 40, 49 (1960) (discussing the public's right to freedom from governmental force in the takings context).

66. *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 65 (1979) ("The Takings Clause . . . preserves governmental power to regulate . . . ." (first quoting *Penn Central*, 438 U.S. at 124; then citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962))).

67. *See Palazzolo*, 533 U.S. at 617–18 ("These inquiries are informed by the purpose of the Takings Clause, which is to prevent the 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.'" (quoting *Armstrong*, 364 U.S. at 49)).

68. 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)). Justice Brandeis hinted to this problem nearly a century ago in *Mahon*. Pa. Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).

69. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1054 (1992) (Blackmun, J., dissenting).

> bered ownership of the landholding affected by the regulation . . . .[70]

Ultimately, the federal courts have never solved the denominator problem and have been inconsistent on the issue.[71]

The Supreme Court, despite deciding many important takings cases since *Lucas*, has rarely touched the denominator issue.[72] Instead, the Court has only tangentially addressed the denominator problem in three kinds of severance cases: vertical severance,[73] temporal severance,[74] and functional severance[75]—all approaches in contrast to the "parcel as a whole" analysis from *Penn Central*. The Court has left room to address the denominator problem in a horizontal severance case.

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70. *Id.* (alterations in original) (quoting Frank I. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1614 (1988)).

71. *Compare, e.g.*, Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100, 108 (2002) (holding that the denominator to be considered was the parcel as a whole), *and* Deltona Corp. v. United States, 657 F.2d 1184, 1192–93 (Ct. Cl. 1981) (refusing to horizontally sever a property, and thus, find a taking where two-thirds of a property was rendered valueless), *with* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181–82 (Fed Cir. 1994) (holding that compensation was required where the regulation destroyed the entire value of one discrete portion of a large parcel), *and* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1562 (Fed. Cir. 1994) (finding a compensable taking where value of the land was reduced by about sixty percent).

State law has shed some light on the problem, but determinations are far from conclusive. New York courts adhere to the "parcel as a whole" rule from *Penn Central*. *See* Putnam Cty. Nat'l Bank v. City of New York, 829 N.Y.S.2d 661, 662–63 (N.Y. App. Div. 2007) (finding that no taking had occurred where a developer was only granted a permit for a 17-lot subdivision as opposed to a 36-lot subdivision because an economic benefit was still present). Colorado courts have come to similar conclusions. *See* Animas Valley Sand & Gravel, Inc. v. Bd. of Cty. Comm'rs, 38 P.3d 59, 61 (Colo. 2001) ("[I]t is inappropriate to limit a takings inquiry solely to one particular right in the land, or, to a particular part of the land.").

72. *See, e.g.*, *supra* Part II.A–B.

73. Vertical severance addresses the interplay between subsurface, surface, and air rights. See the discussion of *Penn Central*, *supra* Part II.B, regarding the severability of air rights. Since *Penn Central*, the Court has been sufficiently clear that vertical severance is impermissible. See *Keystone*, 480 U.S. at 506, where the Court upheld a statute that combined underground interests and surface interests, thus reinforcing the absence of vertical severability.

74. Temporary takings that deny a landowner all use of their property require compensation. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987). In *First English Evangelical Lutheran Church*, the Court determined that compensation was due for the portion of time during which all use of the property was taken, even if use of the property returned to the owner. *Id.* at 321–22. Thus, the Court severed the property into two segments along a timeline: one when the regulation was in effect, and one after it was struck down. *See id.*

75. The Court has twice found a taking where a municipality refused to grant a building permit unless the property owner granted an easement to the municipality. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987). In these cases, the Court equated easements with permanent, physical occupations of a discrete portion of land—functionally severing that portion from the rest. *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 393–94.

III. THE COURT'S REASONING

In *Murr v. Wisconsin*, the Supreme Court held that the Wisconsin Court of Appeals was correct to analyze the Murrs' property as a single unit.[76] The test for regulatory takings analysis requires a court to "compare the value that has been taken from the property with the value that remains in the property,"[77] thus the critical question is how to define the unit of property.[78] In *Murr*, the Court attempted to clarify this question by introducing new factors to consider when determining the proper denominator of a takings inquiry: "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land."[79] Under these factors, the Court held that the Murrs' property should be analyzed as one parcel, and it followed, under prior takings jurisprudence, that the Murrs had not established a compensable taking.[80]

The Court first highlighted the legal background of the Fifth Amendment's Takings Clause, which states that private property shall not "be taken for public use, without just compensation."[81] Writing for the Court, Justice Kennedy emphasized the flexibility of the Court's regulatory takings jurisprudence, and the essential balance of the doctrine's central, competing objectives: (1) the individual's right to retain the interests and freedoms of use attached to private property ownership, and (2) the government's power to adjust rights in the public's best interest.[82]

Next, the Court discussed two guidelines that help identify the relevant parcel for a regulatory takings inquiry.[83] First, the Court has declined to artificially limit the parcel in question to the portion "targeted by the challenged regulation."[84] Second, the Court has expressed caution of the view that property rights within the takings context "should be coextensive with those rights under state law."[85] Due to these considerations, the Court noted that no single test can determine the denominator in a takings inquiry.[86] Instead, the Court introduced new factors that lower courts must consider in order to identify whether reasonable expectations would lead a landowner

76. Murr v. Wisconsin, 137 S. Ct. 1933, 1942–50 (2017).
77. *Keystone*, 480 U.S. at 497 (citing Michelman, *supra* note 68, at 1192).
78. *Murr*, 137 S. Ct. at 1943–44.
79. *Id.* at 1945; *see infra* notes 88–95 and accompanying text.
80. *Murr*, 137 S. Ct. at 1948–50.
81. U.S. CONST. amend. V; *Murr*, 137 S. Ct. at 1943.
82. *Murr*, 137 S. Ct. at 1942–43.
83. *Id.* at 1944–45.
84. *Id.* at 1944; *see supra* Part II.B.
85. *Murr*, 137 S. Ct. at 1944–45.
86. *Id.* at 1945.

