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### Authors

Etty, Thijs  
Heyvaert, Veerle  
Carlarne, Cinnamon  
[et al.](#)

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MURR v WISCONSIN AND THE FUTURE  
OF TAKINGS LAW

Almost a century ago, Justice Holmes famously declared that a regulation becomes a taking of property if it goes too far.<sup>1</sup> Judges and scholars have struggled ever since to give meaning to this test. *Murr v Wisconsin*<sup>2</sup> is the most recent Supreme Court decision wrestling with this issue. This 2017 decision seems to have been something of a sleeper, because it is lacking in dramatic facts or stirring rhetoric. But it actually has broad implications for the rights of property owners and the scope of government regulatory powers.<sup>3</sup> *Murr* sends a strong signal that the property rights crusade led by Justice Antonin Scalia has stalled and that the Court is largely content with the current shape

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Daniel A. Farber is Sho Sato Professor of Law, University of California, Berkeley.

<sup>1</sup> *Pennsylvania Coal Co. v Mahon*, 260 US 393, 413 (1922).

<sup>2</sup> 137 S Ct 1933 (2017). The Takings Clause, “nor shall private property be taken for public use, without just compensation.” US Const, Amend V, cl 5. The language seems plainly to refer to government seizure of possession or title, not to regulation, so *Pennsylvania Coal* was only tenuously supported by the constitutional text. *Chicago Burlington and Quincy RR v City of Chicago*, 166 US 226 (1897), held the clause applicable to the states via the Due Process Clause of the Fourteenth Amendment.

<sup>3</sup> For some recent writing about *Murr*, see Richard A. Epstein, *Will the Supreme Court Clean Up Takings Law in Murr v. Wisconsin?*, 11 NYU L Rev 860, 861–83 (2017); Maureen E. Brady, *Penn Central Square: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism* (2017), online at <https://ssrn.com/abstract=3028886>; Gavin S. Frisch, *What Is the Relevant Parcel? Clarifying the “Parcel as a Whole” Standard in Murr v. Wisconsin*, 12 Duke J Const L & Pub Pol’y 253 (2017). For an early commentary on the Court’s Decision, see Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in Murr v. Wisconsin?* (July 22, 2017), online at <https://ssrn.com/abstract=3007166>.

of takings doctrine.<sup>4</sup> In the dismayed words of one advocate of stronger property rights, *Murr* “further undermined the already enfeebled constitutional rights enjoyed by property owners against regulatory excess.”<sup>5</sup>

*Murr* also has real practical significance. For instance, sea level rise poses an increasing threat to coastal areas.<sup>6</sup> States are experimenting with ways to move existing development back from the shore and limit building in areas that are likely to be at risk in the future.<sup>7</sup> But landowners may claim that it is unconstitutional to require them to abandon existing structures or to prohibit new development or armoring their shorelines.<sup>8</sup> *Murr* does not guarantee government’s success against these claims, but it does significantly strengthen the state’s hand.<sup>9</sup>

As background for understanding *Murr*, a quick review of takings law may be helpful for the uninitiated. The Supreme Court currently employs three tests to determine whether a regulation should be considered a “taking” of property that requires compensation.<sup>10</sup> First, the Court finds a taking when the government mandates a physical intrusion on private property. Such an intrusion is a taking even if it does not cause any significant harm to the owner.<sup>11</sup> Our focus will be

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<sup>4</sup> Arguably, the movement has been stalled for at least a decade. Writing in 2006, Richard Lazarus observed that when Clarence Thomas joined Scalia on the bench, “the property rights movement appeared to have the makings of a solid majority on the Court,” but that “[n]o such significant legal precedent favoring property rights . . . has resulted.” Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 *Hastings L J* 759, 760 (2006). According to Lazarus, Scalia’s “pendant for bright line per se tests favorable to takings plaintiffs ultimately had no legs within the Court.” *Id.* at 761. Instead, Lazarus argued, Justice Stevens had become the most influential Justice on takings issues, advocating a “more contextual analysis.” *Id.* *Murr*, I will argue, can be seen as cementing in place the more contextual approach.

<sup>5</sup> Nicole Steele Garnett, *From a Muddle to a Mudslide*, 2016–17 *Cato Sup Ct Rev* 131, 131 (2017).

<sup>6</sup> See Holly Doremus, *Climate Change and the Evolution of Property Rights*, 1 *UC Irvine L Rev* 1091, 1101–1103 (2011).

<sup>7</sup> *Id.* at 1107.

<sup>8</sup> *Id.* at 1107–10. For another discussion of these issues, see Sean B. Hecht, *Taking Background Principles Seriously in the Context of Sea-Level Rise*, 39 *Vt L Rev* 781 (2015).

<sup>9</sup> See Part III below.

<sup>10</sup> Eminent domain extends back through the Founding Era, and its roots in legal theory are even older, but regulatory takings doctrine is a relatively modern development. See Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L J* 36, 38–60 (1964). One constant since Professor Sax wrote fifty years ago is that “the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results.” *Id.* at 37.

<sup>11</sup> This per se rule stems from Justice Thurgood Marshall’s opinion in *Loretto v Teleprompter Manhattan CSTV Corp.*, 458 US 419 (1982). The “physical-invasion versus use” distinction has

on the remaining two categories. The second category includes so-called “total takings,” where the government has eliminated any possible economically beneficial use of the property.<sup>12</sup> With one important but ill-defined exception, such regulations are per se takings under Justice Scalia’s opinion in *Lucas v South Carolina Coastal Council*,<sup>13</sup> which is “widely considered the high water mark for the property rights movement.”<sup>14</sup> The third category covers all remaining cases. This default category is governed by the *Penn Central* test,<sup>15</sup> which examines whether the government regulation unduly interferes with reasonable, investment-backed expectations. Putting aside the first category (physical intrusions), the other categories both analyze the owner’s economic loss due to a regulation. The degree of loss is customarily expressed as a fraction: the decrease in value due to a regulation (the numerator) divided by the property value absent the regulation (the denominator).

The *Murr* litigation involved just such a claim of diminution of value, brought by siblings who owned two adjoining lots on the bank of a scenic river; they claimed that their inability to sell or develop one of the lots separately was a taking.<sup>16</sup> State law and a local zoning ordinance required them to treat both lots as a unit and limited them to a single building on that unit.<sup>17</sup> The central issue in the case was the denominator of the taking fraction. Should the denominator be limited to the preregulation value of the lot they wanted to sell, or should it include the value of both lots? A related question involved the nu-

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received some justified criticism from various directions. See, e.g., Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 Penn State L Rev 602, 627 (2014); Andrea Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra’s Distinction Between Physical and Regulatory Takings*, 34 Ecol L Q 381 (2007).

<sup>12</sup> The Court recognized an important exception, allowing an activity to be completely banned when it constitutes a common law nuisance. For discussion of this exception, see Richard Lazarus, *Putting the Correct “Spin” on Lucas*, 45 Stan L Rev 1411 (1993).

<sup>13</sup> 505 US 1003 (1982). Lazarus credits Justice Powell with subtly setting the stage for *Lucas* with dictum in *Agins v City of Tiburon*, 447 US 255, 260 (1980). See Lazarus, 57 Hastings L J at 775 (cited in note 4).

<sup>14</sup> Lazarus, 57 Hastings L J at 775 (cited in note 4).

<sup>15</sup> The test derives from *Penn Central Transportation Co. v New York*, 438 US 104 (1978). In practice, there may be a safe harbor, at least in federal court, for regulations that diminish property values by less than 50 percent. See Justin R. Pidot, *Eroding the Parcel*, 39 Vt L Rev 647, 672 n 133 (2013).

<sup>16</sup> *Murr*, 137 S Ct 1939–41.

<sup>17</sup> *Id* at 1941.

merator: should the postregulation valuation take into account the benefits of holding both lots as a unit?

In an opinion by Justice Kennedy, the Supreme Court rejected the owners' invitation to adopt a clear rule to address these issues, instead proposing a somewhat open-ended standard that hampers takings claims.<sup>18</sup> Three dissenters, led by Chief Justice Roberts, accepted the owners' argument about the denominator, but pushed back on their arguments regarding the numerator and timing issues.<sup>19</sup> One of the three, Justice Thomas, wrote separately to express discomfort with the whole doctrine built on Justice Holmes's dictum, which has never been persuasively linked with prior case law or with the original understanding.<sup>20</sup>

The article proceeds as follows. Part I explains the evolution of the denominator problem and its resolution in *Murr*. Part II turns to some other issues in takings law that were less central to *Murr* but were clarified by the opinion, including the determination of the nominator of the takings fraction, the relevance of the timing of the owner's acquisition of the property vis-à-vis the enactment of the regulation, and the role of the state's regulatory interest in determining whether a regulation is a taking. Part III is primarily devoted to taking stock of the current state of takings law and the failure of the property-rights movement championed by Justice Scalia on the Court. It also makes a brief foray into assessing the normative desirability of the ad hoc balancing approaches adopted in *Penn Central* and *Murr*.

Because the article is organized topically, *Murr* itself will come on stage, depart, and then return periodically as we investigate different aspects of the opinion. Hopefully the reader will find the resulting clarity worth the sacrifice of narrative flow.

## I. MURR AND THE DENOMINATOR PROBLEM

Our first topic will be the denominator of the takings "fraction" discussed in the introduction. In a regulatory takings case, to what extent do the owner's other property interests count in determining the prereregulation and postregulation property values?<sup>21</sup> The

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<sup>18</sup> *Id.* at 1944–47.

<sup>19</sup> *Id.* at 1952–53.

<sup>20</sup> *Id.* at 1957.

<sup>21</sup> A helpful introduction to this issue can be found in John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 *U Chi L Rev* 1535 (1994).

owner would like to define the relevant property narrowly, as the specific interest the government has impaired, so it can say that it was deprived of a hundred percent of that interest and invoke the *Lucas* total taking rule. The government has the opposite incentive to define the relevant property broadly to include all of the owner's property. This definitional exercise can determine the outcome of the case.<sup>22</sup>

This section will begin with a history of this branch of takings law. It will then turn to the *Murr* litigation, followed by a look at how the issue was analyzed in Justice Kennedy's majority opinion and Justice Roberts's dissent.

#### A. THE HISTORY OF THE DENOMINATOR PROBLEM

The denominator problem has its roots in the Holmes opinion that this article opened with, in which he said "too much" was taken without ever quite specifying too much of what. For that reason, the denominator problem was present at the creation of regulatory takings doctrine. It received heightened importance with *Penn Central* and later cases that rejected two of the three possible readings of Holmes's opinion. *Murr* is the culmination of this series of cases limiting the ability of owners to define the denominator so as to magnify their perceived loss.

1. *The origin story of regulatory takings law.* Regulatory takings law began with *Pennsylvania Coal Co. v Mahon*,<sup>23</sup> and diminution in value has been central to the law of regulatory takings since then.<sup>24</sup> *Pennsylvania Coal*, an activist decision if there ever was one, rewrote the law of eminent domain. The Fifth Amendment requires compensation when the government takes private property for public purposes. Until *Pennsylvania Coal*, however, the Court had not treated government restrictions on the use of property as takings of property. Justice Holmes's opinion in *Pennsylvania Coal* left much unclear, not least the interpretation of diminution in value.

The holding seems clear enough at first sight. Because coal mines can cause the collapse of structures on the surface, a Pennsylvania statute required mining companies to provide support for mines un-

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<sup>22</sup> Eagle, 118 Penn State L Rev at 631–32 (cited in note 11). As Richard Lazarus explains, this is especially true in terms of the *Lucas* total taking rule. Lazarus, 57 Hastings L J at 818 (cited in note 4).

<sup>23</sup> 260 US 393 (1922).

<sup>24</sup> *Id.*

der populated areas, either by leaving pillars of coal in the ground or building support beams. Justice Holmes held the law unconstitutional, not only as to the homeowner who was the plaintiff in the litigation, but as applied to public buildings, streets, and communities above mines. Justice Holmes announced a “general rule that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>25</sup> There are few cases where the Court has made so large a change in doctrine with so little explanation.

Justice Holmes’s opinion may have eventually launched a thousand lawsuits, but the opinion itself is enigmatic in key respects, including how much Holmes was actually relying on the Takings Clause, as opposed to the Contract Clause or some more general due process claim.<sup>26</sup> More importantly for our purposes, Holmes’s analysis of diminution in value was ambiguous about the denominator—the “property” that was allegedly taken. In terms of the rights of the landowner in the case, Holmes says, the “extent of the taking is great” and “we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.”<sup>27</sup> But precisely what right of the mine owner did Holmes think was taken? There are three possible answers to that question.

First, Holmes might have had in mind the “support estate” under Pennsylvania common law. The state’s common law treated the right to sue for loss of subterranean support for surface land as a separate interest in property. The coal company had kept the support right when it sold off the surface land. Hence, prior to passage of the statute, it had a common law right to deprive the surface land of support. Holmes remarks at one point that the statute “purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.” This language could be interpreted to mean that the “property” which was taken was the support estate. If so, a similar statute in a state without this particular quirk in the common law would be constitutional.

In another key passage, Holmes says that “[t]o make it commercially impracticable to mine certain coal has very nearly the same ef-

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<sup>25</sup> *Id.* at 415.

<sup>26</sup> *Id.* at 413.

<sup>27</sup> *Id.* at 414.

fect for constitutional purposes as appropriating it or destroying it.”<sup>28</sup> But what did he mean by “certain coal”? He may have been referring to the specific coal pillars left in place to support existing mines, since providing other types of bracing was too expensive.<sup>29</sup> Or he may have been referring to the company’s allegation that it would have to close some mines entirely because of the added expense.<sup>30</sup> If so, the “certain coal” was all the coal in those mines, not merely the pillars of coal it would have to leave in place to comply with the statute.<sup>31</sup> The upshot is that it is unclear just what Holmes was defining as the denominator: the support estate, the coal pillars, or the closed mines.

