

RESTATEMENT (SCOTUS) OF PROPERTY: WHAT HAPPENED TO USE IN *MURR V. WISCONSIN*?

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I. INTRODUCTION

A casual observer of the U.S. Supreme Court's efforts over the years to formulate a regulatory takings doctrine could be forgiven if they were to conclude that the Justices were simply making things up as they went along. That certainly is the way it feels to some of us who try to apply the Court's takings rules in actual cases.¹ In most circumstances, a lawyer who attempts to predict their client's chances in a takings case is embarking on a fool's errand, because there is no consistent pattern, unless the lack of consistency is itself a pattern. There are few clear rules, other than it is exceedingly difficult for owners to successfully challenge even those regulations which have devastating impact on the value of their property. The Court's latest foray into regulatory takings, *Murr v. Wisconsin*,² would not disabuse the observer of that conclusion.

I say that because *Murr*'s rule for what constitutes the "property" against which the owner's claimed loss is measured in takings cases where the owner possesses more than a single parcel is a confusing stew of mostly undefined factors: first, the "treatment of the land" under state law; second, the "physical characteristics" of the properties (which includes the parcels' topography and "the surrounding human and ecological environment"); and, most strangely, "the value of the property under the challenged regulation."³

The larger parcel or "denominator" issue in *Murr* was a contest between which regulatory takings rule would apply: the categorical *Lucas* wipeout of use rule,⁴ or the regulation-friendly *Penn Central* balancing test.⁵ In other words, how much of what the Murrs owned would be examined to determine the economic effect of the regulations they claimed negatively affected one distinct part of their holdings. Practically speaking, the narrower the property interest was defined, the more likely the Murrs would be able to prove the regulation was a taking.

We should not be surprised when the majority's solution in *Murr* proves to be unfathomable in practice, because none of the three parties in the case expressly proposed or advocated for the test which the majority adopted; a test which the majority conjured up nearly from whole cloth. *Penn Central* was

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¹ The Takings Clause of the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This has been incorporated under the Fourteenth Amendment's Due Process Clause against states and their subdivisions. See *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897).

² *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

³ *Id.* at 1945.

⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁵ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

another case where the Court simply made up a three-part test not advocated by any party, and it has resulted in decades of confusion.⁶ I think *Murr* will develop the same reputation. As one of the lawyers in the case predicted, this standard represents “*Penn Central* squared,”⁷ referencing the Court’s widely-maligned three-factor test for a taking.⁸ Although *Penn Central* is the applicable standard in most regulatory takings cases to determine whether in “all justice and fairness,” regulating property should be compensated, it is also a test that is infamously unclear.⁹

I characterize *Murr*’s multifactor test far less charitably. In my view, it federalizes the property question, an issue that, until now, has mostly been left to state law. It also transforms the merits test—to determine whether a regulation is a taking—into a threshold question of whether the claimant even owns property. A claimant who survives the property threshold must run the same gauntlet, and more, if she is lucky enough to have her case considered on the merits. It also shifts the decision from one made by juries to being made by judges.

In this article, I will be making three points. First, the narrow margin of victory in *Murr*, coupled with the Court’s denial of certiorari only four days later in another case presenting the same question,¹⁰ suggest the *Murr* factors are hardly set in stone, and could be modified by a different Court majority into a more understandable, practical, and workable rule—one based squarely in state property law. Second, although I will not spend much time deconstructing the *Murr* majority’s three-factor test, I suggest that it simply missed what should have been the center of gravity in the case: the “three unities” which state and federal courts regularly apply in eminent domain cases to determine whether the taking of one parcel results in damages to another. Application of this test to determine how much of the claimant’s property constitutes the denominator in regulatory takings cases—asking whether the plaintiff *uses* multiple parcels together, whether the parcels are *titled* jointly, and whether they are *physically* close—would place the emphasis in all takings cases—both straight and regulatory—where it should be: on objectively measurable evidence that the owner uses two or more parcels together as a single economic unit. Finally, I argue that the Supreme Court’s adoption in *Murr* of a vague, difficult-to-apply test for takings claims under the

⁶ *Id.* at 124. For a comprehensive deconstruction of the case, see Gideon Kanner, *Making Law and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM & MARY BILL OF RIGHTS J. 679 (2005) (noting how *Penn Central* majority made up the three-factor test).

⁷ Transcript of Oral Argument at 35, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214), 2017 WL 1048381, at *35.

⁸ *Penn Central*, 438 U.S. at 124.

⁹ The *Penn Central* test has a poor reputation, even among those who advocate for a limited reading of the Takings Clause. See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 172 (2005) (“The next ‘big thing’—perhaps the last big thing—in regulatory takings law will be resolving the meaning of the *Penn Central* factors.”).

¹⁰ *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

Fifth and Fourteenth Amendments does not constrain state court from applying the three unities test under their respective state takings provisions. Thus, I argue that until there's a more favorable environment at the Supreme Court, property owners should concentrate their efforts on state law and state courts.

II. SPRINGING EXECUTORY REGULATIONS

At the core, the question the Court was being asked to resolve in *Murr* is how much of an owner's entire property holdings can be used to measure the impact of a regulation on a single legally-separate piece of property. The *Murr* case started, as most regulatory takings cases must, in state court.¹¹ The four Murr siblings, owners of two adjacent parcels along Wisconsin's St. Croix River—one vacant (Lot "E"), the other having a small vacation cabin (Lot "F")—sought compensation because state and county regulations prohibited them from selling the vacant parcel to an unrelated owner, or developing it separately from the other.¹² The Murrs' parents originally owned the lots, purchasing them at different times and titling them separately.¹³ They purchased Lot F in 1960, built the cabin, and the following year transferred title to the family's plumbing company.¹⁴ Two years later the parents purchased the adjacent Lot E to hold for investment.¹⁵ They kept title in their names.¹⁶ Although both parcels are larger than one acre, due to a steep bluff, each has less than one acre of developable land.¹⁷ At the time of the purchases, neither was subject to restrictive regulations, nor is there any indication that the parents could not have sold the lots for development to an unrelated third party.

Flash forward a decade, when Congress designated the St. Croix River for federal protection under the Wild and Scenic Rivers Act.¹⁸ The designation required Wisconsin to create a management plan, and in 1976, the state environmental agency adopted rules "to ensure the continued eligibility of the Lower St. Croix River for inclusion in the national wild and scenic rivers system[.]"¹⁹ These rules would "reduce the adverse effects of overcrowding and

¹¹ Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1984), a property owner with a federal constitutional takings claim against a state or local government must ripen that claim by first seeking, and being denied, compensation from state courts.