to anticipate that their land "would be treated as one parcel, or instead, as separate tracts," based on background customs and legal tradition.[87]

The first factor directs courts to "give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law."[88] The Court explained that a restriction that predates ownership can be an objective factor that a landowner would consider in forming their fair expectation of the property, but that a valid takings claim does not disappear "because a purchaser took title after the law was enacted."[89]

The second factor instructs courts to consider the physical characteristics of the property, including (1) the relationship of any distinguishable tracts, (2) the parcel's topography, and (3) the surrounding human and ecological environment.[90] The Court also suggested that it might be particularly relevant that the property is "in an area that is subject to, or likely to become subject to, environmental or other regulation."[91]

The third factor tells courts to "assess the value of the property under the challenged regulation," with particular attention given to the effect of the encumbered land on the value of other assets.[92] The Court offered examples in which a use restriction may decrease the market value of one holding, but effectively add value to the remaining property, such as by increasing privacy, expanding recreation space, allowing expansion of an existing structure, or by preserving natural beauty.[93] In these situations, a court may be inclined to treat the land as a single parcel.[94] On the other hand, the Court noted that the absence of a special relationship between the holdings may lean in favor of treating the land as distinct parcels.[95]

Under the new multifactor standard, the Supreme Court held that the Murrs' lots should be evaluated as a single parcel.[96] First, state and local law—namely the merger provision—defined Lot E and Lot F as one unit

87. *Id.*

88. *Id.*

89. *Id.* (first citing Ballard v. Hunter, 204 U.S. 241, 262 (1907); and then citing Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001)). Similarly, "a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations." *Id.* For example, in this case, the Murrs' "land was subject to [the merger provision] . . . only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted," thus the "law inform[ed] the reasonable expectation they will be treated as a single property." *Id.* at 1948.

90. *Id.*

91. *Id.* at 1945–46 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

92. *Id.* at 1946.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1948.

when they came under common ownership in 1995.[97] Further, the Murrs' "land was subject to [the merger provision] . . . only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted," thus the "law informs the reasonable expectation they will be treated as a single property."[98] Second, the physical properties of the land support the conclusion that the holdings are a unified parcel.[99] "The lots are contiguous along their longest edge," individually they have limited uses due to their rough terrain, and their location on the St. Croix River makes it likely that public regulation might affect enjoyment of the property.[100] "Third, the prospective value that Lot E brings to Lot F supports" unifying the parcels for the purpose of a takings analysis.[101] Despite losing the opportunity to sell Lot E and build a separate structure on Lot F, the Murrs gained the possibility of using the property as an "integrated whole."[102] Using the property as a whole would give the Murrs elevated privacy, increased recreational space, and room for additions or improvements to the cabin on Lot F.[103] The Court further pointed out that, if the lots were sold separately, Lot E and Lot F would be worth $40,000 and $373,000 respectively, while they are worth $698,300 combined.[104] Considering the property as a whole, the Court concluded that the Murrs did not suffer a taking under the *Lucas*[105] and *Penn Central*[106] tests.[107]

The Court also addressed the Murrs' and Wisconsin's suggestions to adopt formalistic rules to guide the denominator inquiry.[108] Wisconsin asked the Court to "tie the definition of the parcel to state law."[109] However, the Court took issue with this approach because, in essence, a state may be able to define a relevant parcel in a way that permits it to escape any takings claim.[110] The Court also noted that state law is part of the new test's

97. *Id.* (citing *Murr II*, No. 2013AP2828, 2014 WL 7271581, at *1 (Wis. Ct. App. Dec. 23, 2014)); *see supra* note 16 and accompanying text.

98. *Murr*, 137 S. Ct. at 1948.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1948–49.

104. *Id.* at 1949.

105. *See supra* notes 45–50 and accompanying text.

106. *See supra* Part II.B.

107. *Murr*, 137 S. Ct. at 1949–50.

108. *Id.* at 1946–48.

109. *Id.* at 1946.

110. *Id.* at 1945–47. The Court stated:

> [A] State might enact a law that consolidates nonadjacent property owned by a single person . . . then impose[] development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value

third factor, which directs courts to look to state law to identify reasonable expectations regarding regulation.[111]

The Murrs, on the other hand, proposed that the Court adopt a test in which "lot lines define the relevant parcel."[112] However, the Court disregarded this argument because "lot lines are themselves creatures of state law," and thus, the Murrs effectively asked the Court to accept one form of state law that induces their preferred result—lot lines—but ignore another that does not—the merger provision.[113] The Court reasoned that, because the merger provision is a legitimate exercise of governmental power, relying on lot lines to define the parcel would frustrate states' ability to implement minimum lot size provisions and "cast[] doubt on the many merger provisions that exist nationwide today."[114] Finally, the Court reasoned that lot-line provisions are not consistent across the country, and thus, it would be "difficult to make them a standard measure of the reasonable expectations of property owners."[115]

In his dissent, Chief Justice Roberts, joined by Justices Thomas and Alito, agreed that the Murrs' property should be treated as a whole, but believed that the Court erred by defining "private property" under a new "elaborate [factorial] test."[116] Chief Justice Roberts instead suggested defining the property at issue based on state law "in all but the most exceptional circumstances."[117] Responding to the majority's concern that property owners may "strategically pluck one strand from their bundle of property rights" to claim a taking on that strand alone, Chief Justice Roberts argued that "unbundling" is not a problem "when a legally distinct parcel is the basis" for a takings claim.[118]

Next, Chief Justice Roberts rebutted the majority's contention that a state-law rule invites "gamesmanship" in which owners may seek to alter lot lines in anticipation of regulation, and states may pass laws to consolidate property and avoid takings claims.[119] He argued that strategic splitting

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in the property as a whole rather than considering whether individual holdings had lost all value.