Justice Holmes’s concise analysis and striking epigrams make for a welcome contrast to the painful plodding more common among judges then and now. But these virtues came at a price, the loss of the more careful elaboration that would help guide future judges and lawyers. In particular, he established the importance of determining what we now call the denominator, but gave little indication how to do so. The Supreme Court made several important efforts to clarify the situation in the time between *Pennsylvania Coal* and the *Murr* opinion. We begin with the question of an owner’s ability to isolate a particular property interest for consideration, like the support right in *Pennsylvania Coal*.

2. *The denominator issue in modern takings jurisprudence.* Every journey in modern takings law begins—and many end—with Grand Central Station, the subject of *Penn Central Transportation Co. v City of New York*.<sup>32</sup> The city designated the station as a historic landmark and rejected both of the railroad’s proposals to expand on the site.<sup>33</sup> One proposal involved construction of a fifty-five-story office building perched above the terminal; the other involved tearing down part

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<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 398.

<sup>30</sup> See *Pennsylvania Coal*, 260 US at 414, where Holmes remarks that “[w]hat makes the right to mine coal valuable is that it can be exercised with profit.”

<sup>31</sup> The upshot is that we cannot be sure how Holmes would have ruled on an otherwise identical case from a state that did not distinguish the support estate from the mineral estate (ownership of the coal). We are also unclear on whether he would find a taking if a mine was profitable but some coal still had to be left in the ground or if providing mine support had involved bracing rather than leaving coal in the ground.

<sup>32</sup> 438 US 104 (1976). It is perhaps an unfortunate twist of history that the *Penn Central* case was not actually about Penn Central Station, to the confusion of generations of law students.

<sup>33</sup> *Id.* at 107.



of the building to add a fifty-three-story tower.<sup>34</sup> When the company's proposals were predictably rejected, the company claimed the city had taken its property, with particular reference to the airspace above the building.<sup>35</sup>

Justice Brennan's opinion for the Court undertook to synthesize the Court's regulatory takings opinions,<sup>36</sup> which it characterized as engaging in "essentially ad hoc, factual inquiries."<sup>37</sup> The Court first observed that takings were more likely to be found if a regulation amounted to acquisitions of resources rather than merely prohibiting certain uses of land.<sup>38</sup> In cases outside this category, no taking would be found unless the government unduly impaired "interests that were sufficiently bound up with the reasonable expectations of the claimant" or had an insufficient connection to public safety or welfare.<sup>39</sup> No one has ever called this standard a model of clarity, and one commentator has aptly compared it to "a soccer field that changes in size according to the strategy of the players, and where referees apply flexible rules that contract or expand the field, depending on the factual nuances of the latest play."<sup>40</sup>

Directly addressing the denominator interest, the Court rejected the company's argument that the airspace above the existing building constituted a distinct property interest, like the support estate in *Penn-*

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<sup>34</sup> Id.

<sup>35</sup> Id. at 118–19.

<sup>36</sup> Id. A law clerk who worked for Justice Brennan at the time testified that other clerks told him the opinion "shouldn't say too much," and was later told by a clerk in a different chambers that it did not in fact "say anything at all." Eagle, 118 Penn State L Rev at 607 (cited in note 11). For a fuller account of the *Penn Central* Court's decisional process based on the Blackmun Papers, see Lazarus, 57 Hastings L J at 769–71 (cited in note 4). According to Buzz Thompson, another law clerk from the same period who is now a property professor at Stanford, because the *Penn Central* opinion "was written to try to hold together a majority, it sets out a test which is appealing to a large number of judges." Eagle, 118 Penn State L Rev at 608 (cited in note 11). Thus, Thompson continued, "it's not at all surprising that as courts have wrestled with takings issues and found them as difficult as they are, they frequently find themselves coming back to *Penn Central* which appears to offer a refuge for virtually everyone." Id.

<sup>37</sup> Id. at 124.

<sup>38</sup> Id. at 128.

<sup>39</sup> *Penn Central*, 438 US at 124–25.

<sup>40</sup> Eagle, 118 Penn State L Rev at 632 (cited in note 11). The description may apply even more fittingly to *Murr* than to *Penn Central*. Eagle also complains that the Court "has not provided even general guidance on how to weigh the various factors." Id. at 644. To the same effect, see William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 51 (Harvard, 1995) (adding that the *Penn Central* factors "do not make much economic sense, either.").

*sylvania Coal*.<sup>41</sup> Inability to use that air space would seemingly deprive it of any economic value, whereas it might have been quite valuable if construction were allowed. The Court held that “‘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.”<sup>42</sup>

A decade later, the Court returned to the issue of conceptual severance in *Keystone Bituminous Coal Ass’n v DeBenedictis*,<sup>43</sup> which was in many ways a reprise of *Pennsylvania Coal*. Pennsylvania had passed a newer statute forbidding coal-mining practices causing surface subsidence, which in effect required leaving pillars of coal in place in some locations.<sup>44</sup> In an opinion by Justice Stevens, the Court found the earlier Holmes decision distinguishable partly because of the broader public purpose of the more recent subsidence statute and partly because the new law would not require mine closings.<sup>45</sup>

In terms of the denominator issues, the Court rejected the coal industry’s claim that the law was a taking of the specific coal pillars that it would be required to leave in the ground for support.<sup>46</sup> The Court refused to consider coal pillars required for support as a property interest that could be severed from the overall coal mine.<sup>47</sup> The Court also rejected the argument that the newer state statute should be considered a taking of the support estate.<sup>48</sup> In the Court’s view, “our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.”<sup>49</sup> “In practical terms,” the Court added, “the support estate has value only insofar as it protects or enhances the value of the estate [surface or subsurface] with which it is associated.”<sup>50</sup> Thus, the denominator consisted of the entire mineral interest owned by the coal company.

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<sup>41</sup> *Penn Central*, 438 US at 130.

<sup>42</sup> *Id.*

<sup>43</sup> 480 US 470 (1987).

<sup>44</sup> *Id.* at 474–77.

<sup>45</sup> *Id.* at 487–88.

<sup>46</sup> *Id.* at 498.

<sup>47</sup> *Id.* at 499.

<sup>48</sup> *Id.* at 500.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 501.

Chief Justice Rehnquist dissented, joined by Justices Powell, O'Connor, and Scalia. The dissenters argued that "there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in an identifiable segment of property," like the coal that the law required to be left in the ground.<sup>51</sup> Rehnquist also argued that since state law defined the support estate as a separate property interest, federal courts must do so as well.<sup>52</sup>

Justice Stevens again wrote for the Court in *Taboe-Sierra Preservation Council, Inc. v. Taboe Regional Planning Agency*.<sup>53</sup> The regional planning agency had imposed a building moratorium lasting almost three years while it considered new measures to preserve Lake Tahoe's water quality.<sup>54</sup> The Court sided with the agency, whose position had been argued by John Roberts, the future Chief Justice.<sup>55</sup> In the Court's view, "[t]he starting point for the [lower] court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework."<sup>56</sup> The Court continued: "An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest."<sup>57</sup> The Court observed that delays of up to a year in processing permits as well as building moratoriums during planning efforts were common aspects of land use planning.<sup>58</sup>

Chief Justice Rehnquist again dissented, joined only by Justices Scalia and Thomas.<sup>59</sup> Rehnquist argued that the government's action was equivalent to seizure of a multiyear lease of the property on its own behalf.<sup>60</sup> In contrast, he contended, "short-term delays attendant

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<sup>51</sup> Id at 517.

<sup>52</sup> Id at 519–20.

<sup>53</sup> 535 US 302 (2002). This case was considered a major defeat for property rights advocates and their judicial champion, Justice Scalia. Richard J. Lazarus, *Celebrating Taboe-Sierra*, 33 *Envir L J*, 3 (2003).

<sup>54</sup> Id at 306. I am simplifying the facts slightly: there were two moratoria totaling thirty-two months, and also an injunction that Stevens did not count as part of the building pause (though the dissenters did). Id at 306–12.

<sup>55</sup> Id at 305.

<sup>56</sup> Id at 331.

<sup>57</sup> Id at 331–32.

<sup>58</sup> Id at 337.

<sup>59</sup> Id at 343.

<sup>60</sup> Id at 348. This does not appear to be quite accurate. The government had not acquired any right to use the property itself or any right for it or the public to enter the property against the owner's wishes.

to zoning and permit regimes are a long-standing feature of state property law and part of a landowner's reasonable investment-backed expectations."<sup>61</sup> Writing separately, Justice Thomas (joined by Justice Scalia) expressed doubts about the entire "parcel as a whole" doctrine and argued that in any event it should not apply to severance of "temporal slices" of property.<sup>62</sup> Thus, temporary deprivation of the right to use property should always be considered a taking.<sup>63</sup>

As a result of these cases, the Court seemed to have firmly established a rule that the denominator in a takings case constitutes the entire parcel owned by the landowner over the entire time period held by the owner. This rule was established in *Penn Central* and continued to hold majority support despite the Court's continued rightward shift after the mid-seventies. But adherence to the whole-parcel rule only raised the further question: how to define the "parcel" if a landowner owned more than one lot. It was this question that *Murr* addressed.

#### B. THE MURR LITIGATION

The *Murr* litigation began as a fairly routine zoning dispute. The Murrs were siblings whose parents had given them two adjoining lots on the bank of the St. Croix River,<sup>64</sup> which Congress had designated a protected "wild and scenic river."<sup>65</sup> The parents had first given them a lot containing a cabin (Lot F) and then an adjoining vacant lot (Lot E).<sup>66</sup> The lots contained a 130-foot bluff, with land at the top fronting on a street and land on the bottom next to the river.<sup>67</sup> The Murrs' cabin located on the bottomland frequently flooded, and they wanted to renovate it using funds from selling Lot E.<sup>68</sup> Because of the protected nature of the river, the lots were subject to special zoning restrictions. Their renovation plan required numerous variances to move the cabin away from the river, regrade a protected slope area, construct retaining walls, and build a patio and deck close to the or-

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<sup>61</sup> Id at 352.

<sup>62</sup> Id at 355.

<sup>63</sup> Id at 356.

<sup>64</sup> See *Murr v St. Croix County Bd of Adjustment*, 796 NW2d 837, 841 (Wis App 2011) (cited as *Board of Adjustment*).

<sup>65</sup> 16 USCA 1274(a)(9).

<sup>66</sup> *Board of Adjustment*, 796 NW2d at 841.

<sup>67</sup> Id.

<sup>68</sup> Id.

dinary high-water mark.<sup>69</sup> The zoning board, with the approval of the Wisconsin courts, rejected the variance requests because the Murrs could instead have flood-proofed the existing cabin or rebuilt in the same place but using fill to raise the building.<sup>70</sup> This left the request for a variance to sell Lot E, which became the central issue in the litigation.

The reason the Murrs needed a variance to sell Lot E separately was that both lots were classified as substandard, being below the minimum buildable area required by the zoning ordinance.<sup>71</sup> If the lots had been owned separately, each of them would be grandfathered in, since they existed before the passage of the building limits, but the grandfather clause did not apply when two adjoining lots were commonly owned.<sup>72</sup> The state court viewed the grandfather clause and its exception as a reasonable accommodation between “property values and the environment,”<sup>73</sup> presumably because it limited building as much as possible while protecting preexisting owners from a wipeout.<sup>74</sup> Moreover, the state appeals court said, the Murrs already knew or should have known about the exception to the grandfather clause when they acquired Lot E from their parents.<sup>75</sup>

Having lost the variance litigation, the Murrs started over again with a takings claim based on the restriction on separate use or sale of Lot E.<sup>76</sup> The Murrs introduced evidence that Lot E was worth only \$40,000 separately if the buyer could not build on the site.<sup>77</sup> According to the state’s appraiser, Lot F would be worth \$373,000 as a separate improved lot, while apparently Lot E would be worth \$398,000 on the same basis—yet the value of the two lots as a single buildable unit was \$698,000, only about 10 percent below the combined value of two separate buildable lots, because of synergies between the lots.<sup>78</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 846.

<sup>71</sup> *Id.* at 842.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 844.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Murr*, 137 S Ct at 1940–41.

<sup>77</sup> *Id.* at 1941.

<sup>78</sup> *Id.* The opinion gives the value for Lot E and the total value of Lots E and F as buildable separate properties; I obtained the value for a buildable Lot F through subtraction. The rea-

The Murrs' petition for certiorari phrased the question presented as the validity of "a rule that two legally distinct, but commonly owned contiguous parcels, must be combined in takings analysis."<sup>79</sup> As we will see, however, the Court did not limit itself to this question in deciding the case.

The parties offered three quite different approaches to the contiguous parcel issue. The Murrs, ably represented by the Pacific Law Foundation (a property rights advocacy group), advocated a rebuttable presumption that diminution in value should be measured in terms of the single lot in question.<sup>80</sup> The burden of proof would be on the government to show instead why "in a particular case, fairness and justice are better achieved by segmentation or aggregation of parcels."<sup>81</sup>

The state of Wisconsin agreed that a clear rule governing the denominator was needed, "[g]iven that regulatory takings analysis already lacks sufficient clarity."<sup>82</sup> The state argued that such clarity could be found by simply following the definition of the relevant property supplied by state law, which in Wisconsin included a merger rule consolidating commonly owned, adjoining tracts when neither lot is separately buildable.<sup>83</sup>

St. Croix County, where the land was located, was separately represented in the Supreme Court by Professor Richard Lazarus of Harvard Law School.<sup>84</sup> Lazarus argued for a multifactor test, involving lot lines, contiguity, ownership history, unity of use, and rules of state law.<sup>85</sup> Lazarus also argued that, regardless of how the denominator

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son for the synergy is that one lot had more buildable land but the other had more beachfront. *Id.* As one of the amicus briefs points out, the state's regulation of development along the river probably increased the value of the Murrs' land under all of these scenarios, compared with a situation where greater development resulted in greater water pollution or robbed the view of its aesthetic appeal. See Brief of Carlisle Ford et al as Amici Curiae in Support of Respondents, *Murr v State of Wisconsin* (No 15-214), online at 2016 WL 3398639.

<sup>79</sup> Petition for Certiorari, *Murr v State of Wisconsin* (No 15-214), online at 2015 WL 4932231.