¹² *Murr v. Wisconsin*, 137 S. Ct. 1933, 1936 (2017).

¹³ *Id.* at 1940.

¹⁴ *Id.*

¹⁵ *Id.* at 1941.

¹⁶ *Id.* at 1940.

¹⁷ *Id.*

¹⁸ 16 U.S.C. § 1274(a)(6), (a)(9) (2017).

¹⁹ WIS. STAT. § 30.27(1) (1973) ("The purpose of this section is to ensure the continued eligibility of the Lower St. Croix River for inclusion in the national wild and scenic rivers system and to guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations.").

poorly planned shoreline and bluff area development[,] . . . maintain property values, and . . . preserve and maintain the exceptional scenic, cultural and natural characteristics of the water and related land[.]”²⁰ The Murrs’ two parcels were classified as “rural residential,”²¹ which meant that they were limited to one single-family home on each,²² provided the parcel had more than “one acre of net project area.”²³ Neither parcel qualified because of its topography: while they were both more than one acre, their actual buildable area was less, due to the bluff. The regulations contain a limited exception to the development ban for substandard “lots of record” which were “in the records of the deeds office” in 1976 when the regulations were adopted.²⁴ To qualify for this exception, however, the parcels could not be owned by the same owners, and until 1995, the parcels remained separately titled.²⁵

But two decades later in 1994, the plumbing company conveyed Lot F to the Murr siblings, and the following year, their parent conveyed Lot E to them.²⁶ This, according to the *Murr* majority’s parenthetical mention, was the operative event which “merged” Lots E and F into one, because the four Murr siblings now held title to both:

There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to the petitioners.²⁷

Nothing, however, changed in the designation of the lots of record in the deeds office, so I cannot be sure why the *Murr* majority and the lower courts assumed the parcels were “merged,” as they apparently retained their separate legal identities.

Flash forward another decade, and the Murr siblings wanted to move the cabin to a different spot on Lot F. They thought they could sell the empty parcel, Lot E, to fund the cabin move.²⁸ The state regulations, however, prohibited the sale of the substandard parcel to an unrelated buyer.²⁹ The Murrs sought a variance from the St. Croix County agency with the power to relieve them from hardship, which would have allowed them to sell Lot E. The agency, as well as the reviewing

²⁰ WIS. ADMIN. CODE § NR 118.01 (2017).

²¹ WIS. ADMIN. CODE § 118.04(4)(a) (2017).

²² WIS. ADMIN. CODE § 118.06(1)(b) (2017) (“In the rural residential and conservation management zones, there may not be more than one single-family residence on each lot.”).

²³ WIS. ADMIN. CODE § 118.06(1)(a)(2)(a) (2017) (“The minimum lot size shall have at least one acre of net project area.”).

²⁴ WIS. ADMIN. CODE § 118.08(4) (2017).

²⁵ See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941 (2017).

²⁶ *Id.* (citing *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 841, 844 (2011)).

²⁷ *Id.*

²⁸ *Id.*

²⁹ WIS. ADMIN. CODE § NR 118.08(4)(a)(2) (2017).

state courts, denied the variance.³⁰ Thus, neither parcel could be developed or sold by the Murr siblings, except in combination with the other parcel.³¹

After being denied the variance, there is little question that to the Murr siblings, Lot E was regulated to near worthlessness because, standing alone, it had little value to them. They could not build on it except in combination with their other parcel. Not only could the Murrs not use their second parcel unless combined with the other, they could not even sell to someone who could use the parcel by itself. Only when combined with the neighboring parcel, which the Murrs also owned, could the regulations result in a reduction in value for the Murrs and not a total economic loss. They instituted a complaint for a regulatory taking in Wisconsin state court seeking the payment of compensation.³² In short, the Murrs viewed Wisconsin's regulations as preventing their sale of Lot E to anyone but the State of Wisconsin.

III. "LUCAS-LAND" OR "PENN CENTRAL-VILLE"

The regulatory takings doctrine is built around the idea that in addition to eminent domain, other exercises of government power have such a dramatic effect on private property that they are considered to be the functional equivalent of an affirmative exercise of the condemnation power, giving rise to a self-executing obligation to compensate the owner.³³ In simple terms, "you broke it, you bought it." Just compensation is the usual remedy in most takings cases.³⁴ In other words,

³⁰ *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 845 (Wis. Ct. App. 2011).

³¹ WIS. ADMIN. CODE § NR 118.04(4)(a)(2) (2017) ("The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.").

³² *Murr*, 137 S. Ct. at 1941.

³³ See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (The Court "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment."); *First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."); *Andrus v. Allard*, 444 U.S. 51, 64-65 (1979) (federal power to protect endangered species measured against Takings Clause; "[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Kohler Act enacted pursuant to state's police power went "too far").

³⁴ See *Lingle*, 544 U.S. at 536-37. In that case, the Court attempted to clear up some of the doctrinal confusion in takings, explaining:

As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." In other words, it "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.

the regulatory takings doctrine is not a limitation on the government's power to regulate for the public good, but rather it merely forces a realistic evaluation of the actual cost of regulation. The principle driving the analysis is whether it is fair to require a property owner to shoulder the entire economic burden of publicly-worthy regulations: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."³⁵

In *Lingle v. Chevron U.S.A. Inc.*,³⁶ the Court reaffirmed that most regulatory takings cases are analyzed by applying a multi-factored balancing test which originated in the Court's earlier opinion in *Penn Central Transportation Co. v. City of New York*.³⁷ To determine whether a regulation works a taking and requires compensation, the factfinder looks at the economic impact of the regulation (the loss in property value resulting from the regulation, for example), the property owner's "distinct investment-backed expectations," and the "character of the governmental action."³⁸ The *Penn Central* factors don't look at the label attached to the exercise of power, but focus on the impact of the regulation on the owner. The Takings Clause is designed "to bar 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," and this applies regardless of the power the government exercises.³⁹ No one factor of *Penn Central*'s three-factor test is dispositive, and courts continue to struggle with how to apply them in practice. If a property owner wins in the trial court, she has a good chance of losing on appeal. The bottom line, however, is that property owner success under *Penn Central* is very rare, and thus it is a very regulation-friendly standard.⁴⁰

Id. (quoting *First English*, 482 U.S. at 314-15). In certain circumstances, declaratory or injunctive relief may be available. See *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.").