Id. at 1945. However, see Chief Justice Roberts' dissent, in which he argues that the Court should adopt this simple test. *Id.* at 1950–57 (Roberts, C.J., dissenting); *see infra* text accompanying notes 116–131.

111. *Murr*, 137 S. Ct. at 1946–47 (majority opinion).

112. *Id.* at 1947.

113. *Id.*

114. *Id.* at 1947–48 (citing Brief of Amici Curiae National Ass'n of Counties et al. at 12–31, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No 15-214)).

115. *Id.* at 1948.

116. *Id.* at 1950 (Roberts, C.J., dissenting).

117. *Id.* at 1953.

118. *Id.*

119. *Id.*

is "not particularly difficult to detect and disarm,"[120] such as in *Penn Central* when the Court prevented an owner's attempt to separate their air rights from other property rights.[121]

Chief Justice Roberts next contended that the Court muddled the takings analysis by failing to separate step one—defining "private property"—from step two—determining whether that property has been taken for public use.[122] He argued that the effects of an ordinance and the extent of property owners' expectations are issues that should not be "[c]ramm[ed]" into the definition of private property.[123] Chief Justice Roberts contended that, in departing from state property principles, the Court has created a "litigation-specific definition of 'property'"[124] Effectively, Chief Justice Roberts maintained, the government's regulatory interests will now be assessed twice in takings analyses: once in "identifying the relevant parcel," and again in determining if the regulation has placed too high a burden on that parcel.[125] That is, property will be defined based in part on the consideration of community interests versus individual rights—allowing the government's goals to shape the inquiry before the takings analysis even begins.[126] Or as Chief Justice Roberts put it, "The result is clear double counting . . . : Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation," therefore "the regulation will seem eminently reasonable given its impact on the pre-packaged parcel."[127] Chief Justice Roberts summed up his discontent with a simple public policy argument: the muddled factor test removes a stable state-law test and compromises the Takings Clause as a protection of private property from overbearing public interests.[128]

Chief Justice Roberts concluded his dissent by applying the state-law test to the Murrs' property.[129] In his eyes, the Wisconsin Court of Appeals erred in applying a takings-specific approach to defining the parcel instead of inquiring whether the lots were separate under Wisconsin law.[130] Chief Justice Roberts suggested vacating the judgment below and remanding to

120. *Id.*

121. *Id.*; *see supra* Part II.B.

122. *Murr*, 137 S. Ct. at 1951, 1954.

123. *Id.* at 1954.

124. *Id.* at 1954–55. The *Penn Central* Court explicitly refused to create a litigation-specific definition of property. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 149 n.13 (1978) (Rehnquist, J., dissenting) ("[T]he Court must define the particular property unit that should be examined. . . . The Court does little to resolve these questions . . . .").

125. *Murr*, 137 S. Ct. at 1955.

126. *Id.*

127. *Id.* at 1955–56.

128. *Id.* at 1956.

129. *Id.*

130. *Id.*

the state court to identify the relevant parcel under Wisconsin property law.[131]

IV. ANALYSIS

In *Murr v. Wisconsin*, the Supreme Court held that the petitioner's property should be analyzed under a new factorial test to determine whether two contiguous lots should be treated as one for the purpose of a regulatory takings analysis.[132] In doing so, the Court further muddled the per se and ad hoc inquiries of regulatory takings analyses. First, the Court provided subjective factors that fail to clarify the few categorical rules available under the takings doctrine and essentially render *Lucas v. South Carolina Coastal Council* claims of total economic deprivation no longer per se takings.[133] Second, the Court allowed for review in ad hoc inquiries that considers state interests twice, providing for gamesmanship by state legislatures.[134] Third, the Court created hollow factors that hamper predictability and do not solve the denominator problem, yet may mislead litigants to embark on an unsuccessful litigation strategy.[135]

The issues with *Murr* stem from long-standing problems with regulatory takings jurisprudence.[136] It would be unreasonable to claim that *Murr* could have completely overhauled the regulatory takings doctrine. However, *Murr* did provide an opportunity to take a step toward clarifying the regulatory takings doctrine by demystifying the denominator problem. Based

131. *Id.* Justice Thomas also wrote a dissenting opinion, in which he argued that the Court should have taken the opportunity "to take a fresh look at . . . takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment." *Id.* at 1957–58 (Thomas, J., dissenting).

132. *Id.* at 1942–50 (majority opinion).

133. See *infra* Part IV.A.1 for a discussion about whether *Lucas* claims were "per se" to begin with.

134. *See infra* Part IV.A.2.

135. *See infra* Part IV.B.

136. *See, e.g.*, Buhmann v. State, 201 P.3d 70, 109 n.4 (Mont. 2008) (Nelson, J., dissenting) ("Federal regulatory takings jurisprudence has been described as a 'doctrinal muddle' lacking 'theoretical coherence,''a confused body of law containing contradictory principles and standards,' a composite of 'ad hoc determinations rather than principled resolutions,' and an area of law whose 'predominant characteristic' is 'a welter of confusing and apparently incompatible results.' It has been said that '[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [the Supreme Court's] takings jurisprudence.' The Supreme Court itself has acknowledged that its regulatory takings jurisprudence 'cannot be characterized as unified.'" (alteration in original) (citations omitted) (first citing Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle"*, 90 MINN. L. REV. 826, 827–28 (2006); then citing John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 696 (1993); then citing Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 562 (1984); then citing Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964); and then citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens & Blackmun, JJ., dissenting))).

on the discussion below, it seems that the Court did not substantially embrace this opportunity.