<sup>80</sup> Petitioners' Brief on the Merits, *Murr v State of Wisconsin* (No 15-214) at \*12, online at 2016 WL 1459199.

<sup>81</sup> *Id.*

<sup>82</sup> Brief for Respondent State of Wisconsin, *Murr v State of Wisconsin* (No 15-214) at \*35, online at 2016 WL 3227033.

<sup>83</sup> *Id.* at \*37-38.

<sup>84</sup> Brief for Respondent St. Croix County, *Murr v State of Wisconsin* (No 15-214), online at 2016 WL 1579483.

<sup>85</sup> *Id.* at \*23-24.

was defined, the economic loss to the Murrs was too slight to support a takings claim.<sup>86</sup> He pointed out that lot lines are relatively malleable under Wisconsin law, making them a poor basis for determining the fairness of a government action.<sup>87</sup>

There was also a flurry of amicus briefs, some of which deserve special mention. The United States took a position similar to the county's, but organized the relevant factors into three categories—the geography of the property, its history, and the timing of an owner's acquisition compared with that of the regulation's passage.<sup>88</sup> Libertarian organizations filed briefs reaching varying conclusions. Going further than the Murrs themselves, the Cato Institute argued for a bright-line rule against ever aggregating lots.<sup>89</sup> It argued that the *Penn Central* test had produced a complete mess under which aggrieved owners were almost certain to lose.<sup>90</sup> Allowing aggregation would further muddle the law and make it all the more difficult for mistreated landowners to recover.<sup>91</sup> The Reason Foundation took a similar position to the Murrs, arguing for an ad hoc inquiry with heavy weight given to lot boundaries, subject to revision if the lots are integrated in terms of use or investment plans.<sup>92</sup>

### C. THE COURT TACKLES THE DENOMINATOR PROBLEM

In an area as contentious as takings law, it was no surprise that the Court was closely divided or that Justice Kennedy was the swing voter. We begin with Kennedy's majority opinion before turning to the view of the dissenters.

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<sup>86</sup> Id at \*24.

<sup>87</sup> Id at \*29.

<sup>88</sup> Brief of the United States as Amicus Curiae Supporting Respondents, *Murr v State of Wisconsin* (No 15-214) at \*12–13, online at 2016 WL 3398637.

<sup>89</sup> Brief of the Cato Institute and Owners' Counsel of America as Amici Curiae in Support of Petitioners, *Murr v State of Wisconsin* (No 15-214) at \*4, online at 2016 WL 1639712. The complaint that the Takings Clause is muddled is widely shared, and not just by libertarians. See Eduardo Moisés Peñalver, *Regulatory Takings*, 104 Colum L Rev 2182, 2186 n 18 (2004) (citing multiple examples of this complaint).

<sup>90</sup> Cato Brief at \*7–12 (cited in note 89).

<sup>91</sup> Id at \*19–25.

<sup>92</sup> Brief for Reason Foundation as Amicus Curiae in Support of Petitioners, *Murr v State of Wisconsin* (No 15-214) \*3–5, online at 2016 WL 1593411. If libertarian views did not prevail in *Murr*, it was not the fault of the Cato Institute or the Reason Foundation. Speaking as someone who does not share their libertarian perspective, I thought both briefs were excellent.

1. *The majority opinion.* Justice Kennedy's opinion for the Court in *Murr* rejects what he called the "formulaic" rules proposed by the state and the Murrs.<sup>93</sup> By relying exclusively on state law, including the challenged regulation, to define the property, the state might simply "define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations."<sup>94</sup>

On the other hand, Kennedy said, the Murrs' approach gave too much credence to lot lines, ignoring "the fact that lot lines are themselves creatures of state law, which can be overridden by the State in the reasonable exercise of its power."<sup>95</sup> The merger provision in *Murr* was just such a reasonable exercise of government power: the "merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago."<sup>96</sup> Adopting the Murrs' proposed approach "would frustrate municipalities' ability to implement minimum lot size provisions by casting doubt on the many merger provisions that exist nationwide today."<sup>97</sup> Finally, rules regarding lot lines vary between states, making a uniform approach inappropriate.<sup>98</sup>

Rather than what he considered to be these overly rigid approaches, Justice Kennedy articulated a three-factor test for determining the denominator: "the treatment of the land under state and local law, the

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<sup>93</sup> *Murr*, 137 S Ct at 1946.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1947.

<sup>96</sup> *Id.* The history and prevalence of this practice was documented in an amicus brief. See Brief of Amici Curiae National Association of Counties et al, in *Murr v State of Wisconsin* (No 15-314), online at <http://www.scotusblog.com/wp-content/uploads/2016/06/15-214-bsac-National-Association-of-Counties.pdf>. As the brief pointed out, "with just a few minutes of research, one can find many periodicals and web pages explaining that the purchaser of a vacant nonconforming lot should be careful to ascertain whether the lot is governed by a merger provision," citing five sources available online.

As it turns out, even a cursory online search would be enough to alert the searcher to merger doctrine. When I googled "purchase of vacant nonconforming lot," the top page of search results contained several mentions of grandfathering and merger either in the name of the source or the brief description displayed on the search page. The source at the top of the list was Kathleen Deegan Dickson, *The Law of Merger*, NY Real Estate J (Nov 11, 2014), online at [https://www.forchellilaw.com/nyrej\\_Nov\\_KDD\\_Law%20of%20Merger.pdf](https://www.forchellilaw.com/nyrej_Nov_KDD_Law%20of%20Merger.pdf). The opening sentence of this post was: "Take caution when purchasing a vacant parcel of land or purchasing a parcel adjacent to one already owned, as the possibility of the merger of lots is a real danger." *Id.*

<sup>97</sup> *Murr*, 137 S Ct at 1947-48.

<sup>98</sup> *Id.* at 1948.



physical characteristics of the land, and the prospective value of the regulated land”—all with the purpose of determining “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,” based on “background customs and the whole of our legal tradition.”<sup>99</sup> Kennedy expressed confidence in the ability of lower courts to apply this somewhat amorphous approach, given their “considerable expertise in adjudicating regulatory takings claims.”<sup>100</sup>

In elaborating on this test, Justice Kennedy made some notable points that seem to have broader implications for takings law. Regarding the first factor (state law treatment), he said “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.”<sup>101</sup> This comment is a bit cryptic, since it does not specify whether this should count in favor of or against the validity of the restriction. But in his later discussion of the application of the test, he clearly viewed this factor as undermining the takings claim. In dismissing the argument that the two parcels should be considered separate, he said that “[p]etitioners’ land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulation was enacted.”<sup>102</sup>

In terms of the second factor (geography), Kennedy had in mind more than the contiguous nature of the lots or even whether the legal boundary corresponded to some physical feature such as a ravine. Instead, he spoke more broadly of the “physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment.”<sup>103</sup> He emphasized the possibility that “the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.”<sup>104</sup> Thus,

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<sup>99</sup> Id at 1945.

<sup>100</sup> Id at 1946. There is a reasonable argument that state courts, in particular, are better suited to reviewing land use decisions than the Supreme Court. See Stewart Sterk, *The Federalism Dimension of Takings Jurisprudence*, 114 Yale L J 203, 226–28 (2004). Sterk argued that the dependence of taking claims on the specific details of state law limits the utility of Supreme Court interventions. Id at 226.

<sup>101</sup> *Murr*, 137 S Ct at 1945.

<sup>102</sup> Id at 1948.

<sup>103</sup> Id at 1946.

<sup>104</sup> Id.

in considering the Murrs' lots later in the opinion, he observed that they "could have anticipated public regulation might affect their enjoyment of the property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land."<sup>105</sup>

The third factor involves the economic relationship between lots. Diminution in value for one lot "may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty."<sup>106</sup> For instance, Kennedy says, the market value of the owner's other properties "may well increase . . . if development restraints for one part of the parcel protect the unobstructed skyline views of another part."<sup>107</sup> The Court found this factor particularly easy to apply in the *Murr* case, because the Murrs' loss was "mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements."<sup>108</sup> The "special relationship of the lots" was confirmed by the valuation figures, showing that the combined lots are valued far more than "the summed value of the separate regulated lots."<sup>109</sup> While the regulation may have left Lot E with little independent value since it could not be developed separately, merging the lots added considerably to the value that Lot F would have had on its own.<sup>110</sup>

Having concluded that the two lots should be considered as a single unit for takings purposes, Justice Kennedy briskly disposed of the merits of the takings claims. The total taking rule did not apply because of the substantial value of the combined lots.<sup>111</sup> The *Penn Central* test for partial takings cases was also easily satisfied. The appraisal "refutes any claim that the economic impact of the regulation is severe."<sup>112</sup> Furthermore, the Murrs "cannot claim that they reasonably

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<sup>105</sup> Id at 1948.

<sup>106</sup> Id at 1946.

<sup>107</sup> Id.

<sup>108</sup> Id at 1948.

<sup>109</sup> Id at 1949.

<sup>110</sup> Id.

<sup>111</sup> Id. Stewart Sterk suggests that this reasoning may "signal the beginning of the end for the per se rule invalidating regulations that deny landowners all economically productive use of their land." Stewart E. Sterk, *Dueling Denominators and the Demise of Lucas* \*2 (2017), online at <https://ssrn.com/abstract=3024093>.

<sup>112</sup> Id.

expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots.”<sup>113</sup> And, finally, “the government action was a reasonable land use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.”<sup>114</sup>

2. *The Roberts dissent.* Chief Justice Roberts wrote the primary dissent, which was joined by Justices Alito and Thomas.<sup>115</sup> (The recently appointed Justice Gorsuch did not participate in the case.)<sup>116</sup> Roberts faulted the majority for deviation from “our traditional approach” that state laws defining property boundaries determine the denominator.<sup>117</sup> Roberts cited with approval the *Penn Central* approach of barring landowners from singling out a specific “stick” within the bundle of property rights as the denominator.<sup>118</sup> By the same token, he said, “in all but the most exceptional circumstances,” state laws defining the boundaries of a parcel should determine the relevant unit to be considered in takings cases.<sup>119</sup>

I will return later to other aspects of the Roberts dissent and a briefer dissent by Justice Thomas, but the Chief Justice’s discussion of the denominator issue deserves attention here. He is clearly correct that the test articulated by the majority for determining the denominator overlaps with the *Penn Central* test for deciding whether the diminution of property is excessive. Roberts is also right that giving the state government the power to define the denominator opens the door to strategic behavior by states and would weaken takings claims in many situations. But in cases like *Murr*, where the challenged regulation effectively merges lots into a single whole, it is hard to see how the definition of the denominator can avoid considering the legitimacy of the state’s merger rule, which necessarily overlaps with the test for whether a taking has actually occurred.

Moreover, the assumption that the denominator must automatically coincide with the parcel subject to the regulation overlooks ambiguities in how a state defines parcels and, more importantly, the

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<sup>113</sup> Id.

<sup>114</sup> Id at 1949–50.

<sup>115</sup> Id at 1950 (Roberts, CJ, dissenting).

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id at 1952.

<sup>119</sup> Id at 1953.

purpose of the inquiry. The Court is not, after all, acting as a tax assessor or issuing title insurance. Rather, it is attempting to determine whether it is unfair to leave the owner uncompensated; the denominator is merely a step in that fairness analysis. There is no reason why the determination of the denominator should not reflect the same concern with fairness as the test for determining a taking. While it is true that state law defines the scope of an owner's property rights, determining what set of rights should enter into the takings denominator is a question of federal law. So too is the question of how to measure the value of the relevant property rights after the regulation. Federal law might simply adopt the market value of ownership of the whole parcel as a way of answering both questions, but that is quite distinct from the state law issue of how the regulation modifies the owner's preexisting ownership rights.

One aspect of *Penn Central* that carries into the *Murr* denominator test is circularity, in which the body of existing regulations shapes expectations, thereby saving future regulations from takings challenges.<sup>120</sup> Kennedy seems to maintain a gap between expectations and current state law by indicating that the extent of notice to landowners and their ability to adjust their investments are relevant factors. Thus, the relevant investment expectations may lag changes in state law. The upshot is that abrupt changes, especially when recent, are more likely to be vulnerable to challenge than more evolutionary or venerable ones. We will return to that timing issue later.

## II. MURR AND OTHER TAKINGS PUZZLES

The primary focus of the *Murr* litigation was the denominator problem. But because Justice Kennedy not only determined the denominator but also considered the merits of the takings claim, he had to decide two other doctrinal issues (the numerator and timing issues) and touch on a third (the relevance of the state's regulatory interest). The rulings on all three were favorable to the government. This section considers those issues in turn.

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<sup>120</sup> Eagle, 118 Penn State L Rev at 604 (cited in note 11). As one disgruntled conservative judge complained: "except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation." *Dist. Intown Props ITD v District of Columbia*, 198 F3d 874, 887 (DC Cir 1999) (Williams concurring). Speaking of *Penn Central* more generally, Judge Williams also complained that "[f]ew regulations will flunk this nearly vacuous test." *Id.* at 886.

## A. THE NUMERATOR PROBLEM

Although the denominator of the takings “fraction” has gotten the most attention, it can also be problematic to identify the numerator for use in determining diminution of value. The problem is that, although the specific property interest subject to regulation might be impaired, this impairment could be offset by other gains. This might happen if the regulation grants the owner an additional property interest or because the owner’s other holdings gain value.

*Penn Central* provides the default test for takings, applicable in the absence of a physical intrusion or a total taking. The case is also significant, however, because it required the Court to consider the extent that benefits outside the affected parcel might be used to offset losses. The Court pointed out that, to the extent the owner of the train station had been denied the right to build above a certain level, “it is not literally accurate to say that they had been denied *all* use of those pre-existing air rights.”<sup>121</sup> The ability “to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity,” and “the rights afforded are valuable.”<sup>122</sup> Thus, “[w]hile those rights may well not have constituted ‘just compensation’ if a ‘taking’ had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants,” and, the Court added, “for that reason, [these transferrable development rights] are to be taken into account in considering the impact of regulation.”<sup>123</sup> Thus, the grant of transferrable development rights (TDRs) weighs against finding that a development restriction “takes” private property. In effect, the TDRs were included in the numerator of the takings fraction.