³⁵ *Pa. Coal Co.*, 260 U.S. at 416.

³⁶ *Lingle*, 544 U.S. 528.

³⁷ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Lingle* labeled the *Penn Central* test the "default" test. See *Lingle*, 544 U.S. at 538-39; see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor J., concurring) ("[O]ur polestar . . . remains the principles set forth in *Penn Central* itself," which require a "careful examination and weighing of all the relevant circumstances.")).

³⁸ *Penn Central*, 438 U.S. at 124-25 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

³⁹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁴⁰ See, e.g., *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1269-71 (Fed. Cir. 2017); *Cass Cty. Joint Water Res. Dist. v. Brakke (In re 2015 Application for Permit to Enter Land for Surveys and Examination)*, 883 N.W.2d 844, 849 (N.D. 2016); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 272-76 (Tex. App. 2016); *Lockaway Storage v. Cty. of Alameda*, 156 Cal. Rptr. 3d 607 (Cal. App. 2013).

But *Lingle* also affirmed the Court's earlier rule in *Lucas v. South Carolina Coastal Council*,⁴¹ which held that in certain cases where a regulation deprives the owner of "all economically beneficial us[e]" of property, the case is analyzed without examining any of the other *Penn Central* factors.⁴² In *Lucas*, the Court concluded that a near-total restriction on an owner's use of property is, from the owner's perspective, the same thing as condemning it.⁴³ Thus, it isn't necessary to look at their expectations or the nature of the government action or the reasons for it. Property owners obviously have a much better chance of success in regulatory takings cases if they can have their claim considered under *Lucas*' categorical rule.

"The critical terms [in takings cases] are 'property,' 'taken' and 'just compensation,'"⁴⁴ and most courts approach such cases by tracking the text of the Fifth Amendment. First, the claimant must plead and prove that she owns "private property,"⁴⁵ after which the finder of fact determines whether the property was "taken," either by applying *Penn Central* or *Lucas*.⁴⁶ If it was, the factfinder next determines what compensation is "just."

The Murrs naturally wanted to be in *Lucas*-land with its greater probability of success. The right to use property along with the right to sell are fundamental sticks in the bundle of rights which make up our concept of private property, and the economic impact of Wisconsin's regulations on Lot E, viewed alone, was devastating: the Murr siblings could not sell it to an unrelated buyer at market value, and they could not develop it separately. Thus, Lot E was reduced to a nominal stand-alone value. Accordingly, their claim identified the "property" which they alleged was taken as the vacant parcel, and the Murrs asserted the regulations deprived them of all economically beneficial use of Lot E.⁴⁷

The government's goal, by contrast, was to move the case to *Penn Central*-ville. If the factfinder were required to consider the economic impact of the regulations on both parcels as a whole (and not separately), Wisconsin's forecast looked much brighter. The county and state argued that both of the Murr parcels constituted the "property" against which the effects of the regulation should be

⁴¹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁴² *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019 (emphasis omitted)).

⁴³ See *Lucas*, 505 U.S. at 1066.

⁴⁴ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945).

⁴⁵ See, e.g., *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 906 (2003) (stating that there is a two-step approach to takings claims, where the first step is for a court to determine "whether the plaintiff possesses a valid interest in the property affected by the governmental action, *i.e.*, whether the plaintiff possessed a 'stick in the bundle of property rights'" (quoting *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000))); *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 478 (2009) ("Before assessing plaintiffs' categorical takings claim, this court must, as a threshold matter, determine whether plaintiffs possessed a property interest protected by the Fifth Amendment."), *aff'd*, 785 F.3d 660 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016).

⁴⁶ See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21 (1999) ("[W]e hold that the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.").

⁴⁷ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1956 (2017).

measured.⁴⁸ To be sure, they could not use the vacant parcel separately, nor could they sell it, but they could use it in conjunction with the parcel on which the cabin was located, and indeed, it may have even added value to that parcel. The whole was greater than the sum of its parts.

The key battle in the case therefore was not “*was property taken*,” but rather “*what property?*”⁴⁹ Was it Lot E alone, or Lots E and F considered together?⁵⁰ In short, the issue to be resolved was whether on the merits, the court will apply the *Lucas per se* test—a claim the Murrs were very likely to win—or the *Penn Central ad hoc* takings test—which is heavily slanted in favor of the government. Answering that question one way or the other would, most likely, resolve the dispute on the merits.

IV. FEDERALIZING PROPERTY: *PENN CENTRAL* GONE WILD

The Wisconsin trial court agreed with the government. Appraisal testimony valued Lot E in its separately-regulated state at \$40,000 (assuming it could be sold, which it could not), a nearly 90% loss of value of the parcel’s worth of \$398,000 as a separate developable lot.⁵¹ There was no market for the property since it could not be sold, meaning value in its regulated state was zero. Lot F as a single improved lot was worth \$373,000, and the two parcels treated as a single lot under the regulations was valued at \$771,000.⁵² The trial court concluded that the regulations had not severely impacted the value of the two parcels when considered as one.⁵³ The Wisconsin Court of Appeals affirmed, similarly concluding that the regulations were not a taking of the Murrs’ Lot E, because the Murrs also owned Lot F.⁵⁴ When measured against their use of the two parcels combined, the appeals court concluded their loss of use of the single parcel—otherwise a *Lucas* taking—was merely a diminution in value of the combination, and not a wipeout.⁵⁵ This added to the inconsistencies among lower courts in how to determine the denominator in these cases.⁵⁶ The Wisconsin Supreme Court denied discretionary review.⁵⁷

⁴⁸ *See id.*

⁴⁹ Steven J. Eagle, *The Four Factor Penn Central Regulatory Takings Test*, 118 PA. ST. L. REV. 601, 631 (2014).

⁵⁰ I have suggested that courts should not treat “property” as a threshold question when analyzing these cases. *See* Robert H. Thomas, “Property” and Investment-Backed Expectations in Ridesharing Regulatory Takings Claims, 39 U. HAW. L. REV. 301, 302 (2017). Instead of considering this a preliminary question, it should be a part of the merits analysis of the effect of the regulation on an owner’s expectations.

⁵¹ *Murr*, 137 S. Ct. at 1941.

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *See id.* at 1941-42.

⁵⁵ *See id.* at 1942.

⁵⁶ Petition for a Writ of Certiorari at 17-21, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2015) (No. 15-214), 2015 WL 4912231, at *17-21.