A. The Murr *Analysis Hollows out Already Questionable Categorical Takings Jurisprudence and Systematically Defers to the State in Ad Hoc Inquiries*

Section A.1 addresses the issues with *Lucas*'s categorical, economic deprivation rule, and *Murr*'s effect on that rule going forward.[137] Section A.2 explores the application of the *Murr* test to non-categorical takings—an analysis that relies on state interests twice.[138]

1. The Lucas *Framework Was Never Really a "Categorical" Rule*

Lucas purports to create a categorical rule so that a taking occurs whenever a regulation deprives a landowner of all economically viable use of their property. Even with the decision in *Murr*, the Court has failed to provide a workable standard for determining the appropriate denominator for the *Lucas* inquiry.[139]

From the outset, the *Lucas* Court was aware of how blurry its new "bright-line"[140] rule was:

> 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 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.[141]

Not only is *Lucas* internally incomplete, but also, *Lucas* compounded confusion over the denominator problem by neglecting to explain or overturn inconsistent prior cases.[142] For example, in *Pennsylvania Coal Co. v. Mahon*, the Court determined that, because sub-surface property interests are separate from surface property interests and the statute[143] at issue "pur-

137. *See infra* Part IV.A.1. In Part II, this Note described another categorical rule—*Loretto v. Teleprompter Manhattan CATV Corp.*'s physical occupation taking—but the analysis that follows will focus on *Lucas* and not on *Loretto*. *See supra* Part II.A.

138. *See infra* Part IV.A.2.

139. Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 65 (2017).

140. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1067 (1992) (Stevens, J., dissenting).

141. *Id.* at 1016 n.7 (majority opinion).

142. Blais, *supra* note 139, at 63.

143. The *Mahon* Court described the statute as follows:

port[ed] to abolish" the entire sub-surface property interest, a compensable taking had occurred.[144] Yet, sixty-five years later the Court held in *Keystone Bituminous Coal Ass'n v. DeBenedictis*[145] that a nearly identical law[146] did not constitute a taking—all this without overruling *Mahon*.[147] In other words, despite nearly identical facts, the Court determined that in *Mahon* a taking occurred because a distinct bundle of property rights was taken, yet later held in *Keystone* that the property as a whole must be taken in order to establish a taking. The *Lucas* Court acknowledged this inconsistency, but chose not to address it, thus further confusing the denominator issue and undermining its new, so-called "categorical" rule.[148]

Despite the Court's insistence that the *Lucas* total takings rule should apply very rarely,[149] it is raised in a large number of regulatory takings cases.[150] Yet, in spite of its frequent invocation, the success rate is shockingly low at 1.6%.[151] Lower courts have found a *Lucas* taking in only four in-

> The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.

Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–14 (1922).

144. *Id.* at 414.

145. 480 U.S. 470 (1987).

146. The *Keystone* Court described the statute as follows:

> Section 4 of the Subsidence Act prohibits mining that causes subsidence damage to three categories of structures that were in place on April 17, 1966: public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries. Since 1966 the [regulatory agency] has . . . generally require[d] 50% of the coal beneath structures protected by § 4 to be kept in place as a means of providing surface support. Section 6 of the Subsidence Act authorizes the DER to revoke a mining permit if the removal of coal causes damage to a structure or area protected by § 4 . . . .

Id. at 476–77 (footnotes omitted) (citations omitted) (citing Subsidence Act, 52 PA. CONST. STAT. § 1406.4 (1986)).

147. *Id.* at 496.

148. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1016 n.7 (1992) (comparing *Mahon* with *Keystone* and stating that "this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court") (first citing *Mahon*, 260 U.S. at 414; then citing *Keystone*, 480 U.S. at 497–502); *see* Blais, *supra* note 139, at 63 (noting the inconsistencies between *Mahon* and *Keystone*).

149. *Lucas*, 505 U.S. at 1018; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) ("[O]ur holding was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" (quoting *Lucas*, 505 U.S. at 1017)).

150. *See* Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of* Lucas*: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1849–50 (2017) (reviewing over 1,700 *Lucas* cases in state and federal courts over the past twenty-five years).

151. *Id.* (finding only 27 successful *Lucas* claims out of a total of approximately 1,700 cases).

stances: nuisance abatement cases,[152] private agreement cases,[153] specific zoning cases,[154] and extreme delay of development cases.[155] These cases point to the heart of the issue: the doctrine's ambiguity—it is only successful in a small number of cases, yet is ambiguous enough to lead litigants to believe they may have a successful claim in a large number of cases.

It is no secret that *Lucas* has undergone its fair share of criticism.[156] One commentator attacked the "theoretical gap" underlying *Lucas*—a fraction without a way to determine the denominator—by describing it as a "conceptual black hole."[157] To many, this legal gap is what made *Murr* such an attractive case: it gave the Court a chance to clear up the denominator problem and give real power to the "total takings" doctrine.[158] Professor Lynn E. Blais took that thought even further, believing that *Murr* should have overturned *Lucas* because total takings are a "myth" and "bright-line rules have no place in regulatory takings doctrine."[159]

2. State Law Is a More Straightforward and Established Standard for Defining the Relevant Parcel

In *Murr*, the Court did not do anything as drastic as overturn *Lucas*, but instead attempted to define a parcel of land through three subjective fac-

152. *See id.* at 1863–66 (discussing four successful *Lucas* cases where "courts perceive that the statutory nuisance defenses are weak or unsupported, sometimes because they are inconsistent with common-law nuisance principles").

153. *See id.* at 1866–75 (discussing successful *Lucas* cases where private agreements, such as restrictive covenants, lease agreements, and development plans, reduced the property owner's denominator).

154. *See id.* at 1875–84 (discussing successful *Lucas* cases where the property was zoned in the least inclusive zoning classification and the government denied the owner's requests for development of some other land use).

155. *See id.* at 1884–87 (discussing successful *Lucas* cases where extreme delay occurred in the building permit process).