The significance of *Penn Central*’s treatment of TDRs has not been lost on property rights advocates. Justice Scalia called for overruling this aspect of *Penn Central* or limiting it to its facts (involving the owner of contiguous parcels). In his view, transferrable rights are “a clever, albeit transparent, device” that could “render much of our regulatory takings jurisprudence a nullity.”<sup>124</sup> Justice Scalia’s critique of

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<sup>121</sup> *Penn Central* at 137.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 750.

*Penn Central* seems misguided, given that TDRs do have legal and economic substance. But the Scalia critique does not seem to have been successful. As a disgruntled commentator conceded, most courts today have “considered TDRs as an economic use existing with the land, thus mitigating the effects of regulation.”<sup>125</sup>

In its amicus brief in *Murr*, the federal government cited this part of the *Penn Central* holding<sup>126</sup> and argued that it required taking into account the benefits to the owners of merging the lots in *Murr*: “[a]ny analytically coherent attempt to value what the petitioners have lost in being unable to separately sell or develop Lot E must therefore also account for what they have gained by merging their land into one larger parcel.”<sup>127</sup> The government also cited language from *Keystone* indicating that, even if the coal pillar required by the support requirement were considered to be the denominator, the other coal of the owners would be taken into account in determining the economic effect on the owner (the numerator of the takings fraction).<sup>128</sup>

It is unsurprising that the majority opinion included in the numerator the value of utilizing the two lots together, given that it had defined the denominator to include both lots. What is somewhat more surprising is the openness of the dissenters to doing so. In the opening paragraph of the Roberts dissent, he remarks that the majority’s rejection of the Murrs’ taking claim “does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots.”<sup>129</sup> Then, at the end of the opinion, he mentions that many of the facts relied on by the majority would be relevant to a takings analysis, including that Lot E could still be used “as ‘recreational space,’ as ‘the location for any improvements’ [on the combined lots], and as a valuable addition to Lot F.”<sup>130</sup> These facts, he says, “could be relevant to whether the ‘regulation denies all economically beneficial or productive use’ of Lot E.”<sup>131</sup>

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<sup>125</sup> Arthur J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?*, 39 Nat Res J 459, 491 (1999).

<sup>126</sup> Amicus Brief of the United States, \*30–31 (cited in note 88).

<sup>127</sup> *Id.* at \*13.

<sup>128</sup> *Id.* at \*24 n 3 (citing *Keystone*, 480 US at 501).

<sup>129</sup> *Murr*, 137 S Ct at 1950.

<sup>130</sup> *Id.* at 1957.

<sup>131</sup> *Id.*

Roberts seemed to be quite open to considering the synergy between the two property interests in determining the effect of the regulation. In effect, he seemingly countenanced including the regulated lot's enhancement of the adjoining lot's value in the numerator of the takings fraction. If so, his dissent seems to lose much of its practical significance. If there are synergies between the properties, the numerator will increase even under the Roberts approach, making the diminution in value about the same as if both properties were in the denominator.<sup>132</sup> In *Murr* itself, the diminution in value would be 20 percent under the Roberts approach rather than 10 percent under Kennedy's approach, still light years away from the 100 percent loss triggering the *Lucas* "total taking" rule.<sup>133</sup>

Perhaps Roberts would respond to this point by rethinking the issue and excluding from the numerator Lot E's value to someone who also happens to own Lot F. But the federal government's brief seems right about the irrationality of that approach. An economically rational owner of Lot F would be unwilling to sell Lot E for anything under \$325,000, the amount by which the value of the owner's combined holdings would be reduced by selling Lot E. To say that Lot E is worth only \$40,000 to the Murrs under these circumstances seems completely out of touch with economic reality.<sup>134</sup>

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<sup>132</sup> For readers who are interested, here's the arithmetic based on *Murr* itself. Recall that, according to the government's appraiser, Lot F is worth \$373,000 alone but that the value of being able to build on the combined lots is \$698,000. The value of separately developing both lots is \$771,000, so the owner has lost the difference, or \$73,000, because only combined development is allowed. So if, like Kennedy, we include both lots in the numerator and the denominator, the diminution in value thus is \$73,000/\$771,000, or about 10 percent. Suppose instead that we include Lot E alone in the denominator, as Roberts advocated. Without the regulation, if it were separately developable, Lot E would apparently be worth \$398,000, which would be the denominator. Under Roberts's approach, the numerator is \$325,000, the difference between owning only Lot F and owning both lots. (I derived this value by subtracting the separately developed value of Lot F (\$373,000) from \$698,000, the value of developing the two lots jointly.) Decreasing the denominator makes the diminution of value somewhat larger: with the Murrs retaining \$325,000/\$398,000, or slightly over 80 percent of the value of a separately developable Lot E.

<sup>133</sup> One way of seeing this is to ask what a rational owner would be willing to accept as a lot E, given the fact that the value of lot F by itself was \$325,000 less than the value of holding both lots. The \$73,000 is then the difference between their asking price and the value a buyer would be willing to pay for Lot F (\$398,000).

<sup>134</sup> Indeed, even if the two lots were in separate hands, the owner of Lot F would be willing to pay up to \$325,000 to acquire Lot E in an arms-length transaction. The Murrs' appraiser put a \$40,000 value on Lot E, considered in isolation from Lot F, so the parties would have a huge range of bargaining outcomes that would leave them both better off. If they were to split the difference, Lot E would sell for about \$182,000. A map suggests that there is another privately owned lot on the other side of Lot E from Lot F. App \*28. The possibility of selling to that owner

Thus, it is hard to see how the “total loss” rule could ever apply on any reasonable interpretation of the facts. The most that can be said is that, if Roberts’s view on the denominator issue were accepted, the Murrs might have a marginally stronger *Penn Central* claim (retaining only 80 percent rather than 90 percent of the original property value).

Perhaps Roberts is right that this would be a tidier method of analysis, but it seems unlikely to make a difference to whether a taking is actually found. There could conceivably be other cases where this difference would change the outcome, but even the Roberts approach makes it considerably more difficult for a court to find that the owner of contiguous lots had suffered a total taking of one of them. And given the vagueness of the *Penn Central* test, whatever nuanced differences exist between the two approaches seem well inside the test’s margin of error anyway.

#### B. MURR AND THE TIMING PROBLEM

The argument for finding a taking seems stronger when a new regulation unexpectedly impairs an existing investment. But the timing may be different, with the regulation either predating the investment or at least being clearly on the horizon then. How, if at all, should the timing of the regulation vis-à-vis acquisition of the land affect a takings claim? *Murr* also addresses this issue.

The leading authority on this timing issue is *Palazzolo v Rhode Island*.<sup>135</sup> The Palazzolos and others had formed a company to develop land located on the edge of a pond and across the street from dunes and beachfront homes.<sup>136</sup> Palazzolo bought out the other owners and became the direct owner when the corporation was dissolved for failure to pay taxes.<sup>137</sup> Well before the dissolution of the company, however, the state had passed extensive regulation protecting salt mar-

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might improve the bargaining position of the owner of Lot E vis-à-vis the owner of Lot F if the two lots were owned separately. Of course, the bargain could well be lower, depending on which side had the most willingness to hold out, but it seems clear that Lot E remained a valuable piece of property despite the ordinance and regardless of whether it was held by the owner of Lot F.

<sup>135</sup> 533 US 606 (2001). Although our focus is on the timing issue, *Palazzolo* also rejected the argument made by amici that *Lucas* applies whenever a regulation eliminates any economically viable use of any portion of a piece of property. See Lazarus, 57 Hastings LJ at 816 (cited in note 4).

<sup>136</sup> *Palazzolo*, 533 US at 613.

<sup>137</sup> *Id.* at 614.



shes like those on the property from development.<sup>138</sup> Thus, the timing was: (1) Palazzolo made his investments via a corporation, (2) the regulations were enacted, and (3) Palazzolo then acquired title in his own name. The state courts rejected Palazzolo's takings claim, holding that it was necessarily barred because he acquired title after the regulation was in effect.<sup>139</sup>

In an opinion by Justice Kennedy, the Court rejected the state court's per se rule barring a subsequent owner from bringing a takings claim. The Court's strongest argument was that such a rule would sometimes mean no one would ever be in a position to challenge an unconstitutional land regulation. Under ripeness doctrine, an owner cannot bring a takings claim without making a development proposal and having it rejected, which might not happen until the property has changed hands.<sup>140</sup> The Court had "no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."<sup>141</sup> Rather, it "suffic[ed] to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of time."<sup>142</sup> Thus, "[t]he 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional."<sup>143</sup>

The concurring opinions debated just how such timing issues should be resolved. Justice Scalia argued that, unless an existing law qualified as a background principle of state law, "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking."<sup>144</sup> Justice Scalia did not provide any guidance as to how to distinguish between an ordinary rule of law and a background principle. Perhaps, by background principle, he meant a long-standing common law rule, as he seemed to have had in mind in *Lucas*.

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 616.

<sup>140</sup> *Id.* at 628.

<sup>141</sup> *Id.* at 629.

<sup>142</sup> *Id.* at 630.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 373 (Scalia, J).

Yet it surely would seem odd to say that the background principle of water law in some western state is the common law doctrine of riparian rights, even though those rights were replaced over a century ago by a statutory system of water rights, prior appropriation.<sup>145</sup>

Justice O'Connor rejected Scalia's position, stating that "[t]oday's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis."<sup>146</sup> "Indeed," she added, "it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance."<sup>147</sup> Under *Penn Central*, which she said remained the "polestar," a "regulation regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."<sup>148</sup> For "if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicia of fairness is lost."<sup>149</sup>

*Palazzolo* settled one point regarding timing: the fact that property acquisition occurred after a regulation went into effect does not automatically bar a takings claim. But it left open the question whether the timing of the regulation is ever relevant to determining reasonable expectations, as O'Connor thought and Scalia disputed. The theory behind Kennedy's *Palazzolo* opinion was also a bit ambiguous as to whether the current owner's rights are derivative of the prior owner's possible takings claim or whether it is independent. That might matter in situations where the acquisition or other changed circumstances bring the challenged regulation into play or change its practical impact—as in *Murr*, where the exception to the grandfather clause for

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<sup>145</sup> See Michael C. Blumm and J. B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 *Ecol L Q* 805, 812 n 27 (2010). Blumm and Ruhl point out that there was a similar switch in the east, from the natural flow doctrine to riparian rights. *Id.* There have been other changes as well, such as the American abandonment of the English doctrine that improvements on leased land were for the benefit of the landlord, and a contraction of the rights of neighboring landowners under nuisance doctrine. *Id.* at 812, 816. The nineteenth-century expansion of the public trust doctrine from tidelands to other navigable waters could be considered another example. *Id.* at 833. Sax points to other examples of changes in property law, such as limiting rights of dower and curtesy to expand testator freedom and abolishing husbands' property rights in their wives' estates a century before sex discrimination was recognized as a constitutional issue. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 *Stan L Rev* 1411, 1448 (1993).

<sup>146</sup> *Palazzolo*, 533 US at 633 (O'Connor, J).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 635.

adjoining properties was not triggered until the Murr children acquired Lot E after already owning Lot F, which meant that the previous owners had never been subject to the exception themselves.

The parties were well aware of the timing question in *Murr*, and the briefs teed up the issue for the Court. St. Croix County argued that “the distinct treatment of commonly owned, adjacent substandard lots [as effectively merged] is so longstanding and widespread as to be fairly considered part of what Justice Kennedy has described as ‘the whole of our legal tradition’ upon which ‘reasonable expectations must be understood’ in defining property rights in land.”<sup>150</sup> Thus, the county maintained, “anyone remotely knowledgeable about land use law, including realtors, mortgagees, title companies, builders, and local counsel, knows the implications of owning adjacent, substandard lots.”<sup>151</sup>

Similarly, the state argued that “[w]hen Petitioners obtained title to Lot E in 1995, they were ‘charged with knowledge’ that the Lot was subject to a preexisting merger provision that would trigger if Lot E was brought into common ownership with a contiguous substandard lot.”<sup>152</sup> The state read *Palazzolo* narrowly as making the later owner’s claim dependent on whether the owners would have had a valid claim if they had been able to get into court when the regulation was passed.<sup>153</sup> Since the previous owners in this case (the Murrs’ parents) owned only Lot E in 1976, their only loss was an inability to convey the property without threat of merger to someone who already owned an adjoining lot.<sup>154</sup> The state’s view was that only *that* claim of the parents could be brought by the Murrs today.

The Murrs’ reply brief took a sharply opposing position. In their view, as in Scalia’s, a regulation that is challenged under the Takings Clause can never be considered relevant to determining the owner’s reasonable expectations.<sup>155</sup> Among other things, they also quoted language from *Palazzolo* that “[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land.”<sup>156</sup>

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<sup>150</sup> St. Croix brief \*22 (cited in note 84).

<sup>151</sup> *Id.* at \*43.

<sup>152</sup> State brief \*36–37 (cited in note 82).

<sup>153</sup> *Id.* at \*42.

<sup>154</sup> *Id.*

<sup>155</sup> Petitioners’ Reply Brief, *Murr v State of Wisconsin* (No 15-214), online at 2016 WL 4072806.

<sup>156</sup> *Id.* at \*13.

Thus, the Murrs argued, “[u]nder this precedent, the Murr siblings have the same right to seek compensation under the Takings Clause as their parents,” given that “the transfer of title from the parents to the children vests the same property interest as was held by the parents.”<sup>157</sup> In other words, since a new regulation cannot determine expectations at the time of earlier investments, it remains equally irrelevant no matter how much time goes by or who acquires the property in the meantime.