⁵⁷ *See Murr*, 137 S. Ct. at 1942.

Two of the parties (the Murrs and the state of Wisconsin) urged the U.S. Supreme Court to adopt clearly-defined rules. Wisconsin advocated for the most rigid, a categorical rule in which state law, both the bitter and the sweet, controlled.⁵⁸ It argued that lot and parcel lines, along with separate title, mean pretty much nothing in takings cases because state law defines property, and the states are, in effect, free to (re)define it by regulation. Fee simple metes-and-bounds are just lines on a map, and Wisconsin property law (on which the Murrs relied to define their property rights) also included the regulations which require combining substandard, adjacently-owned parcels. Wisconsin, in turn, argued that people do not own property parcel-by-parcel, but more like a Monopoly game in which an owner collects up different deeds, and what really matters is all of its holdings considered together; separately-titled lots need to have a “legal link” (wholly defined by the government), which is the key to defining property.⁵⁹ The Murrs argued for a more flexible—but still mainly categorical—standard, one that started with a presumption that a parcel’s metes-and-bounds lines defined Takings Clause property, and placed the burden on the government to show that the owner used separately-titled parcels as a single integrated economic unit.⁶⁰ Contrasting with the certainty that each of these parties urged, the County seemed to want to play the part of an agent of chaos, arguing for bootstrapping a *Penn Central*-type “factors” test into what constitutes property.

During oral argument, Justice Kennedy chided both sides for advocating for a categorical rule, which he viewed as “wooden,”⁶¹ and none of the resulting opinions written for this case adopted a bright-line rule. In an opinion authored by Justice Kennedy, the five-Justice majority held that the Murrs’ “property” was both

⁵⁸ Justice Kagan seemed to like the argument that background principles included “all of state law,” advanced by the state:

And why should we do that? If we’re looking to State law, let’s look to State law, the whole ball of wax. In other words, saying: Well, when I buy those two lots, they’re really not two lots anymore. According to State law, they are one lot.

Transcript of Oral Argument at 17, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214), 2017 WL 1048381, at *17. But state property law is not “the whole ball of wax,” and as Justice Thurgood Marshall noted, “[t]he constitutional terms ‘life, liberty, and property’ do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.” *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

⁵⁹ *Id.* at 34 (“Not at all, Your Honor. Our test is if two lots have a link, a legal link under State law, then they are one parcel. If they have no legal link under State law, then they are completely separate.”).

⁶⁰ Brief of the Petitioner at 24, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2016) (No. 15-214), 2016 WL 1459199, at *24.

⁶¹ See Transcript of Oral Argument at 34, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214), 2017 WL 1048381, at *34 (“But are you—you’re talking just about State law. It seems to me that your position is as wooden and as vulnerable a criticism as—as the Petitioner’s. You say, whatever State law—basically you’re saying, whatever State law does, that defines the property. But you have to look at the reasonable investment-backed expectations of the owner.”).

parcels, considered together.⁶² The majority first acknowledged that for over one hundred years, the Court has “refrained from elaborating this principle through definitive rules.”⁶³ Building on this, Justice Kennedy identified three main factors (some of which contain subfactors, because this list is not exhaustive) for courts to examine.

First, courts must consider the “treatment of land . . . under local and state law.”⁶⁴ This looks at the actual metes-and-bounds of the legal parcel, but the purpose is to discern the owner’s reasonable expectations about whether she owns one parcel or two. To make this determination, however, a judge should not look at the owner’s actual use of one parcel with another, but rather at how much she knew or should have known about “background customs and the whole of our legal tradition.”⁶⁵ The opinion acknowledged the rule in *Palazzolo* that acquiring property subject to restrictive regulations does not eliminate a potential takings claim.⁶⁶ But in the very next sentence the Court noted that a “reasonable restriction that predates a landowner’s acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property”⁶⁷; which effectively neutralizes the *Palazzolo* rule, something the lower courts had been doing from nearly the moment the Court adopted it.⁶⁸ Second, courts must consider the “physical characteristics” of the property:

These include the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulations.⁶⁹

Finally (and the most troublesome in an already difficult list), the Court held that judges will need to “assess the value of the property under the challenged regulation, with special attention to the effect of the burdened land on the value of other holdings.”⁷⁰

⁶² *Murr*, 137 S. Ct. at 1948.

⁶³ *Id.* at 1942.

⁶⁴ *Id.* at 1945.

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (“Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause.”)).

⁶⁷ *Id.* (“the reasonable expectations . . . an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property”).

⁶⁸ *See, e.g.*, *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc) (“Since the ordinance was a matter of public record, the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer.”).

⁶⁹ *Murr*, 137 S. Ct. at 1945-46.

⁷⁰ *Id.* at 1946.

Applying these factors, the majority concluded the “state law” element cut against the Murrs. Although “substantial weight” should be given to how the land “is bounded or divided, under state law,”⁷¹ the majority paid no attention to the lot lines, and concluded that Wisconsin’s regulations, which considered the two lots as one, are what shaped the Murrs’ property rights, because the Murrs voluntarily put the lots under common ownership after the regulations were adopted.⁷² They knew about the regulations, but in 1994 transferred the property anyway.⁷³ The amalgamated two-parcel denominator meant no *Lucas* taking.⁷⁴

Chief Justice Roberts, joined by Justices Alito and Thomas, dissented. But they were not so much bothered by the outcome or the fact that the majority avoided bright-line rules, but instead were concerned with the majority’s specific factors.⁷⁵ Instead of specific factors, the dissenting justices would adhere with the “traditional approach” of defining constitutional property by looking at state law, and state law alone, at least where parcels of land are involved.⁷⁶

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue.⁷⁷

This provides certainty, a bright-line between what is mine and what is yours,⁷⁸ and would prevent “strategic unbundling” of property sticks in order to perfect a *Lucas* takings claim.⁷⁹ The dissent also chided the majority for bootstrapping the question of whether the regulation is reasonable into the threshold question of property, arguing “[t]hese issues should be considered when deciding if a regulation constitutes a ‘taking’” and not “cram[ed]” in the preliminary “property”

⁷¹ *Id.* at 1945.

⁷² *Id.* at 1948. This suggests that had the Murrs’ plumbing company not conveyed Lot F to the siblings, but instead the siblings became the owners of the plumbing company, analysis of this factor would have turned out differently.

⁷³ *Id.* (“Petitioners’ land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted.”).