156. *See, e.g.*, Richard A. Epstein, Lucas v. S.C. Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1369, 1370 (1993) (describing the *Lucas* opinion as "rickety" and "anticlimactic"); William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393, 1395 (1993) (criticizing Justice Scalia's "cavalier use of constitutional principles" in the *Lucas* decision). *But see, e.g.*, John J. Delaney, *Advancing Private Property Rights: The Lessons of* Lucas, 22 STETSON L. REV. 395 (1993) (describing the positive impact of *Lucas*).

157. Blais, *supra* note 139, at 65 (quoting John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1032 (2003)).

158. *See, e.g.*, Gavin S. Frisch, Note, *What Is the Relevant Parcel? Clarifying the "Parcel as a Whole" Standard in* Murr v. Wisconsin, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 253, 267 (2017),
https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1157&context=djclpp_sidebar (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) ("*Murr v. Wisconsin* provides the Court a crucial opportunity to clarify the rule for determining the 'parcel as a whole.'").

159. Blais, *supra* note 139, at 85, 88. Still, Blais argues, there will be plenty of opportunity to overturn *Lucas*. *Id.* at 88 ("The Court's recent decision in *Murr* is certain to generate a flood of *Lucas* total takings litigation, so the Court will have ample opportunity in the near future to . . . overturn *Lucas*.").

tors.[160] The identification of a parcel would be easier to come by if the Court stopped after the first factor: deference to the state's treatment of the land under local law.[161] Under the new framework for takings analyses, a court must ask "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."[162] As Chief Justice Roberts argued in his dissent, if the inquiry ended there, the denominator would be clearly defined by state law.[163] Thus, because the Murrs' properties were merged into one tract under a local ordinance, the takings inquiry would have treated the lots as one.[164] But as Justice Kennedy pointed out, there are significant issues with this inquiry.[165]

Primarily, states may be able to define the relevant parcel in a way that allows them to escape responsibility for regulatory takings.[166] In other words, if the numerator is the loss of value attributable to the regulation and the denominator is the relevant parcel for which the impact should be judged, the state will always define the denominator as broadly as possible to prevent the numerator from equaling the denominator, which would represent a total taking.[167] Thus, a state would be able to define a parcel in a manner that leaves available some economically viable use, thereby denying a compensable *Lucas* taking. In this situation, a landowner would have to "roll the dice under the *Penn Central* balancing" factors to argue that, although not a total economic deprivation, a regulatory taking has occurred.[168]

Chief Justice Roberts, in his dissent, properly disarmed the majority's worry over "gamesmanship."[169] Both landowners seeking to alter lot lines in anticipation of regulation, on the one hand, and a state passing laws to consolidate property and avoid a takings claim, on the other, are somewhat

160. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017) (providing three new factors, but refusing to overturn any prior takings jurisprudence).

161. *See id.* (providing two additional factors to consider beyond the treatment under local law).

162. *Id.*

163. *Id.* at 1950 (Roberts, C.J., dissenting).

164. *Id.* at 1948 (majority opinion).

165. *See infra* notes 166–168 and accompanying text.

166. *Id.* at 1946.

167. *See* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 188 (2004) ("[W]hen the numerator is a small toothpick and the denominator is the entire bundle, the likelihood of the Court requiring compensation is small. Where the numerator is a large portion of the bundle, or cuts across every stick in the bundle, the likelihood of compensation increases until it becomes mandatory if certain core sticks or the entire bundle is taken."). Alternatively, a property owner wants to define the denominator as narrowly as possible. *See id.*

168. *Murr*, 137 S. Ct. at 1955 (Roberts, C.J., dissenting).

169. *Id.* at 1953.

easy to "detect and disarm."[170] For example, in *Penn Central*, the Court rejected a strategic splitting of property rights where the property owners attempted to focus the takings analysis on air rights as distinct from other property rights.[171] Further, the nature of the Takings Clause and prior Supreme Court jurisprudence will always balance the interests of the individual's private property rights[172] and the government's power to adjust rights for the public good.[173] Any impermissible posturing on either side of a takings litigation will certainly be snuffed out by courts and existing state property law in the interest of this balance.[174]

Wisconsin, for example, has strict, formal procedures that must be followed in order for an owner to alter lot lines.[175] Wisconsin requires a certified survey map to change boundaries, and even then, the new survey is not permissible "if the reconfiguration does not result in a subdivision or violate a local ordinance or resolution."[176] These strict formulations make it extremely difficult for a property owner to alter lot lines in anticipation of regulation.

To be sure, little guidance exists on *how* courts would "detect and disarm" such gamesmanship by either side.[177] One solution would advise courts to use the second and third factors under *Murr*—physical characteristics and encumbered property value—to snuff out any impermissible posturing.[178] In this scenario, the denominator would be easily identified under state law and then courts would apply the remaining *Murr* factors if the case at hand stunk of impermissible gamesmanship. Having defined the relevant

170. *Id.*

171. *See generally* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); *cf.* Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998) (first citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–64 (1980); and then citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.").

172. *See supra* note 65.

173. *See supra* note 66.

174. Some courts and commentators have noted that protections from impermissible posturing would be snuffed out by combination of the takings doctrine and the substantive due process test—two frameworks that "seem analytically identical." *See* Orion Corp. v. State, 747 P.2d 1062, 1076 (Wash. 1987) (en banc) (first citing William B. Stoebuck, San Diego Gas*: Problems, Pitfalls and a Better Way*, 25 J. URB. & CONTEMP. L. 3, 20 (1983): and then citing Ross A. Macfarlane, Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715, 729 (1982)); *see also* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 980 (2000) (arguing for greater property rights by overlapping substantive due process with takings protections).

175. *See* WIS. STAT. ANN. § 236.34 (West 2015) (providing strict guidelines for changing lot lines).