The Court’s opinion clearly rejects the theory that the challenged regulation itself can never become relevant to determining owner expectations. Justice Kennedy observed that the Murrs “could have anticipated public regulation might affect their enjoyment of the property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.”<sup>158</sup> While “[a] valid takings claim will not evaporate just because a purchaser took title after the law was enacted,” nevertheless “[a] reasonable restriction that predates a landowner’s acquisition . . . can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.”<sup>159</sup> As noted earlier, the opinion also notes that the merger rule applied only because of the petitioner’s voluntary conduct in bringing the land into common ownership after the restriction came into effect. “As a result,” Kennedy added, “the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.”<sup>160</sup>

As with the numerator problem, the Roberts dissent takes only a modestly different course. He notes that the majority relies in part on the fact that the Murrs “could have predicted Lot E would be regulated.”<sup>161</sup> This is another fact that he says “could be relevant” to the merits of the takings claim because it would “speak to . . . interference with ‘investment-backed expectations.’”<sup>162</sup> While this statement is sufficiently equivocal that the dissenters could justify abandoning it in a later case, it does suggest a lack of much distance between the dissenters and the majority on this issue. There seems little reason to

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<sup>157</sup> *Id.*

<sup>158</sup> *Murr*, 137 S Ct at 1948.

<sup>159</sup> *Id.* at 1945.

<sup>160</sup> *Id.* at 1948.

<sup>161</sup> *Id.* at 1957.

<sup>162</sup> *Id.*

think that the dissenters will support overruling the majority's holding on the timing issue and reverting to Scalia's view.

### C. A NOTE ON REGULATORY JUSTIFICATIONS

Even Professor Richard Epstein, arguably the founder of the modern property rights movement, concedes the need for regulation when the risk level is sufficiently high, as in the 2014 Oso mudslide in Washington State. As the *New York Times* reported:

Another prominent libertarian legal thinker, Richard A. Epstein of the University of Chicago Law School, said that the case of Oso should be simple, however, because of its history of landslides. "The case is a no-brainer in favor of extensive government regulation in order to protect against imminent perils to life and health," he said. "I'm a property guy, but I'm not a madman."<sup>163</sup>

Although it seems clear that regulatory interests are relevant at some level, the Court has had a great deal of trouble in defining that role. Justice Scalia's opinion in *Lucas v South Carolina Coastal Commission* argued that only a narrow range of government interests could be considered in a total takings case. Lucas had purchased two residential lots on an island in 1986.<sup>164</sup> Two years later, the state had passed a beachfront management act, which prohibited new construction on the island because it was in a high-erosion zone.<sup>165</sup> Relying primarily on dicta in preceding cases, the Court held that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."<sup>166</sup> Thus, while an owner deprived of 95 percent of the property's use might sometimes recover nothing, the owner deprived of 100 percent would recover completely, due to the bright-line nature of the rule.<sup>167</sup> In a footnote,

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<sup>163</sup> John Schwartz, *No Easy Way to Restrict Construction in Risky Areas*, NY Times (March 28, 2014), online at <http://www.nytimes.com/2014/03/29/us/governments-find-it-hard-to-restrict-building-in-risky-areas.html?hpw&rref=us&r=0>. Epstein's libertarian vision of takings law as an instrument to eliminate government regulation is extensively articulated in many writings, including Epstein, 11 NYU L Rev at 883–908 (cited in note 3). Epstein is "widely considered the intellectual fountainhead of the property rights movement." Lazarus, 57 Hastings L J at 799 (cited in note 4).

<sup>164</sup> 505 US 1006.

<sup>165</sup> *Id.* at 1008 & n 1.

<sup>166</sup> *Id.* at 1019.

<sup>167</sup> *Id.* at 1019–20 n 8. *Lucas* was the first time in seventy years that the Court had found a land use rule to be an unconstitutional taking. See Lazarus, 57 Hastings L J at 785 (cited in note 4).

however, Justice Scalia conceded that “[r]egrettably, the rhetorical force of our . . . 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.”<sup>168</sup> Thus, what we have called the denominator problem reared its head explicitly for the first time in a footnote, though it had been implicit in takings law since *Pennsylvania Coal*.

*Lucas* was based on dicta in previous cases,<sup>169</sup> but Justice Scalia marshaled several justifications on behalf of the rule in addition to its long-standing articulation. First, he said, a complete loss of value made it less likely that the rule was simply a matter of the legislature adjusting economic burdens and benefits in a way that on average benefited everyone concerned.<sup>170</sup> Second, total-loss cases were rare enough that requiring compensation would not be a major incursion into the government’s ability to function.<sup>171</sup> Third, the fact that a regulation left the owner with no economically viable use of land heightened the risk that the regulation was a disguised condemnation of the property for public benefit.<sup>172</sup>

Announcing the total taking rule did not, however, completely dispose of the case, given that earlier cases had upheld the power of the government to severely regulate property to protect the public.<sup>173</sup> Scalia rejected any distinction between affirmative mandates to provide public benefits and negative restrictions on harmful conduct, though that distinction was articulated by the earlier cases.<sup>174</sup> Instead, he argued that regulations eliminating all economic uses can be upheld only if they “do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”<sup>175</sup> Scalia gave as two exam-

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<sup>168</sup> Id at 1016 n 7.

<sup>169</sup> Id at 1015–16.

<sup>170</sup> Id at 1017.

<sup>171</sup> Id at 1018. Of course, the same argument would apply to any rule awarding compensation to any small class of cases, however arbitrarily defined.

<sup>172</sup> Id. Justice Scalia of course provides no support for this empirical assertion. It may be equally likely that such decreases in value occur only in cases where development would be particularly harmful.

<sup>173</sup> Id at 1022.

<sup>174</sup> Id at 1022–24.

<sup>175</sup> Id at 1029. According to Fischel, *Regulatory Takings* at 185 (cited in note 40), William Penn reserved the right to take up to 6 percent of his grantees’ land for road-building purposes; the

ples the denial of a permit to engage in landfilling that would flood the lands of neighbors and an order to remove a nuclear plant that is discovered to sit on an earthquake fault.<sup>176</sup> In a concurring opinion, Justice Kennedy argued that Scalia was wrong to limit the permissible justifications to common law doctrines rather than allowing consideration of how statutes might shape reasonable expectations.<sup>177</sup>

The *Lucas* opinion attracted great controversy.<sup>178</sup> But it does at least suggest that background rules of state law, including nuisance law, act as carve-outs from the owner's property rights. State courts were not slow to extend this treatment to other common law rules such as the public trust doctrine. Indeed, in at least one way, *Lucas* weakened the owner's position under the *Penn Central* test. Conduct prohibited by common law nuisance doctrine or the public trust doctrine is now per se ineligible for the *Penn Central* test, because on Scalia's theory, it was never part of the owner's title in the first place. Thus, at least in some cases, state interests embedded in common law doctrines trumped claims of reasonable investment-backed expectations without need for further inquiry.<sup>179</sup>

The role of governmental interests in the takings inquiry has remained unclear in other respects. Dicta predating *Lucas* by a couple of years suggested that one relevant factor was whether a regulation substantially advanced legitimate state interests.<sup>180</sup> In 2005, however, the Court rejected that formulation in *Lingle v Chevron U.S.A.*,<sup>181</sup>

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*Lucas* argument would presumably apply to such a reservation since it was part of the owner's title.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 1035.

<sup>178</sup> For an incisive critique of *Lucas*, see Sax, 45 *Stan L Rev* at 1411 (cited in note 145). One of Sax's observations that is especially relevant to this article relates to the evolution of doctrine:

Of course, predicting future Supreme Court outcomes based on past performance is an uncertain enterprise. The Court is not monolithic; its views change along with its membership. Less obvious, but as important, the Court's views shift as its assumptions regarding the world around it change.

*Id.* at 1431.

<sup>179</sup> Nicole Steele Garnett criticizes *Murr* for "import[ing] public policy considerations into the definition of private property itself." Garnett, 2016–17 *Cato Sup Ct Rev* at 148 (cited in note 5). But *Lucas* itself did that by making nuisance law a carve-out from the owner's title, given the connection between nuisance law and public policy (particularly in terms of public nuisances).

<sup>180</sup> *Agins v City of Tiburon*, 447 US 255, 260 (1980).

<sup>181</sup> 544 US 528 (2005).

a takings challenge to a rent-control law protecting gas station owners. *Lingle* seemed to downplay any role for regulatory justifications in the takings analysis: “The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation.”<sup>182</sup> Likewise, the Court continued, “an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners.”<sup>183</sup>

The primary focus in *Murr* was not on the state’s justifications for protecting lands on the St. Croix River. Everyone in the case, even the Murrs, seemed to take those for granted. But Justice Kennedy did indicate that the state’s interests were relevant to takings claims. In listing the factors to be considered, he pointed particularly to the possibility that “the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.”<sup>184</sup> He cited his own *Lucas* concurrence, quoting a statement that “[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.”<sup>185</sup> Thus, it would seem, if the state is pursuing an important goal such as protection of fragile lands, it is more reasonable for property owners to expect regulation and to adjust their “investment-based expectations” accordingly, even when the regulation does not track background principles of state law.

### III. TAKING STOCK OF TAKINGS LAW

*Murr*’s greatest doctrinal significance was for the denominator problem. But as we have seen, it also had something significant to say about a number of the other issues presented in takings cases. Before we try to think about the larger implications of the decision, it

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<sup>182</sup> *Id.* at 543.

<sup>183</sup> *Id.* Other language in *Lingle* suggests that regulatory takings should include only actions functionally equivalent to takings. *Id.* at 539. This standard seems more restrictive than *Penn Central*, but the Court does not seem to have taken notice of the inconsistency. See Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 *Stan. Environ. L. J.* 247, 286–87 (2015).

<sup>184</sup> *Lingle*, 544 US at 543.

<sup>185</sup> *Id.* at 1946 (quoting *Lucas*, 505 US at 1035).



may be helpful to pull together the doctrinal issues that *Murr* touches upon.

First and foremost, the Court established a multifaceted test for the denominator issue, which governed whether adjoining lots should be considered in determining the value of the owner's prerogation holdings. This in itself was a significant defeat for property rights advocates.

The Court also resolved some related issues. It held that in determining the amount of value retained by the owner despite a regulation (the "numerator"), the property's value includes its synergies with the owner's other holdings. The majority found it relevant that the regulation protected an important government interest and that the regulation was in place long before the owners acquired the property. The dissenters seemed willing to entertain these views as well, though stopping short of a full-throated endorsement. Where the majority and dissent came fully together was endorsing the government-friendly *Penn Central* test, living up to an old criticism that the "Court seems to be inordinately proud of the ad hoc nature of its takings opinions."<sup>186</sup>

The overall import of *Murr* is to soften the edges of property rights as barriers to government regulation. This would not have been at all to Justice Scalia's liking, nor is it to the liking of property rights advocates today. We begin by looking at those implications of the decision, before considering its implications for future doctrinal evolution.

#### A. THE STALLED PROPERTY RIGHTS REVOLUTION

*Murr* represents a serious blow to efforts to build upon Justice Scalia's opinion in *Lucas*. *Murr*'s approach to the denominator issue obviously reduces the occasions on which an owner will be able to claim a total deprivation of value. Other aspects of *Murr* also help to limit *Lucas*. Justice Kennedy characterized the "nuisance exception" as broadly "recognizing the relevance of state law and land-use customs."<sup>187</sup> Moreover, in discussing the relevance of a property's ecological features, he cited his own *Lucas* concurrence, quoting a statement that "[c]oastal property may present such unique concerns for

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<sup>186</sup> Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum L Rev 1697, 1699 (1988). Rose-Ackerman argues that "[t]he ad hoc nature of the law introduces an element of uncertainty into private investment decisions that could make the coexistence of democracy and private property more, rather than less, difficult." *Id.* at 1702.

<sup>187</sup> *Murr*, 137 S Ct at 1943.

a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.”<sup>188</sup>

During his time on the Court, Justice Scalia championed the cause of property owners. As Peter Byrne puts it, Scalia “advocated for them with characteristic rhetorical vigor that encouraged property rights advocates, terrified regulators and environmentalists, and enriched scholarly debate about constitutional property.”<sup>189</sup> Byrne also correctly notes that Scalia “consistently adopted or argued for clear rules without any balancing of interests in his regulatory takings opinions,” making sure that any rule “favors private property owners over public regulations.”<sup>190</sup> The *Penn Central* test is the epitome of the kind of balancing that Scalia detested. Yet no Justice in *Murr* had a word of criticism of that test.

*Murr* also reflected a defeat for Justice Scalia’s skepticism about the “whole parcel” rule, which was ignored even by the *Murr* dissenters. Instead, Roberts emphasized his support for the whole-parcel view. In Roberts’s thinking, the parcel as a whole rule blocks the “strategic” use of individual property interests by owners as the basis of taking claims, which “would undermine the balance struck by our regulatory takings cases.”<sup>191</sup> Thus, with the possible exception of Gorsuch, whose view is not yet known, every member of the current Court seems to have endorsed *Penn Central*’s approach, which rejects use of anything less than the whole parcel as the basis for takings claims.

This adherence to the “whole parcel” rule may or may not stick for individual Justices. Roberts, Thomas, and Alito joined a Scalia plurality opinion in *Stop the Beach Renourishment, Inc. v Florida Dept. of Env. Protection*<sup>192</sup> that would have struck out in another direction. The case involved a Florida law limiting the ability of littoral owners to access the sea directly across dry land.<sup>193</sup> The plurality held that a taking would exist whenever a state court eliminates an “established right of property,” even if the state court’s decision was foreshad-

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<sup>188</sup> Id at 1946 (quoting *Lucas*, 505 US at 1035).

<sup>189</sup> See J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 Vt L Rev 741 (2017).

<sup>190</sup> Id at 743.

<sup>191</sup> *Murr*, 137 S Ct at 1954.

<sup>192</sup> 130 S Ct 2592 (2010).

<sup>193</sup> Id at 2598–99.

owed by prior state dicta or holdings.<sup>194</sup> But this plurality opinion was wholly dictum, since a majority of the Court agreed with the plurality that there was actually no established rule of state law establishing the property owners' claim and therefore no possible taking.<sup>195</sup> Whether any of the *Murr* dissenters would be willing to return to this approach in a future case is unclear. All we know is that seven years after *Stop the Beach Renourishment*, Chief Justice Roberts's dissent in *Murr* seemingly endorsed the whole parcel rule, with the support of Alito and Thomas.