⁷⁴ *Id.* at 1949. And, naturally, no *Penn Central* taking because “[p]etitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots.” *Id.*

⁷⁵ *Id.* at 1950 (Roberts, C.J., dissenting) (“This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.”).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1953.

⁷⁸ *Id.* (“But the definition of property draws the basic line between, as P.G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue.”).

⁷⁹ *Id.*

determination.⁸⁰ Property becomes a matter of regulatory bundling case-by-case, rather than applying predictable principles, and gives the government two opportunities to trip up the property owner.⁸¹ Property owners will most often lose in the calculus of their abstract rights when weighed against a “concrete regulatory problem.”⁸² The dissent would have sent the case back to the Wisconsin courts for a determination of the denominator by applying “ordinary principles of Wisconsin property law.”⁸³

The majority’s multifactor, case-specific approach will not be much help at all to property owners trying to predict whether their expectations about their property will be deemed to be reasonable enough that they should rely on them. Moreover, officials are not much better off either, because they cannot undertake the calculus the Takings Clause is supposed to have them ask (this is a worthy regulation, but can we afford to apply it here?).⁸⁴ Instead, the majority shifted the focus to the reasonableness of the regulation. And what, exactly, is included in the “human and ecological environment?”⁸⁵ Or, more importantly, what isn’t? Apparently, in the majority’s view, an owner should not only know of existing regulations, but—break out your crystal balls—they should be charged with anticipating possible future regulations. Given the tendency of the modern regulatory state to expand into any unregulated space, are there truly any future

⁸⁰ *Id.* at 1954.

⁸¹ *Id.* at 1955. (“The result is that the government’s regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on the property.”). Actually, this gives government three chances, not two. Because the plaintiff property owner in most cases, even in state court, will also need to demonstrate standing. *See* *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017) (intervenor in a takings case must show Article III standing in order to pursue relief that is different from that which is sought by a party with standing).

⁸² *Murr*, 137 S. Ct. at 1955. (labeling the *Penn Central* test a “roll of the dice,” and noting that “surely in most” cases the owner will lose).

⁸³ *Id.* at 1957 (Thomas, J., dissenting). Justice Thomas filed a separate dissenting opinion arguing the Court’s approach to takings is on the wrong analytical footing. Instead of being grounded in the Takings Clause, the Court should examine whether the Fourteenth Amendment’s Privileges or Immunities Clause “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 meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.” *Id.* (Thomas, J., dissenting). (citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008)).

⁸⁴ *See* *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 (Fed. Cir. 1994) (“The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large. In the final analysis the answer to that question is one of fundamental public policy. It calls for balancing the legitimate claims of the society to constrain individual actions that threaten the larger community, on the one side, and, on the other, the rights of the individual and our commitment to private property as a bulwark for the protection of those rights. It requires us to decide which collective rights are to be obtained at collective cost, in order better to preserve collectively the rights of the individual.”).

⁸⁵ *Murr*, 137 S. Ct. at 1945.

restrictions a reasonable property owner should not anticipate? This is especially true if the property is located in areas presenting “unique concerns” or “fragile land systems.”⁸⁶ The majority faulted the Murrs for not realizing that merger provisions are common—and therefore, in the Court’s view, reasonable—in land use regulations.⁸⁷ Maybe the Murrs should have waited to transfer their lots for the Court to decide *Palazzolo*, a decision the majority failed to adequately distinguish.⁸⁸ Overall, however, I am left with the impression that the majority was not all that concerned with the nuances of state property law (only the regulations), or bothered by the lack of clear rules in regulatory takings. As long as the regulation is, in the Justices’ view, reasonable, not much else matters.

Underlying all this was the majority’s belief that Wisconsin’s regulation of the Murrs’ property is a good thing. But the reasonableness of a regulation is not supposed to be part of the takings calculus, especially after the unanimous Court in *Lingle* rejected the “substantially advances” test as one of takings.⁸⁹ To even get to the takings question, the property owner either must concede the validity of the regulation or a court must have concluded it was reasonable.⁹⁰ Unreasonable regulations cannot be enforced, and this is a separate question of whether otherwise reasonable regulation will result in a regulatory taking—a point Justice Kennedy has made in both condemnation and regulatory takings cases.⁹¹ But *Murr* made this the central question in determining Takings Clause property, because the measure of the owner’s expectation is the “reasonableness” of the regulation.⁹² This is recursive, though, because it duplicates the ultimate takings

⁸⁶ *Id.* at 1946 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)).

⁸⁷ *Id.* at 1947.

⁸⁸ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001); *cf. Murr*, 137 S. Ct. at 1945 (“A valid takings claim will not evaporate just because a purchaser took title after the law was enacted.”); see *Palazzolo*, 533 U.S., at 627, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (some “enactments are unreasonable and do not become less so through passage of time or title”; “A reasonable restriction that predates a landowner’s acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.”).

⁸⁹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005) (The Court explained that the Takings Clause is not designed to prohibit government action, but to secure compensation “in the event of otherwise proper interference amounting to a taking.”) (emphasis added).

⁹⁰ See *Loveladies*, 28 F.3d at 1175 (“What is not at issue is whether the Government can lawfully prevent a property owner from filling or otherwise injuring or destroying vital wetlands. The importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas, whether privately or publicly held, through appropriate regulatory mechanisms is not here being questioned. There can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled.”).

⁹¹ See *Kelo v. City of New London*, 545 U.S. 469, 491 (Kennedy, J., concurring); *Lingle*, 544 U.S. at 548–49 (Kennedy, J., concurring) (whether a regulation is reasonable, or whether an exercise of eminent domain is for public use is a question under Due Process, and not the Takings Clause).

⁹² *Murr*, 137 S. Ct. 1933, 1945 (2017) (“a reasonable restriction that predates a landowner’s acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property.”).

question and makes it a threshold question of property. In order to understand whether she even possesses an interest worthy of protection—and to survive the government’s motion for summary judgment—the property owner will need to convince a judge that her interest was taken. In effect, this front-loads the ultimate question on the merits—which a jury should decide—into a legal question for the judge. If the owner survives and gets to trial, she gets to prove it all over again. It is also a view of property as the product of positive law, where an owner’s expectations are mostly, in the majority’s thinking, shaped by the “human and ecological environment.”⁹³

The majority also was worried that bright lines would encourage property owners to manipulate lot lines in order to avoid regulation or set up takings claims.⁹⁴ Clear rules would allow owners to game the system. But what is wrong with owners understanding the regulatory milieu, and reacting accordingly to maximize their outcomes? That is rational behavior, not, as the majority put it, “gamesmanship.”⁹⁵ The result of *Murr* is asymmetrical because, while regulators have a free hand to tailor “property” for each case, property owners do not. But maybe that’s the point, because the majority’s approach does not limit regulation one bit, and leaves property owners guessing. Besides, the case may have turned out differently if the Murr parents had not conveyed Lot F to their children directly, but had transferred their plumbing company (which owned Lot F) to the children instead, thus avoiding the common ownership provision in Wisconsin’s regulations.⁹⁶ Constitutional property should not turn on whether the Murr siblings acquired the lot or their parents’ plumbing company.