176. *Id.* § 236.34(1)(4)(bm).

177. Murr v. Wisconsin, 137 S. Ct. 1933, 1953 (2017) (Roberts, C.J., dissenting).

178. *Id.* at 1945–46 (majority opinion); *supra* text accompanying notes 90–95.

parcel, the court would be free to analyze the property under *Lucas*, *Loretto*, and *Penn Central*.

Consider this hypothetical: A developer purchases two contiguous lots—Lot A and Lot B—abutting a landfill that the developer also owns. Lot A, the lot closest to the landfill, is rendered economically useless pursuant to a recently enacted environmental regulation that essentially forbids expansion of the landfill. Lot A is surrounded on three sides by the landfill with the fourth side abutting Lot B. Lot B is surrounded by a beautiful and popular beach on three sides. Under local law, Lot A could be merged with Lot B.

State law has defined clearly the lots' lines through its merger provision, but the developer believes that it can establish a taking of Lot A because it wants to expand the landfill onto that lot. Under the second and third *Murr* factors, a court would look to the physical characteristics and the value of the property under the new regulation to determine if the state defined lot lines to avoid a takings claim.

First, Lot A is surrounded by the landfill, yet Lot B is beautiful and a perfect spot to build an apartment building. The physical characteristics of the lots show that each has its own individual uses. However, the lots' location near a landfill and a beach make it likely that public regulation might affect enjoyment of the property.[179]

Second, Lot A does not likely bring any prospective value to Lot B. In fact, it is likely that the landfill will lower the value of Lot B. The developer is losing the opportunity to build the only thing feasible on Lot A (a landfill), but not gaining any use of the property as an integrated whole. Unlike *Murr*, the developer gains no more privacy, recreational space, nor room for improvements under the merger provision.[180] A court would balance these two factors to determine if any impermissible posturing occurred.[181]

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Instead of clearing up the denominator problem, *Murr*'s subjective factors will increase instances of litigations that invoke what was supposed to be the rarely used *Lucas* framework.[182] Now, plaintiffs can attempt to use these subjective factors to narrowly define their property and claim that a regulation has taken all economic use of that narrowly defined property.[183] As discussed above, these cases will generally fail.[184] In short, the *Murr*

179. Much like the location of the lots on the St. Croix River in *Murr*. *Murr*, 137 S. Ct. at 1948.

180. *Id.*

181. In this hypothetical it seems more likely that a court would find posturing than in a situation like *Murr*, but it is clear that a landowner must climb a high hurdle to win. There is no doubt separation of powers and deference to the legislature would also play significant factors.

182. *See supra* note 149 and accompanying text.

183. *See supra* note 150 and accompanying text.

184. *See supra* note 151 and accompanying text.

factors have further attenuated property owners from successful takings claims under the misguided *Lucas* "per se" test.

Further, the vague and subjective factors set out in *Murr* poke major holes in "categorical" takings jurisprudence, showing that bright-line rules really are a "myth" in the infinitely subjective takings inquiry.[185] In response to the uncertainty revolving around *Lucas*, and now *Murr*, commentators have offered compelling evidence that overturning *Lucas* would be a good first step in resolving problems with takings jurisprudence, however, it is beyond the scope of this Note to analyze those predictive assertions.[186]

3. The Court Impermissibly Relied on a Double-Reasonableness Test That Gives Too Much Deference to the State

Instead of stopping at the state law factor, the *Murr* Court explained that in applying the new test, a court should also focus on "[t]he reasonable expectations of an acquirer of land," whether "the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation," and whether the regulation of one portion of property benefits or harms the value of another portion.[187] Thus, before even applying the *Penn Central* factors, a court would define the relevant property using factors that incorporate familiar aspects of the *Penn Central* test, such as diminution of the property and the reasonable expectations of the property owner.[188]

Put another way, there are two questions a court must answer under the current takings jurisprudence: (1) what is the relevant property affected

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185. *See* Blais, *supra* note 139, at 88 (arguing that there is no such thing as a categorical rule in regulatory takings doctrine). Professor Blais argued:

> [T]he Court's attempt to create a total takings doctrine has failed, and . . . the Court should repudiate it. It demonstrates that the Court's initial total takings opinions were conceptually incoherent and woefully undertheorized. And . . . attempts by lower courts to rehabilitate the doctrine by crystallizing the bright-line rules through careful and consistent application were doomed to, and did, fail. . . . Although bright-line rules have their place, it is not in the heart of regulatory takings doctrine, which is premised on concerns for fairness and justice in distributing the burdens of land use regulation.

Id. at 47–48.

186. *See id.* (suggesting that the Court should overturn *Lucas*); John D. Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 VT. L. REV. 689, 716 (2017) ("The *Lucas* decision remains a governing Supreme Court precedent, but the test's numerous qualifications and limitations make its future viability uncertain."); John D. Echeverria, *Time to Overturn* Lucas, NAT'L L.J. (Nov. 14, 2005), https://www.law.com/nationallawjournal/almID/900005440881/time-to-overturn-lucas/?back=law.

187. Murr v. Wisconsin, 137 S. Ct. 1933, 1945–46 (2017) (first citing Ballard v. Hunter, 204 U.S. 241, 262 (1907); and then citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)).

188. *See id.* at 1955 (Roberts, C.J., dissenting) ("The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes 'too far' even gets underway."); Blais, *supra* note 139, at 65 (noting that the *Murr* factors incorporate parts of the *Penn Central* test).

by the regulation; and (2) does the regulation vacuum out all economic value in the relevant property?[189] Under the new *Murr* factors, the Court is prescribing lower courts to look into the merits of the takings claim, which should be done in step two, to define the property in step one, thus the regulation will seemingly always be reasonable; a court does not reach the ad hoc *Penn Central* test until it has determined that the regulation did not deny all productive use of the parcel.[190] This leaves a court to consider the state's interests twice: once in identifying the parcel, and again in determining if "the regulation has placed too" high a burden on that parcel.[191] Not only is a court predetermining the reasonableness of the regulation, but it is also predetermining the basic question of whether or not there was a taking.