Both the majority and the dissenters in *Murr* also seemed quite contented with the ad hoc nature of takings jurisprudence. Writing for the majority, Justice Kennedy observes that the Court has "for the most part refrained from . . . definitive rules" and instead has been prone to "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances."<sup>196</sup> Thus, he says, "[a] central dynamic of the Court's regulatory takings jurisprudence is its flexibility" as a way of balancing property rights with the public interest in regulating.<sup>197</sup> Chief Justice Roberts's dissent referred to the *Penn Central* test and, a paragraph later, stated that "[d]eciding whether a regulation has gone so far as to constitute a 'taking' of one of those property rights is, properly enough, a fact-intensive task that relies 'as much on the exercise of judgment as on the application of logic.'"<sup>198</sup>

The Justice who might seem most likely to pursue a campaign on behalf of property rights is Justice Thomas, who has long been the most conservative member of the Court. I have delayed discussing Thomas's separate dissent until now, but it suggests that he could actually be moving in the opposite direction. Thomas notes what seems to be common ground—that prior to *Pennsylvania Coal*, "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] possession.'"<sup>199</sup> This is a direct quote from

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<sup>194</sup> Id at 2608, 2610.

<sup>195</sup> Id at 2612.

<sup>196</sup> *Murr*, 137 S Ct at 1942.

<sup>197</sup> Id at 1943.

<sup>198</sup> Id at 1957 (Roberts, CJ, dissenting).

<sup>199</sup> Id (Thomas, J, dissenting). The consensus among historians seems to be that the Framers understood the Takings Clause to apply only to government expropriation. See John H.

Justice Scalia's opinion in *Lucas*.<sup>200</sup> Although Scalia was an originalist, he seemed unfazed by the historically untethered nature of regulatory takings doctrine. Thomas, who is perhaps a more dedicated adherent to originalism, then suggests that "it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."<sup>201</sup>

No doubt the property rights movement will still have its victories from time to time. With a majority of conservatives on the bench, and a malleable approach to takings, property rights owners will surely have their good days. But what seems to be lacking is any great discontent with the legal status quo in a way that would drive the Court toward large-scale doctrinal changes.<sup>202</sup>

#### B. TAKINGS LAW AFTER MURR

Most of scholarship about takings revolves around the Supreme Court. But the practical significance of the Court's rulings turns on their application by lower courts. As we will see in subsection 1, the Court's ruling in *Murr* is consistent with the overall tenor of takings litigation, which provides spotty protection for landowners. Subsection 2 offers some thoughts about the future direction of takings law. Both *Murr* and lower court decisions are indications of the difficulty of providing more comprehensive protection to property rights given that the existence of a considerable land use regulation has itself become a background principle of property law.

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Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause: Setting the Record Straight*, 1996 Utah L Rev 1099 (2000); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum L Rev 782 (1995). An early Reconstruction-era opinion does express concern that a ban on liquor might be a violation of the due process rights of owners of existing stocks, see *Batemeyr v Iowa*, 85 US 129, 133–34 (1874). But in *Mugler v Kansas*, 123 US 623 (1887), the Court squarely upheld the validity of a similar law, on the theory that exercises of the state's police power were not equivalent to a taking of property for public use. *Id.* at 662.

<sup>200</sup> 505 US 1014.

<sup>201</sup> *Id.*

<sup>202</sup> Justice Thomas may be an exception, but his inclination seems to be to exempt the federal government from regulatory takings doctrine based on the original understanding—not a change that would please property rights advocates. He cites an article whose title conveys its thesis: Michael Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 15 San Diego L Rev 729 (2008).

1. *Takings law in the lower courts.* Even to the extent that property rights advocates have enjoyed victories in the Supreme Court, it is unclear how much those victories have actually changed land use laws or their applications. The scholarly literature on regulatory takings has focused more on legal theory or doctrinal developments than on the implementation of doctrine. There have been relatively few efforts by legal scholars to examine how lower courts (largely state courts)<sup>203</sup> have been applying the doctrine, or what effects changes in doctrine may be having on actual land use decisions. What information we do have suggests that the Court's rulings may be less momentous than scholars (or perhaps the Justices) believe.

Two of the studies involve an aspect of regulatory takings I have mentioned only briefly: a series of cases on the intersection between takings and unconstitutional conditions doctrine.<sup>204</sup> In such cases, as a condition of approving a development permit, the government demands that the landowner make a concession such as providing free public access or requiring a transfer of property or money to the government. Because these concessions are a condition of obtaining a permit the owner voluntarily sought, these "exactions" are not per se takings. The Court has, however, required such an exaction to have a clear justification as a means to address problems created by the project.

Studies of this rule at different points in its evolution seem to indicate relatively benign effects. The first study involved the impact of the earlier cases on land use planning in California. The researchers concluded that land use planners generally regarded the rule as merely reinforcing good professional practice.<sup>205</sup> Communities with large amounts of development often increased their requirements on developers as a result of reexamining their rules under the new doctrine, although more developed urban areas were more constrained by the doctrine.<sup>206</sup> The second study, involving the most recent expansion of the rule by the Court, found very little effect on litigation in

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<sup>203</sup> Under *Williamson County v Hamilton Bank*, 473 US 172 (1985), a plaintiff must first seek compensation from the state before a takings claim becomes ripe.

<sup>204</sup> See *Koonts v St. Johns River Water Management Dist.*, 133 S Ct 2586 (2013); *Dolan v City of Tigard*, 512 US 374 (1994); *Nollan v Cal Coastal Comm'n*, 483 US 825 (1987).

<sup>205</sup> Ann E. Carlson and Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 UC Davis L Rev 103, 105 (2001).

<sup>206</sup> *Id.* at 105–6.

Virginia.<sup>207</sup> The author speculates that given the repetitive nature of interactions between developers and land use authorities, strategic incentives to reach accommodations outweigh the appeal of litigation despite the availability of compensatory damages and attorney's fees.<sup>208</sup>

Three other studies focus on the diminution-of-value strand of takings doctrine. One of these studies focused specifically on the *Penn Central* and *Lucas* doctrines in federal court.<sup>209</sup> Based on a study of ninety-one federal cases, the author found that the results turned largely on the choice of forum.<sup>210</sup> As of that time, at least, the study found that the Federal Court of Claims was happy to spend the government's money on takings compensation, but that other federal courts took a much different position.<sup>211</sup> In particular, outside of the Court of Claims, application of the *Penn Central* rule meant almost invariably a defeat for the landowner.<sup>212</sup>

Another study by Michael Blumm and Lucas Ritchie found that *Lucas* had the unexpected effect of expanding lower court reliance on background norms to eliminate takings claims.<sup>213</sup> In addition to the nuisance exception articulated in *Lucas*, lower courts had identified a number of other background norms of state law. Perhaps the most obvious additional norm is the public trust doctrine, which traditionally limits the rights of landowners over navigable waters.<sup>214</sup> Some states, however, have applied the public trust doctrine more broadly to include tributaries of navigable waters and dry beach.<sup>215</sup> The federal government has its own protection from takings claims under another background principle: the navigable servitude, which gives it paramount authority over tidal and navigable waters.<sup>216</sup> Courts have also

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<sup>207</sup> Antonio M. Elias, *Koontz v. St. Johns River Water Management Dist. Was Not a Big Deal*, 34 Va Envir L Rev 457 (2017). For an in-depth analysis of *Koontz* and its implications, see Lee Anne Fennell and Eduardo M. Peñalver, *Exactions Creep*, 2013 Supreme Court Review 287.

<sup>208</sup> Id at 463, 488.

<sup>209</sup> Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 Willamette L Rev 695 (2000).

<sup>210</sup> Id at 699.

<sup>211</sup> Id at 747.

<sup>212</sup> Id at 743–47.

<sup>213</sup> Michael C. Blumm and Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv Envir L Rev 321 (2005).

<sup>214</sup> Id at 341.

<sup>215</sup> Id at 343.

<sup>216</sup> Id at 346–47.

invoked less familiar background principles, including customary rights of beach access,<sup>217</sup> native Hawaiian food-gathering rights (a decision also invoking the “Aloha spirit”),<sup>218</sup> laws protecting in-stream water flows,<sup>219</sup> state ownership of all wildlife under the common law,<sup>220</sup> and Indian treaty rights predating private land ownership.<sup>221</sup>

The final study was by far the most thorough. James Krier and Stewart Sterk examined more than two thousand reported takings decisions from 1979 to 2012.<sup>222</sup> Like Blumm and Ritchie, they found that *Lucas* had an unexpected effect: “After *Lucas*, the success rate for wipeout takings claims dropped precipitously,”<sup>223</sup> from 64 percent to 26 percent.<sup>224</sup> Moreover, few cases raised these claims: under 4 percent of takings claims.<sup>225</sup> Krier and Sterk found that most of the opinions in those cases focused on whether a complete loss of value had occurred.<sup>226</sup> Courts were divided on the issue that would ultimately reach the Court in *Murr* and on situations where inability to use the land was due to a combination of regulation and market forces.<sup>227</sup>

Like the study of federal court decisions discussed above, Krier and Sterk also found that *Penn Central* claims were markedly unsuccessful. Indeed, they said, “courts almost always defer to the regulatory decisions made by government officials, resulting in an almost cate-

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<sup>217</sup> Id at 347–48.

<sup>218</sup> Id at 349.

<sup>219</sup> Id at 351.

<sup>220</sup> Id at 353.

<sup>221</sup> Id at 354.

<sup>222</sup> James E. Krier and Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 Wm & Mary L. Rev 35, 39 (2016). The time period was chosen because 1979 was the year after *Penn Central*, and 2012 was the year that their data source, a publication collecting takings cases, ceased publication. Id at 52.

<sup>223</sup> Id at 59.

<sup>224</sup> Id at 60.

<sup>225</sup> Id at 87. An even more recent study found that *Lucas* claims succeed in only 1.6 percent of takings cases that cite *Lucas*. Carol Nicole Brown and Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 Iowa L. Rev 1847 (2017). More specifically, they found only twenty-seven cases in twenty-five years in which *Lucas* claims succeeded. The authors observe that “[e]ven though *Lucas* set out a categorical rule, the rule is so fact-intensive that the gravitational pull is back toward the *Penn Central* weighing.” Id at 1892. They conclude: “What does this say about the law? It says that the law is resistant to a categorical rule. It is just as resistant to a compensable taking post-*Lucas* as it was pre-*Lucas*.” Id at 1892.

<sup>226</sup> Id at 60–61.

<sup>227</sup> Id.

gorical rule that *Penn Central*-type regulatory actions do not amount to takings.<sup>228</sup> They found that owners won less than 10 percent of *Penn Central* cases and that even this figure exaggerated the level of success, since it included decisions by lower courts that were reversed on appeal.<sup>229</sup>

Taking the sample of cases as a whole, Krier and Sterk found that diminution-of-value claims had only a 5 percent success rate.<sup>230</sup> Claims had higher success when a regulation required out-of-pocket expenses or prohibited an existing property use.<sup>231</sup> Thus, courts seemed to largely take the status quo as the baseline, looking for loss of value compared to current use, rather than taking the property's potential value without regulation as the baseline.

It may be a mistake to read too much into these findings. Nearly all of the studies focus on reported decisions, which are not a random sample of all litigation. Moreover, we still have limited information about how land use planners have responded to the Court's decisions or on how the decisions have affected negotiations between landowners and regulators. If anything, however, *Murr* should expand the discretion of lower courts, probably further decreasing the likely success of takings claims. After *Murr*, the door is not barred to successful taking claims, but it appears that relatively few will be able to slip through. The Court, then, seems to have given property rights and the Takings Clause mostly symbolic support, with just enough practical effect so its endorsement of property rights is taken seriously.

2. *Prognosis*. No one has ever accused the Court's takings decisions of being governed by an excessive obsession with consistency. As Laura Underkuffler has said, "[t]o claim that any particular body of Supreme Court jurisprudence is the most incoherent is to set oneself up for challenge."<sup>232</sup> Still, she continued, "even if proof of the assertion is impossible, as a practical matter, it is—when it comes to takings law—

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<sup>228</sup> Id at 62.

<sup>229</sup> Id at 64.

<sup>230</sup> Id at 67–68. Claims regarding development exactions were more successful, although litigation was relatively sparse, leading Krier and Sterk to speculate that landowners prefer to agree to the exactions so projects can proceed rather than litigate. Id at 68–69. *Penn Central* claims had higher success when a regulation required out-of-pocket expenses or prohibited an existing property use. Id.

<sup>231</sup> Id at 67–68.

<sup>232</sup> Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 Tex L Rev 2015, 2017 (2013).



quite probable.”<sup>233</sup> Perhaps this is an overstatement, given the presence of other strong contenders such as the Establishment Clause and standing doctrine. Still, it would be safe to say that the Court has never steered a steady course in the takings domain. Nor does the Court seem to be drifting in any particular direction, having embarked on this journey.

There is a certain paradox to calls for a radical expansion of takings protection. As David Dana points out, “[m]uch of the value of property in land, of investments in land, comes from land use regulation.”<sup>234</sup> Whole cities have been built out of desert or farmland, including billions of dollars of private investment, on the assumption that zoning laws apply.<sup>235</sup> A radical expansion of property rights would put much of this legal infrastructure in doubt or invalidate it completely. As the Supreme Court said in a due process case, “[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”<sup>236</sup> As a number of Justices have recognized, land use laws such as zoning are very much now a part of what the Court has called background principles of state law on which everyone relies.<sup>237</sup>

The libertarian program would drastically unsettle those background principles, with tangible impacts on owners. The delight of the owner of any specific piece of property about this newfound freedom would be counterbalanced by fears of what unexpected activities newly empowered neighbors might pursue. It may be all very well to have the option of selling one’s house to construct a gas station; it is less pleasant that one’s neighbors also have that option.<sup>238</sup>

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<sup>233</sup> Id.

<sup>234</sup> David A. Dana, *Why Do We Have the Parcel-as-a-Whole Rule?*, 39 Vt L. Rev. 617, 634 (2015).