Should the Court just tell us that as long as land use regulators avoid physically invading land, they are pretty much free to regulate it without serious judicial review to ensure the burdens of publicly-beneficial regulations are shared equally?⁹⁷ The Court could, I suppose, simply inform us that there is no such thing as a regulatory taking except in very limited circumstances, as it has done in substantive due process cases where in order to prevail, a plaintiff must convince a court that the government’s conduct shocks the conscience.⁹⁸ But I don’t think the Court is ready to go that far just yet because, as Justice Holmes famously opined, left unchecked by the Takings Clause, the police power—especially as it is aggressively pursued by the modern regulatory state—would eventually

⁹³ *Id.* at 1945.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1948 (“The ease of modifying lot lines also creates the risk of gamesmanship.”).

⁹⁶ *See id.*

⁹⁷ The very first sentence in Justice Kennedy’s opinion in *Murr* should give us a clue about what the five Justices in the majority view as important: “The classic example of a property taking by the government is when the property has been occupied or otherwise seized.” *Id.* at 1939.

⁹⁸ *See* Paul D. Wilson & Noah C. Shaw, *The Judge as Cartoon Character Whose Hat Flies Into the Air: The “Shocks The Conscience” Standard in Recent Substantive Due Process Land Use Litigation*, 42 URB. LAWYER 677 (2010).

overwhelm the very idea of private property ownership.⁹⁹ Even the *Murr* majority continues to pay at least lip service to the principles behind the Takings Clause.

In that vein, *Murr* isn't entirely bad, and the decision has at least one silver lining. All eight Justices who considered the case rejected Wisconsin's argument that state law alone governs the parameters of Fifth Amendment property interests. No member of the Court was willing to say that states have a totally free hand to define and redefine property, and even the three dissenters' reliance on state property law boundaries is limited to "all but the most exceptional circumstances."¹⁰⁰ Wisconsin's argument was built on a very Hobbesian foundation in that the Murrs relied on Wisconsin property law to define the boundaries of the parcel they claim was taken, and the limiting regulations are also part of that body of law. The Murrs must take the bitter with the sweet, and property owners should know about these and similar ordinances nationwide. But state law has never been the be-all and end-all answer to the question of what constitutes "property" as Wisconsin argued, at least as far as what is a compensable property interest in takings.¹⁰¹ Property advocates should take heart that no Justice was willing to accept the view that state and local governments can freely define these interests without compensation. The Court has always suggested that property ownership is not one of those things completely subject to state definition or redefinition,¹⁰² and it doesn't appear any Justice is ready to jettison those principles just yet.

V. COVFEFE!¹⁰³

What could explain the majority's clouding of the waters by adopting a multi-factor test that puts the focus on the validity of the regulations, something

⁹⁹ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more, until at last private property disappears."). Justice Holmes also gave us the notoriously difficult-to-apply maxim that "[t]he general rule, at least, is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." *Pa. Coal Co.*, 260 U.S. at 415. Justice O'Connor later labeled Holmes' maxim "storied but cryptic." *Lingle*, 544 U.S. at 537 (citing *Pa. Coal Co.*, 260 U.S. at 415) ("In Justice Holmes' storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"). "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Id.* at 538.

¹⁰⁰ *Murr*, 137 S. Ct. at 1953.

¹⁰¹ See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 22 (1990) (O'Connor, J., concurring) (state law defines property but that "is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioners' property") (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979)).

¹⁰² See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("[t]he constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect.").

¹⁰³ See Matt Flegenheimer, *What's a 'Covfefe'? Trump Tweet Unites a Bewildered Nation*, N.Y. TIMES (May 31, 2017), <http://www.nytimes.com/2017/05/31/us/politics/covfefe-trump-twitter.html>

which the Court has repeatedly told us is not part of takings? Bear with me while I engage in a bit of supposition. The point of what follows is not inside baseball speculation, rather it is only support for my thought that the *Murr* majority's multifactor analysis probably isn't all that secure.

I surmise that the majority may have predicted *Murr* would be one of the last chances for the Court's property rights hawks to influence the development of regulatory takings doctrine for a long time. The Court granted certiorari and agreed to review the case on January 15, 2016.¹⁰⁴ On that date, the surrounding environment in which the case would be considered was thought to be much different than how it ended up being. First, right up to the presidential election in November 2016, it appeared that candidate Hillary Clinton was the odds-on favorite to win. Thus, she would have the power during her tenure to nominate justices who were predicted to lock-in a generation of regulation-friendly decisions. Some legal commentators were rubbing their hands in anticipation.¹⁰⁵ Perhaps the four property-friendly Justices (Chief Justice Roberts and Justices Scalia, Alito, and Thomas) believed that *Murr* represented one of their final chances to influence takings law before it inevitably swung leftward after the election. But less than one month after the Court accepted the case, on February 13, 2016, Justice Scalia unexpectedly died,¹⁰⁶ and the Republican-controlled Senate slow-walked President Obama's nomination of a replacement.¹⁰⁷ Second, while that alone may not have altered the predictions about the future direction of the Court, all prognostications were blown out of the water in the November election, and fortunes were radically reversed: the all-but-certain future liberal majority now could see that their presumed dominance had evaporated overnight.¹⁰⁸ The Court's long delay in scheduling oral arguments suggests there was some behind-the-scenes maneuvering, perhaps signaling that the conservatives might be trying to muster support for a way to avoid a decision in the case. Maybe better to not decide than risk the chance of it serving as a vehicle to upset existing takings doctrine and take it two steps back. But that never happened. So maybe the *Murr* majority, viewing the case as the last charge of

("And on the 132nd day, just after midnight, President Trump had at last delivered the nation to something approaching unity—in bewilderment, if nothing else. The state of our union was . . . covfefe.").