This double counting presents a major problem in takings inquiries because the government's goals shape the outcome of the takings analysis before it even begins. *Lucas* and *Penn Central* each require that the relevant property has already been defined.[192] The Supreme Court has never relied on anything other than state property principles to define property.[193] Under *Murr*, courts will now rely on the reasonableness of the regulation as applied to the landowner when determining what constitutes the relevant property.[194] Thus, the Court has authorized exactly what it refused to do in *Penn Central*: create a litigation-specific definition of "property."[195] Because takings cases necessarily pit the interests of the few against the greater good, giving too much deference to the state further isolates the suffering of the minority.[196] The Fifth Amendment was created to do just the opposite—protect the citizen from the encumbrances of the government.[197]

189. *Murr*, 137 S. Ct. at 1955.

190. *See id.* at 1955–56 ("The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel.").

191. *Id.* at 1955.

192. *Id.*; *see* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981) ("These 'ad hoc, factual inquiries' must be conducted with respect to specific property . . . .").

193. *Murr*, 137 S. Ct. at 1954.

194. *Id.* at 1945, 1947 (majority opinion).

195. *Id.* at 1954–55 (Roberts, C.J., dissenting).

196. *Id.* at 1955; *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) ("The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions."); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government 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.").

197. *See, e.g.*, Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893) ("[The Takings Clause] prevents the public from loading upon one individual more than his just share of the burdens of government . . . .").

B. Confusion and Unpredictability Are Sure to Follow the Subjective Murr Test

The practical issues with the *Murr* holding will derive from the confusion that the *Murr* test adds to an already murky doctrine. Ultimately, *Murr* decided a very specific type of takings case: one where two contiguous and commonly owned parcels of land face merger.[198] This was a prime case for the Supreme Court to try to clarify the denominator problem because, here, it was as clear as possible that the outcome of the takings analysis depended on what the court determined the denominator to be. Under one theory, Lot E would be the denominator, and all of Lot E was taken from the Murrs, so the St. Croix regulation would constitute a taking.[199] Under another, Lot E and Lot F would be treated together as the denominator, and thus, taking Lot E would not constitute a taking of all economic benefit from the property.[200]

Under the guise of solving the denominator problem, the Court muddled the takings doctrine by providing a subjective firewall that is outcome determinant. The majority admits that "[d]efining the property at the outset . . . should not necessarily preordain the outcome in every case."[201] But the factors the Court created do just that. By objectively analyzing "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land" to define the property,[202] the Court has allowed lower courts to determine the outcome of the case before even getting to the takings inquiry.[203] Because the factors generally give deference to the state, it is likely that the outcomes will increasingly be a win for the state.

The *Murr* test will no doubt lead courts to inconsistent and unpredictable outcomes.[204] When creating its new test, the Court provided lists of possible inquiries under each factor,[205] but noted that these lists are not ex-

198. Murr, 137 S. Ct. at 1936 (majority opinion).

199. *See supra* text accompanying notes 21–22.

200. *See supra* text accompanying notes 23–25.

201. *Murr*, 137 S. Ct. at 1944.

202. *Id.* at 1945.

203. See Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601, 631–32 (2014), for a discussion on why some regulatory takings cases are outcome determinative. "The determination of what constitutes the 'parcel as a whole' in a given case often is outcome determinative, because regulatory takings law measures the claimant's loss with respect to the relevant parcel." *Id.* at 631.

204. *See Murr*, 137 S. Ct. at 1945 (providing an expansive list of factors).

205. The lists of inquiries for each factor given by the Court include (1) treatment of land—"how it is bounded or divided, under state and local law," and whether the purchaser took title before or after the law was enacted; (2) physical characteristics—"the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment," and whether the property is in an area "subject to, or likely to become subject to," environmental regulation; and (3) prospective value—the existence of special relationships between

haustive.[206] Effectively, the Court has provided the state a fail-safe with endless litigation strategies and factors to pull from.[207] The Court is clear to emphasize that "the reasonable expectations at issue derive from background customs and the whole of our legal tradition."[208] Thus, the Court has provided endless ways of defining the three factors, against the backdrop of "reasonable" legal traditions, which are driven by government.[209]

As such, *Murr* is a big win for governments and a big loss for real property owners—especially those with adjacent lots—for two reasons. First, when a government decides to redefine the boundaries of, or restrict the use of, private property, a property owner must now wade through six judicially created factors (three from *Murr* and three from *Penn Central*) to figure out if compensation is due.[210] It is unlikely that a layperson could individually analyze their case under these factors, resulting in ambiguity and increased legal fees to the property owner. In contrast, if the Court had adopted a model using state law to define the property subject to a taking analysis, the average landowner would simply refer to state law to begin assessing their takings claim, thus compelling less ambiguity and less legal fees. Second, a clever legislature can craft regulations that will affect property rights without requiring just compensation.[211] The subjective factors are also good news for property lawyers and legal scholars—the uncertainty of *Murr* will undoubtedly produce substantial litigation and literature.[212]

Consider, for example, the environmental regulation at issue in *Murr*. Under the regulation's "Substandard Lots" provision, an owner may only build on a substandard lot if (1) it "is in separate ownership from abutting lands"; or (2) "by itself or in combination with an adjacent lot" in common ownership, it has at least one acre of developable land (otherwise called "net project area").[213] If Lot A is 0.5 acres and Lot B is 0.49 acres, and the lots are contiguous, they are individually substandard lots. If *X* owns Lot A and *Y* owns Lot B, then each owner would be able to build on their sub-

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the burdened land and other holdings and the effect of that relationship on the value of the holdings. *Id.* at 1945–46.