<sup>235</sup> See Brief of the American Planning Association and the Wisconsin Chapter of the American Planning Association as Amici Curiae in Support of Respondents, in *Murr v Wisconsin* (No. 15-214) \*1–4, 13–18 (tracing history of modern land use regulation and of its acceptance by the Court).

<sup>236</sup> *Bd. of Regents of State Colleges v Roth*, 408 US 564, 577 (1972).

<sup>237</sup> See *Palazzolo*, 533 US at 627 (development rights are subject to “valid zoning and land-use restrictions”); *Taboe-Sierra*, 535 US 302, 352 (Rehnquist, CJ, dissenting, joined by Scalia, J, and Thomas, J) (“zoning and permit regimes are a longstanding feature of state property law”).

<sup>238</sup> Pointing to the political backlash against an effort in one state to dramatically expand compensation for the costs of land use regulation, Fennell and Peñalver observe that “once they confront the unpredictability of unregulated land use, owners quickly come to realize the mutually protective value of at least some land use regulation.” Fennell and Peñalver, 2013 Supreme

To put it another way, land use laws are equivalent to what property lawyers call negative covenants on the lands of neighbors, and an expansion in takings doctrine would in effect “take” those negative covenants. If, as Carol Rose has said, property rules “encourage individual investment, planning, and effort because actors have a clearer sense of what they are getting,”<sup>239</sup> a radical takings expansion would destabilize those expectations. Paradoxically, a major strengthening of property rights could itself be seen as undermining the purposes of property law. For this reason, it is not surprising that the Court has been so chary of a lunge toward a more libertarian takings jurisprudence. If it is not to unsettle the expectations of property owners, it must take as given most of the existing structure of land use law. That means that the battles will necessarily take place at the margins.<sup>240</sup>

It is tempting to view *Murr* as indicating a new equilibrium in takings law. Certainly the majority, the Chief Justice, and Justice Alito seem content with the *Penn Central* test, and it is hard to see that test being overruled any time soon. But given the number of 5–4 decisions in the area, we might well see smaller movements either because of Justice Kennedy’s shifting votes or because of changes in the makeup of the court. So long as Justice Kennedy remains the swing Justice in these cases, doctrinal stability is somewhat dependent on his views, which are not always predictable. If Chief Justice Roberts becomes the swing vote due to a conservative appointee replacing Kennedy or one of the four liberals, we would see other outcomes, but probably not abandonment of the *Penn Central* test or the creation of sweeping new exceptions. Roberts seems largely happy with *Penn Central*. Too much land use regulation is now baked into property law and into the legal system more generally. With due regard for the unpredictability of

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Court Review at 352 (cited in note 207). There is some recent empirical confirmation of the positive effects of land use planning. In a study of the impact of California’s stringent coastal regulations on property values, two economists conclude that the regulatory regime raises property values by 5–8 percent. See Christopher Severen, *Land-Use Regulations, Property Values, and Rents: Decomposing the Effects of the California Coastal Act* (Sept 2017) (Federal Reserve Bank of Philadelphia, Working Paper No 17-33), online at <https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2017/wp17-33.pdf>.

<sup>239</sup> Carol M. Rose, *The Shadow of the Cathedral*, 106 Yale L J 2175, 2187 (1997).

<sup>240</sup> This kind of incremental intervention is difficult for the Court to oversee effectively. One reason is that none of the Justices are likely to have any expertise in land use law or real estate transactions, making it hard for the Court to assess the impact of its interventions or the need for them. The other is that incremental decisions necessarily leave a great deal of leeway to lower courts, and in the takings area, those are state courts across the nation—a difficult universe for the Court to police effectively on a case-by-case basis.

doctrinal development, especially in an area as muddled as this,<sup>241</sup> it seems likely that *Penn Central* will remain the central fixture of takings law.

It is also significant that the most formidable advocate of property rights, Justice Scalia, is no longer on the Court. His replacement, Neil Gorsuch, may turn out to share his views, but Scalia was an unusually forceful advocate who will be hard to replicate. A decade ago, Richard Lazarus observed that “[t]he Court’s analytic framework for regulatory takings analysis remains today, just as it was in 1978, Justice Brennan’s opinion for the Court in *Penn Central*.”<sup>242</sup> If anything, *Murr* shows that the *Penn Central* test is even more deeply embedded in the law today. If the *Penn Central* test is muddy, the Justices seem happily stuck in the mud.

### C. PENN CENTRAL, MURR, AND THE TAKINGS DILEMMA

One reason to expect *Murr* and its elder sibling, the *Penn Central* test, to survive is the difficulty of making the case for a sterner approach to diminution-in-value cases. Subsection 1 argues that the judicial justifications for regulatory takings doctrine are underwhelming and that the best arguments from scholars are also less than compelling. Subsection 2 argues that there is a more fundamental obstacle: a truly strong takings doctrine would resemble a revival of *Lochner*.<sup>243</sup> The Court is not willing to abandon property rights protection, but neither is it willing to embrace this other horn of the dilemma. *Penn Central* and *Murr* allow it to vacillate somewhere in the middle, intervening now and then to protect property without upsetting the regulatory property apocrypha too much.

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<sup>241</sup> As an example, twenty years ago an astute observer thought that the balancing test was on its way to being supplanted with categorical takings rules, a trend that never eventuated. See Frank Michelman, *Takings*, 1987, 88 Colum L Rev 1621–22 (1988). It is hard to avoid a superstitious fear that any prediction in this area of law is doomed to failure.

<sup>242</sup> Lazarus, 57 Hastings L J at 823 (cited in note 4).

<sup>243</sup> The reference is, of course, to *Lochner v New York*, 198 US 45 (1905) (striking down a maximum-hours law for bakery employees). *Lochner* has become the emblem of an era in which courts defended freedom of contract from regulations they regarded as overreaching. Expansion of regulatory takings doctrine is at least theoretically less intrusive on decisions made through the political process, because the government can save a restriction on property by paying compensation. But given budget constraints, compensation may be more a theoretical than a practical alternative. It probably would have done little to mollify critics of *Lochner* if the Court had allowed the state to impose maximum hours or minimum wages provided the state fully compensated employers.

1. *Possible justifications for regulatory takings doctrine.* In trying to understand takings jurisprudence, it is worth asking what the Justices themselves view as the goals of takings law. Both the majority and the Roberts dissent in *Murr* devote some effort to explaining the normative basis of takings law. As I read them, they present three arguments. Unfortunately, those arguments are all deeply unsatisfactory as a basis for constructing constitutional doctrine. Besides being questionable in their own right, they are also too vague to provide much guidance in structuring constitutional rules.

Justice Kennedy grounds the Takings Clause in individual liberty and fairness. He argues that “[p]roperty rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.”<sup>244</sup> Even if true empirically, this assertion seems tenuously connected with regulatory takings doctrine. If property ownership is necessary to empower people to shape and plan their own destiny, the most pressing problem is that many people do not own property in the first place, not that property is regulated. To the extent Kennedy’s assertion is right, it would seem that what people really need for freedom is access to resources—wealth—rather than ownership of any specific piece of property. The remedy would seem to be a major redistribution of wealth, not regulatory takings doctrine.

The second part of Kennedy’s assertion (“governments are always eager to do so for them”) raises an empirical question—is it true that governments are always eager to control the lives of individuals? Students learn at an early age not to pick an answer with the word “always” on a multiple-choice question, since such statements are rarely true outside of mathematics. Only a student who is completely unaware of current American politics would pick “always” as an answer to the question, “when do governments seek to expand the scope of regulations?” We seem to have no shortage at the moment of legislators and executives whose dearest wish is to eliminate economic regulation.

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<sup>244</sup> *Murr*, 137 S Ct at 1943. In a similar vein is the suggestion that “the ownership of property gives individuals the security in their homes and businesses that provides the sense of independence necessary for free citizens in a democratic polity,” Eagle, 118 Penn State L Rev at 614 (cited in note 11), which seems to relegate to serfdom those who own neither homes nor businesses.

Putting aside the question of the argument's validity, it is unclear where it leads in terms of regulatory takings doctrine.<sup>245</sup> Kennedy agrees that this individual interest in having the material basis for freedom must be balanced against the "government's well-established power to 'adju[s]t rights for the public good.'"<sup>246</sup> Indeed, limiting the property rights of some might be necessary to protect the property rights of others. As to how this balancing is to be accomplished, Kennedy reverts to what he says is "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.'"<sup>247</sup> One can hardly quarrel with this premise, but it is hard to see how it provides any traction in deciding an individual case. It is little wonder that the Court has ended up relying on the almost equally vague *Penn Central* test.

Chief Justice Roberts offers his own effort at explaining regulatory takings doctrine. He, too, repeats the formulae about shifting burdens from individuals that the public should bear.<sup>248</sup> But he adds some embellishments. First, he argues (quoting *Pennsylvania Coal*<sup>249</sup>) that if compensation were required for government appropriation of property but not for overregulation, "the natural tendency of human nature' would be to extend regulations 'until at last private property disappears.'"<sup>250</sup> Alas, that was a silly statement when Holmes made it, and it remains a silly statement a century or so later. Where is the evidence? Was private property on the road to extinction until 1922, when Holmes sprung this new doctrine on the world? Did it disappear

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<sup>245</sup> To the extent that the concern about singling out property owners to bear burdens does have any implications, it seems to point toward tolerance of broadly applicable property restrictions and greater scrutiny of restrictions that apply only to small groups or individual owners. See Saul Levmore, *Just Compensation and Just Policies*, 22 Conn L Rev 285, 306, 313 (1990). The ad hoc nature of many land use decisions does seem to be an animating force in some takings opinions, but the Court has not clearly articulated this as a part of the takings test. See Fennell and Peñalver, 2013 Supreme Court Review at 313–14 (cited in note 207).

<sup>246</sup> *Murr*, 137 S Ct at 1943.

<sup>247</sup> Id. Justice Kennedy likes this language so much that he repeats it at the end of the opinion. Id at 1949.

<sup>248</sup> Id at 1950 (Roberts, CJ, dissenting). Roberts also finds this mantra worth repeating twice. See id at 1952.

<sup>249</sup> Id at 1951. Holmes's comment seems especially off-center when we remember that he wrote when Harding was in the White House and the government was firmly in Republican hands.

<sup>250</sup> Id at 1951.

in England without the benefit of constitutional protection for property rights?<sup>251</sup> Surely, it is at least as plausible to say that the natural tendency of governments is to leave private property rights alone, because property owners are strongly motivated to resist interference and are more likely than others to be rich and powerful.

Again, putting aside doubts about the validity of Roberts's statement, it suggests at most that governments would use regulation to accomplish the functional equivalent of expropriation. But blocking abuses of this kind would require only a very limited takings doctrine. For instance, courts might find a taking only when property owners lose both the power to exclude others and the right to use the property, since condemnation of property involves both elements.

Roberts also suggests an alternative line of argument. He sees an inherent mismatch between regulatory interests and affected property owners: given that "[r]egulatory takings . . . —by their very nature— pit the common good against the interests of a few," and "[t]he widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals."<sup>252</sup> "[L]ooking at the bigger picture," he says, property rights are likely to be given too little weight because "the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem."<sup>253</sup>

Empirically, both propositions seem highly contestable. The NIMBY (Not in My Back Yard) phenomenon, as well as the notorious difficulty of passing legislation over the objections of special interests, suggests that adversely affected individuals have all too much ability to block regulations that would be in the public interest. A great deal of public choice theory supports that view. Moreover, it seems dubious as a psychological matter that people will overlook arresting stories of individual unfairness in the pursuit of more abstract public interests.

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<sup>251</sup> See Byrne, 41 Vt L Rev at 736 n 16 (cited in note 189).

<sup>252</sup> *Murr*, 137 S Ct at 1955.

<sup>253</sup> *Id.* Once again, however one might feel about these arguments in the abstract, they seem to lead nowhere doctrinally. Roberts's point about the tendency of the political process to overlook harm to individuals seems to have no particular connection with the protection of property as opposed to other individual interests. The need for governments to protect capitalism goes astray in a different direction, for it leads not to regulatory takings doctrine but to *Lochner*. The difficulty that the Court has confronted since the day it decided *Lochner* is the impossibility of finding a nonpolitical standard for determining when regulation has impinged too much on the free market.

Roberts's second proposition seems to come down to the idea that capitalism is in need of judicial assistance in protecting itself against excessive regulation. If so, the Court seems to have administered the cure in *Citizens United*<sup>254</sup> and related cases, ensuring that wealthy and powerful business organizations will have full scope to protect themselves in the political process.

Anyone who was offering these rationales seriously would realize that they at least require justification and refinement to be credible. They are by no means self-evident propositions. Nor is it at all clear how they translate into doctrine. Yet the Justices seem content to repeat them without elaboration. I count at least five repetitions in *Murr* of the language about putting public burdens on individuals. All of this suggests that the language is serving as much a ritualistic as a substantive purpose.

This is not to fault the Court's inability to agree on a usable normative basis for the diminution-of-value standard. It is not easy to formulate such a basis for takings liability based on diminution of value. Because it compensates owners for unexpected losses in market value, it seems akin to an insurance program. In this analogy, takings compensation is like the payout on an insurance policy, while the taxes used to fund compensation are like premiums paid by property owners generally.<sup>255</sup> One of the insurance-like aspects of the system is that only some of the landowners who lose out under a regulation will receive compensation, depending on how severe a diminution of value they suffer. In effect, *Penn Central* establishes something like a deductible in this "insurance program," whereby lower levels of loss are not covered, whereas *Lucas* attempts to ensure compensation to the landowner who has a complete loss.<sup>256</sup> It is unclear, however, why the Constitution should be read to mandate government insurance for this one kind of loss, or why private markets could not do so more efficiently and equitably.<sup>257</sup> Landowners are expected to buy fire in-

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<sup>254</sup> *Citizens United v Federal Election Commission*, 558 US 310 (2010) (holding that corporations have a First Amendment right to expend unlimited funds to support political candidates).

<sup>255</sup> Lawrence Blue and Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Cal L Rev 569 (1984).