¹⁰⁴ *Murr*, 137 S. Ct. 1933 (2017).

¹⁰⁵ See, e.g., Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKANIZATION (May 6, 2016) <http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> ("Liberals should be compiling lists of cases to be overruled at the first opportunity on the ground that they were wrong the day they were decided. . . . Of course all bets are off if Donald Trump becomes President.").

¹⁰⁶ Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://nyti.ms/1XqvGem>.

¹⁰⁷ See generally Karoun Demirjian, *Republicans Refuse to Budge Following Garland Nomination to Supreme Court*, WASH. POST (Mar. 16, 2016), <http://wapo.st/1UzGIUd>.

¹⁰⁸ Paul Booth, *Getting Serious About 2018*, AMERICAN PROSPECT (July 5, 2017) <http://prospect.org/article/getting-serious-about-2018> ("The Republican power stranglehold is tightening. The Supreme Court is theirs, for a generation.").

Wyatt Earp and his immortals,¹⁰⁹ saw this as the last opportunity to make takings law harder before it gets easier. Moving forward, a different Court may see things differently.

Another indicator that *Murr* did not settle the issue was a case being considered contemporaneously with *Murr* but which the Court ultimately denied review. In *Lost Tree Village Corp. v. United States*,¹¹⁰ the U.S. Court of Appeals for the Federal Circuit concluded that the economic impact of the Corps of Engineers' denial of a Clean Water Act permit for development of a single parcel should be measured against the parcel alone, and not the parcel plus "a neighboring upland plat (Plat 55), and scattered wetlands in the vicinity owned by Lost Tree at the time the permit was denied."¹¹¹ The Federal Circuit concluded that the focus of the denominator question should be on whether the owner treated the multiple parcels "as part of the same economic unit."¹¹² After the case was remanded to the Court of Federal Claims (which concluded the federal government was liable for the taking of the stand-alone parcel),¹¹³ and the Federal Circuit affirmed,¹¹⁴ the government sought Supreme Court review, asking the Court to hear the case together with *Murr*.¹¹⁵ Without comment, the Court denied review four days after issuing the opinion in *Murr*.¹¹⁶ While a denial of certiorari is not usually indicative of anything, the fact that the Court did not grant the federal government's petition and hear the case together with *Murr* (in which the federal government was already arguing as *amicus curiae*), or vacate the Federal Circuit's judgment and remand for consideration in light of *Murr*, may indicate that future takings litigants should take a hard look at *Lost Tree*'s "same economic unit" test, because the Court may likewise do so later, taking careful note that at least four Justices in *Murr* appear to be not dissatisfied with the Federal Circuit's analysis. I don't think *Murr*'s multi-factor test will endure.

VI. A BARBECUE, A VOLLEYBALL COURT, OR INVESTMENT— IT SHOULD BE ABOUT THE OWNER'S JOINT USE

The lower courts' consideration of the denominator issue in regulatory takings case was inconsistent, as the Murrs' petition for certiorari pointed out.¹¹⁷

¹⁰⁹ See generally STEVEN LUBET, MURDER IN TOMBSTONE: THE FORGOTTEN TRIAL OF WYATT EARP (2004) (detailing the Earp vendetta ride).

¹¹⁰ *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

¹¹¹ *Id.* at 1288.

¹¹² *Id.* at 1293.

¹¹³ *Lost Tree Vill. Corp.*, 115 Fed. Cl. 219, 231 (2014).

¹¹⁴ *Lost Tree Vill. Corp.*, 787 F.3d 111.

¹¹⁵ Petition for Writ of Certiorari at 29, *United States v. Lost Tree Vill. Corp.*, 137 S. Ct. 2325 (2016) (No. 15-1192), 2016 WL 1166134, at *29.

¹¹⁶ *Lost Tree Vill. Corp.*, 787 F.3d at 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

¹¹⁷ Petition for Writ of Certiorari at 17-21, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214), 2015 WL 4932231, at *17-21.

These courts did not apply uniform standards, and instead seemed to prefer conflicting categorical rules. However, *Murr* only contributed to the uncertainty when the Court rejected categorical rules and adopted a multifactor test. Multifactor tests are not by themselves bad. For example, in straight takings cases—where the government is exercising its eminent domain power to affirmatively take property and it does not dispute its obligation to justly compensate the owner—courts have longstanding experience in analyzing cases where the owner claims more than one parcel has been taken (or damaged, if under state law) by the condemnation.¹¹⁸

In these cases, to determine whether the owner is entitled to severance damages for the taking of one parcel which (allegedly) damages another, juries and appraisers look at the “three unities” (that is, unity of use, title, and contiguity), and ask: (1) are the two parcels *used* by the owner as an integrated whole; (2) does the condemnee or a related owner have *legal rights* in the other parcel; and (3) are the parcels *close* to each other?¹¹⁹ Also known as the “larger parcel or tract rule,” the three unities test is applied flexibly and holistically, and in these cases “no rigid rules can be prescribed.”¹²⁰ The critical question after all, is whether the parcels are part of a larger tract or unified whole—with no single element being dispositive.¹²¹ In other words, the three considerations are *factors* as opposed to *elements*. How these ultimately balance out is a matter for the factfinder, not a threshold question of law for a judge.¹²² If the factfinder concluded that on the whole the owner reasonably treated two parcels as an integrated whole, then the condemnor is liable to pay compensation, even though it has not formally taken the separate parcel.

¹¹⁸ For a recent example, see *Cty. of Kauai v. Hanalei River Holdings, Ltd.*, 394 P.3d 741 (Haw. 2017), which focused on joint use of multiple parcels by a single owner. *Id.* at 750 (“the test generally used by courts to determine whether a parcel to be acquired by eminent domain proceeding is a part of a larger tract of land to entitle owners to severance damages is that there must be unity of title, physical unity and unity of use of the parcel taken and parcel left[.]”) (quoting *Honolulu v. Bonded Inv. Co.*, 511 P.2d 163, 165 (Haw. 1973)).

¹¹⁹ See, e.g., *Am. Sav. & Loan Assoc. v. Cty of Marin*, 653 F.2d 364, 369 (9th Cir. 1981).