206. *Id.*

207. *See id.* (providing numerous factors and leaving the door open for additional considerations).

208. *Id.* at 1945.

209. *Id.*

210. *Id.* at 1945–46; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (first citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962); and then citing United States v. Causby, 328 U.S. 256 (1946)).

211. *See* Roger Pilon, *Supreme Court Confusion Could Cost a Family $410,000*, WALL ST. J. (Mar. 19, 2017), https://www.wsj.com/articles/supreme-court-confusion-could-cost-a-family-410-000-1489957554 (describing the impact of the *Murr* decision).

212. Ilya Somin, *A Loss for Property Rights in* Murr v. Wisconsin, WASH. POST (June 23, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/?utm_term=.2229dd010d48.

213. ST. CROIX ORDINANCES § 17.36(I)(4)(a).

standard lot. But if *X* owns both Lot A and Lot B, then at 0.99 acres, *X* may not build on each lot separately. This seemingly absurd result is exactly what occurred in *Murr*.[214]

States remedy this absurd result by way of merger, where lots are treated as one.[215] Thus, under a merger provision, *X* would be able to build on Lots A and B as if they were one substandard lot. Merger provisions are useful because they are "designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property."[216] Moreover, merger provisions are commonplace across the country and have been so for nearly a century.[217]

Where merger provisions are at play, litigants must target those provisions before getting to the substance of their takings claims. Previously, this would have been the litigant's only hurdle in a takings case. But instead of leaving the state regulation to its own volition, the *Murr* Court added more factors that further defer to the state in defining the denominator. The added confusion and deferential undertones of the new subjective factors work against the litigant.[218]

Interestingly, only two months after the *Murr* decision, the Wisconsin state legislature introduced a bill that "limit[s] the authority of local governments to regulate development on substandard lots and require the merging of lots."[219] On November 27, 2017, Wisconsin Governor Scott Walker signed the bill into law.[220] In a clear reaction to *Murr*, the legislature expanded property rights by allowing owners to sell and build on substandard lots if such activity was legal when the lot was created.[221] Additionally, the "bill prohibits a [municipality] from requiring that one or more lots be

214. *See Murr*, 137 S. Ct. at 1945–46 (merging two contiguous lots into one under a Wisconsin merger statute).

215. *See, e.g.*, ST. CROIX ORDINANCES § 17.36(I)(4)(a)(2) (requiring a merger for separate substandard adjacent lots unless "each of the lots has at least one acre of net project area").

216. Day v. Town of Phippsburg, 110 A.3d 645, 649 (Me. 2015) (citing Stewart v. Town of Durham, 451 A.2d 308, 311 (Me. 1982)).

217. Brief of Amici Curiae Nat'l Ass'n. of Ctys. et al. in Support of Respondents, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 3383223, *14–31 (listing over 100 examples of merger provisions). Merger provisions have become so commonplace that the American Society of Planning included one in its Model Zoning ordinance published in 1960. AMERICAN SOCIETY OF PLANNING OFFICIALS, THE TEXT OF A MODEL ZONING ORDINANCE 24–29 (3d ed. 1966).

218. *See supra* notes 201–203 and accompanying discussion.

219. Assemb. 479, 103d Leg., 2017–2018 Sess. (Wis. 2017).

220. *See* Patrick Marley, *Wisconsin Gov. Scott Walker Signs Bill to Expand Property Rights*, MILWAUKEE J. SENTINEL (Nov. 27, 2017), https://www.jsonline.com/story/news/politics/2017/11/27/wisconsin-gov-scott-walker-signs-bill-expand-property-rights/898148001/ (noting that Wisconsin Governor Walker signed the new property rights bill).

221. Wis. Assemb. 479, at 2.

merged with another lot without the consent of the owners of the lots that are to be merged."[222] Supporters of the bill are calling it the "homeowners' bill of rights."[223] It would not be surprising to see similar bills pop up across the country.[224]

Ultimately, *Murr* did not change the functionality of regulatory takings jurisprudence. As it was previously, it will still be very difficult for property owners to win these cases.[225] However, the legal field could see a decrease in commonly owned contiguous lots. A sophisticated property owner will research local regulation and merger laws before purchasing contiguous lots to avoid the risk of losing serious value when a regulation takes away the use of one of their lots. *Murr* stands for the chipping away of private property rights by creating further obstacles for just compensation under the Fifth Amendment.

V. CONCLUSION

In *Murr v. Wisconsin*, the Court had the opportunity to solve the denominator problem,[226] but instead, failed to clarify the few categorical rules available under the takings doctrine including the seldom-successful *Lucas v. South Carolina Coastal Council* total takings test.[227] Further, the Court gave too much deference to the state by requiring double counting of state interests and regulation reasonableness.[228] Finally, the Court created confusion through narrow factors that ultimately will be meaningless in most takings inquiries, yet may mislead litigants to embark on an unsuccessful litigation strategy.[229] Going forward, states will have freer range to enact regulations that affect property interests and upset property owners' access to relief under the current regulatory takings scheme.[230]

222. *Id.*

223. *See* Marley, *supra* note 220 (noting the colloquial name for the new bill).

224. Similar bills are likely to arise in Republican-led states that are in favor of expanded individual property rights. *See, e.g.*, Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1128 n.64 (1986) ("[T]he republican view does not necessarily support a property right that is sensitive to the consequences to others or to the society as a whole that exercise of the right might produce *in particular circumstances*. Instead, the theory assumes that the individual ought to be free to labor on her land and that her independence will necessarily enure to the public good by instilling desirable civic virtues.").

225. *See supra* note 151 and accompanying text.

226. *See supra* Part II.C.

227. *See supra* Part IV.A.1.

228. *See supra* Part IV.A.2.

229. *See supra* Part IV.B.

230. *See supra* Part IV.B.