<sup>256</sup> Susan Rose-Ackerman explains the logic of this insurance-based function of takings compensation. Rose-Ackerman, 88 Colum L Rev at 1705 (cited in note 186).

<sup>257</sup> See Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const Comm 279, 284–85, 287 (1992).

surance, so why not insurance against possible losses due to government regulation?<sup>258</sup>

A related argument is that the prospect of paying compensation forces government to take into account the harm its regulations impose on landowners, which it might otherwise overlook.<sup>259</sup> This rationale is also shaky, because it assumes that the government fully takes into account the benefits of its regulations but systematically overlooks the costs.<sup>260</sup> Public choice theory suggests that the problem will frequently be the opposite: the diffuse public benefits of a regulation will often carry less weight than the opposition of the more concentrated group bearing the costs.<sup>261</sup> Certainly the NIMBY phenomenon supports this perspective. Thus, there's no clear empirical basis for the argument that regulatory bodies overweigh the benefits of regulation over its costs, while both theory and experience suggest that the opposite is as likely to be true.

The Justices' difficulty in articulating a convincing rationale for the diminution-of-value doctrine may help explain the Court's willingness to live with the relatively flaccid *Penn Central* doctrine.<sup>262</sup> The Court's most successful ventures into takings doctrine have taken other directions, such as the blanket rule against permanent physical intrusions or the restrictions on development exactions. These rules avoid relying on the degree of loss. Instead, they prioritize the dignitary harm of nonconsensual intrusions for one rule and concern about unconstitutional conditions for the other.

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<sup>258</sup> The argument for private insurance is made in Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 Ohio State L J 451 (2003).

<sup>259</sup> See Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U Pa L Rev 829, 839–60 (1989); William A. Fischel and Perry Shapiro, *Takings, Insurance, and Michaelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J Leg Studies 269 (1988).

<sup>260</sup> For a critique of this view, see Peñalver, 104 Colum L Rev at 2216–17 n 160 (cited in note 89). Bethany Berger argues that effects on property taxes provide a better signal to local governments: the beneficial effects of regulation cause property values and therefore tax receipts to go up, while the costs of regulation have the opposite effect. See Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 Am U L Rev 1 (2016).

<sup>261</sup> Farber, 9 Const Comm at 290 (cited in note 257).

<sup>262</sup> It may be harsh to say that in takings law, "a 'totality of the circumstances' analysis masks intellectual bankruptcy." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L Rev 61, 93 (1986). But such wide-open tests do seem to imply the absence of a clear normative theory behind the test, instead leaving value judgments to be made in the face of specific circumstances.



2. *Defending Penn Central* and *Murr*. *Penn Central* is a highly contextual, ad hoc analysis. Most lawyers would probably agree that something clearer and easier to apply would be better.<sup>263</sup> Yet, this may be about the best the courts can do. Muddled jurisprudence is often a sign that courts are facing fundamental tensions they are unable to resolve. The Court could escape these tensions by jettisoning the doctrine of regulatory takings, but only Justice Thomas seems willing to even contemplate the slightest possibility of that step. As long as the Court wants to maintain this field of law as more than a hollow shell, however, it will face some very serious problems. As we have seen, one of those problems is that a sweeping assault on land use regulations would destabilize the legal framework in which owners have made countless investment decisions.

Reinforcing this difficulty, and perhaps of greater importance, is the tension between regulatory takings law and the Court's continuing rejection of *Lochner*. The post-*Lochner* era stance of great deference toward economic regulations is in tension with the project of protecting against excessive regulation that is at the heart of regulatory takings doctrine. In this sense, the doctrine might be considered a kind of living fossil from the *Lochner* era. Libertarians have a simple solution: resurrect *Lochner*.<sup>264</sup> But given that the Court is unwilling to do that or to get rid of regulatory takings doctrine, it has to find some way of doing takings law that does not involve reasonableness review and does not present a threat to government regulation at large.<sup>265</sup> This is no easy task.

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<sup>263</sup> An economist who frequently testifies in takings cases puts the points rather nicely: "Hundred of briefs, decisions and journal articles debating 'how much loss is enough' should be sufficient proof that the *Keystone Bituminous* 'taking fraction' provides poor guidance to decision making in partial taking cases." William W. Wade, *Temporary Takings, Tahoe Sierra, and the Denominator Problems*, 43 *Envir L Rep* 10189, 10189 (2013).

<sup>264</sup> Fennel and Peñalver explain this as what might be called the "*Lochner* for land-only" approach, Fennel and Peñalver, 2013 *Supreme Court Review* at 351 (cited in note 207). Not surprisingly, the most prominent academic defender of *Lochner*-era jurisprudence rejects *Murr* and advocates overruling or at least sharply limiting the *Penn Central* test. See Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean up Takings Law in Murr v. Wisconsin*, 11 *NYU J L & Liberty* 151, 156, 215–17 (2017). Epstein notes ruefully that the Roberts dissent "did not at any point question the soundness of this particular framework, but only disagreed about its application to the parcel-as-a-whole test." *Id.* at 155.

<sup>265</sup> This tension must have posed a particular problem for Justice Scalia, who was both an advocate for property rights and an opponent of active judicial review of economic regulations. See John Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 *Vt L Rev* 689, 708 (2017).

An additional problem is determining just what constitutional value the doctrine is trying to protect, which might give greater direction to efforts to strengthen the doctrine. As we have seen, the Justices have had little success in this regard, but they are not alone. This problem has been the subject of valiant efforts by brilliant scholars, but they have been unable to persuade each other, let alone the judges.<sup>266</sup> On the one hand, one would expect a constitutional value to be something more fundamental than the owner's financial health—thus the impulse to tie the Takings Clause to fundamental theories of property. Yet on the other hand, the compensation portion of the Takings Clause suggests that the clause protects the cash value of property, not the inherent value of property rights.<sup>267</sup>

A final tension stems from the era of legal positivism in which we live. We no longer believe that the shape of property law and the rights of property owners stem from natural law. Rather, they stem from the rules of property law developed by courts and legislatures. This poses a logical problem: if property is created by state law, and state law includes the power to modify property rights, then how can a change in state law be a violation of property rights? Any solution requires adopting the general principle of state control over property rights but nevertheless finding space for exceptions—no easy matter. The concept of background principles seems to address this problem, but the Court has never been able to define the distinction between a background principle and an ordinary rule of law.

The *Penn Central* test is an effort to thread the needle, or perhaps one should say square the circle. Given that it's impossible to square the circle, a lot of hand waving is to be expected and perhaps some ink blots covering part of the argument. Of course, there are ways of escaping the conundrum. The Court could once again embrace *Lochner*. It could efface the compensation part of the clause, just as it has effaced the opening language of the Second Amendment. It could adopt a natural rights approach and impose a nationwide set of property rules, which would almost seem worth trying if only to see what version of the Rule Against Perpetuities the Court discerned in the

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<sup>266</sup> For a catalogue of the leading theories, which range from Rawles to Nozick, Hegel to law and economics, and much else, see Peñalver, 104 Colum L Rev at 2187 (cited in note 89).

<sup>267</sup> As Peñalver has argued, regulatory takings doctrine is also in severe tension with the government's broad power to acquire money or even tangible forms of property through taxation, creating another intellectual puzzle for takings doctrine. *Id.* at 2183–85.

penumbra of the Takings Clause. Or, at the other extreme, it could abandon the idea of regulatory takings entirely or limit the doctrine to the functional equivalent of the government acquiring title. But it seems the Justices find neither a *Lochner* revival nor blanket approval of regulations to be acceptable.

The Court's reluctance to embrace these more principled, extreme positions is understandable, for either extreme would be unacceptable to a large portion of society. True, it would be more appealing intellectually to embrace one of the extremes—either a libertarian assault on the modern state or complete deference to regulators. But we live in a society that is sharply divided about economic liberty, property rights, and the role of government—and where many are simply ambivalent about the balance. If the Court's regulatory takings doctrine is muddled, the reason may be that our society's values are in disarray.

Given that the best the Court can do is probably to muddle along, something like *Penn Central* is probably about all one should expect. This inevitably leaves the lower courts, and the state courts in particular, to make their own judgments, based on local community practices and norms. When a state seems to have gotten far out of line, the Supreme Court can step in, just as a trial judge can step in when a jury seems to have botched the similar task of defining negligence. Given all the constraints the Court is trying to satisfy, occasional ad hoc interventions may be the best it can do. Certainly, the opinions in *Murr* suggest that most of the Justices have come to that conclusion.

#### IV. CONCLUSION

The doctrinal implications of *Murr* may seem subtle, but they have a real impact. Consider state responses to sea-level rise that seek to move development away from the coast, which were discussed in the introduction. As we have seen, both the majority and dissent were agreed in *Murr* that at a minimum the relevant unit of analysis is the lot as a whole and can sometimes include nearby lots of the same owner. *Murr* also shores up *Penn Central*'s holding that the state can give owners transferrable development rights and use those to offset any diminution in value. Moreover, *Murr* indicates that the existence of a restriction on property, especially a long-standing one, can put future coastal owners on notice that their development rights will be limited. Finally, *Murr* observes that coastal lands are fragile, allowing

a greater degree of state regulation. All of these features of *Murr* will make it harder for coastal landowners to take advantage of the *Lucas* total takings rule and will count against them in applying the more flexible and less owner-friendly *Penn Central* rule.

In doctrinal terms, *Murr* is revealing for both what was said and what was not said. The Court had been presented with the evidence that, outside of the total takings situation, its balancing test for takings nearly always results in a government victory. No one on the Court bothered mentioning that issue, and the dissenters seemed happy to use the balancing test notwithstanding its friendliness to regulators. In earlier decisions, the dissenters had argued that even a single piece of land was too big a unit to use as the denominator, let alone multiple lots. Instead, they argued, the denominator should be limited to the separate interest at issue, which might be less than the total bundle of property rights to the whole parcel. No one chose to bring up that argument again, and it is incompatible with both the majority opinion<sup>268</sup> and the Roberts dissent.<sup>269</sup> Justice Scalia had also argued that it was irrelevant whether the challenged law was already in effect when the present owner acquired the property. No one on the Court embraced that claim in *Murr*.<sup>270</sup> And in terms of the numerator problem, the majority<sup>271</sup> and dissenters<sup>272</sup> both seemed willing to consider the amount of value added by the vacant lot to the total value of the two lots as offsetting the Murrs' loss from being unable to develop the lot separately. In other words, apart from attracting a minority of the Court on the denominator issue, property rights advocates were rebuffed at every turn.

Justice Scalia had championed a far different vision of takings law, one much closer to the hearts of property rights advocates. In his view, the existence of a taking did not turn on economic loss but rather

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<sup>268</sup> See *id.* at 1944 (discussing prior holdings prohibiting “conceptual severance”).

<sup>269</sup> See *id.* at 1952 (relevant property for Takings Clause purposes is the entire parcel “in all but the most exceptional circumstances”).

<sup>270</sup> See *id.* at 1945 (although passage of title after a law is enacted does not automatically extinguish a takings claim, “[a] reasonable restriction that predates a landowner’s acquisition . . . can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property”).

<sup>271</sup> *Id.* at 1949 (plaintiffs have not been deprived of all beneficial use since they can use the vacant tract in conjunction with the other tract to build a house).

<sup>272</sup> *Id.* at 1957 (plaintiffs’ ability to use tract in conjunction with adjoining land “would be relevant” to determine the merits of any takings claims for the vacant lot).

on whether the government had impaired any established right of property owners.<sup>273</sup> In describing government land use decisions, he was apt to use terms such as extortion and larceny.<sup>274</sup> Nothing approaching his viewpoint, either substantively or rhetorically, figured in any of the opinions in *Murr*. Perhaps this should not be totally surprising, given that Scalia wrote only two majority opinions on takings during his time at the Court, and none in the last twenty-five years of his tenure.<sup>275</sup> Yet he was always a strong presence in takings cases, if only because of the strength of his rhetoric. That rhetoric was always deployed on the side of the property owner—in his thirty years on the Court, he never wrote in opposition to a takings claim.<sup>276</sup>

Justice Kennedy's majority opinion in *Murr* can easily be seen as the triumph of the *Penn Central* balancing test. That by itself would represent a significant setback for property rights advocates. But what may be equally important in *Murr* is that even the dissenters complacently accept *Penn Central*. Moreover, as I have explained, although they differ from the majority over the narrow issue of how to determine the denominator of the takings fraction, that disagreement has limited significance given the dissenters' seeming accord with the majority on other aspects of *Penn Central*.

As discussed in the previous section, the Court is not in a good position to abandon *Penn Central*. The Justices' own normative arguments are too vague to push strongly toward any particular doctrinal outcome. Indeed, the diminution-in-value test seems hard to ground in any really strong normative justification. And a sharp move away from *Penn Central* would involve either abandoning protection for property owners or else embracing some version of *Lochner*, neither of which is appealing to today's Court.

The Court's embrace of *Penn Central* does not mean the end of takings claims. The Court has carved out exceptions for physical appropriations and for total takings. The total takings category will be narrower after *Murr*, though courts may encounter such regulatory

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<sup>273</sup> Byrne, 4 Vt L Rev at 744, 750–58 (cited in note 189).

<sup>274</sup> Id at 744, 749, 756.

<sup>275</sup> See Echeverria, 41 Vt L Rev at 692 (cited in note 265). The two majority opinions were *Nollan v Cal. Coastal Comm'n*, 483 US 825 (1987), and *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992). He also wrote a plurality opinion in *Stop the Beach Renourishment, Inc. v Florida Dept of Env. Protection*, 560 US 702 (2010) (stating that a judicial decision overruling a previously established common law property right is a per se taking).

<sup>276</sup> Id at 693.

wipeouts from time to time. Nor would it be surprising if the Court were to identify some other narrow categories of regulation for special treatment, flirting occasionally with the Lochnerian side of takings doctrine. But what does seem clear is that the Court has no stomach for a libertarian campaign to deregulate land use. Nor is it prepared to abandon all protection for property from government regulation. Thus, as we approach the beginning of the second century of regulatory takings doctrine, it seems likely the doctrine's next century will be as muddled as its first.