¹²⁰ *Id.* (the court held the three unities factors “are not absolutely inflexible” but rather, “are working rules courts have adopted to do substantial justice in eminent domain proceedings”) (citing *United States v. Miller*, 317 U.S. 369, 375-76 (1943); *United States v. 429.59 Acres*, 612 F.2d 459, 463-64 (9th Cir. 1980)); see also *Barnes v. N.C. State Highway Comm’n*, 109 S.E.2d 219, 224-25 (N.C. 1959) (“The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential.”); *Terr. v. Adelmeyer*, 363 P.2d 979, 985 (Haw. 1961) (“The facts and circumstances of each case must be considered to determine the applicable formula.”).

¹²¹ See 8A ROBERT C. BYRNE & JENEAN TARANTO, *NICHOLS ON EMINENT DOMAIN* § G16.02(2)(a) (rev. 3d ed. 2015) (“It is important to note that the presence or absence of any or all of these factors is not absolutely determinative. They are merely working rules adopted to do justice to the owner(s) of the remainder.”).

¹²² *M & R Inv. Co. v. State*, 744 P.2d 531, 535 (Nev. 1987) (“Under the prevailing rule, identification of the larger tract is an issue of fact to be decided by the trier of fact.”) (citing *United States v. 8.41 Acres of Land*, 680 F.2d 388 (5th Cir. 1982)).

Most courts emphasize joint use of multiple parcels.¹²³ Title and physical proximity are relevant, but most often only in conjunction with actual use by a single property owner.¹²⁴ One of the classic illustrations of a case that results in larger parcel and severance damages is a business whose parking lot is located on the other side of the street across from the business. If the parking lot is condemned, the business owner is entitled to present evidence of the economic impact of the loss of her parking lot on her business, and it is a question for the factfinder whether the separation of the parcels make it more or less likely that she uses them together.¹²⁵ It would not have made sense in those examples to say that simply because the parcels were separated by a road and they did not abut, that the owners should have been barred from presenting evidence about how the loss of the parking lot damaged the other parcel.

A case decided by the Hawaii Supreme Court illustrates the analysis and how joint use of multiple parcels by one owner is the key, rather than other considerations such as topography and whether or how regulations may reduce or enhance the parcel's value. In *Honolulu v. Bonded Investment*,¹²⁶ the owner owned three contiguous lots: Lot 59 and the lots on either side, Lots 65 and 60. Thus, “[t]here is no question . . . the three lots could comprise one tract of land.”¹²⁷ The

¹²³ See, e.g., *Doolittle v. Everett*, 786 P.2d 253, 259 (Wash. 1990) (“[T]he factor most often applied by courts in determining whether land is a single tract is unity of use[.]”); *Div. of Admin., State Dep’t of Transp. v. Jirik*, 471 So. 2d 549, 552 (Fla. Dist. Ct. App. 1985) (“[U]nity of use is generally given the greater emphasis. . . . [S]ome cases suggest that ‘unity of use,’ or integrated use and not physical contiguity is the test but that physical contiguity often has great bearing on the question of unity of use.”); *Sauvageau v. Hjelle*, 213 N.W.2d 381, 389 (N.D. 1973) (“[T]racts physically separated from one another may constitute a ‘single’ tract if put to an integrated unitary use. . . . Integrated use, not physical contiguity, therefore, is the test.”); *State ex rel. Road Comm’n v. Williams*, 452 P.2d 548, 549 (Utah 1969) (“[A]n award of severance damages to the remaining property is appropriate where two or more parcels of land, although not contiguous, are used as constituent parts of a single economic unit.”).

¹²⁴ The leading eminent domain treatise notes “[c]ontiguity, in and of itself, is not usually conclusive. Rather, most cases refer to the contiguity element in conjunction with the unity of use or unity of ownership components.” 8A ROBERT C. BYRNE & JENEAN TARANTO, *NICHOLS ON EMINENT DOMAIN* § G16.02(2)(a) (rev. 3d ed. 2015) (citing *United States v. 8.41 Acres of Land*, 680 F.2d 388 (5th Cir. 1982); *United States v. 5.00 Acres of Land*, 731 F.2d 1207 (5th Cir. 1982); *United States v. 6.90 Acres of Land*, 685 F.2d 1386 (5th Cir. 1982); *Town of Hillsborough v. Crabtree*, 547 S.E.2d 139 (La. App. 2002); *City of Winston-Salem v. Slate*, 647 S.E.2d 643 (N.C. App. 2007); *Dep’t of Transp. v. Rowe*, 531 S.E.2d 836 (N.C. App. 2002)).

¹²⁵ See, e.g., Robert H. Thomas, *The Larger Parcel, Eminent Domain, and the World’s Best Pastrami Sandwich*, INVERSECONDEMNATION.COM (June 28, 2017), <http://www.inversecondemnation.com/inversecondemnation/2017/06/the-larger-parcel-and-the-worlds-best-pastrami-sandwich.html>; see also *Barton v. City of Norwalk*, 135 A.3d 711, 725 (Conn. App. Ct. 2016) (condemnation of parking area resulted in inverse condemnation of building across the street because loss of parking substantially destroyed landowner’s ability to operate his business on that property), *aff’d*, 2017 WL 2806277 (Conn. July 4, 2017); *State v. Rittenhouse*, 634 A.2d 338, 343-45 (Del. 1993) (condemnation of parking lot resulted in taking of building across street, whose owner used parking lot to serve tenants of building).

¹²⁶ *Honolulu v. Bonded Inv. Co.*, 511 P.2d 163, 165 (Haw. 1973).

¹²⁷ *Id.* at 164.

city condemned all three, and Bonded asserted that all three together should be considered the larger parcel.¹²⁸ Bonded, however, did not use all three parcels together: Lots 59 and 60 were being used for a condominium project, and Lot 65 was designated for use with a separate condo project.¹²⁹ The court concluded that the owner's use of Lot 65, separate from its joint use of Lots 59 and 60, "is controlling here on the question of whether Lots 65, 59 and 60 constituted one tract of land."¹³⁰ Because Bonded used Lot 65 separately from the other two, only Lots 59 and 60 could be treated as a single larger parcel:

The owners having thus separated the use of Lot 65 from other lots, it could no longer be said that there was such "connection, or relation of adaptation, convenience, and actual and permanent use between them, as to make the enjoyment of the parcel taken, reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used."¹³¹

The flexibility of the three unities test's focus on use can also be illustrated by cases in which the owner uses two parcels as an integrated whole, even though the parcels are physically separated. For example, in *Baetjer v. United States*,¹³² the U.S. Court of Appeals for the First Circuit held the district court "erred in ruling that the [property owner's] lands on Puerto Rico had not been severed in the legal sense from their lands on Vieques."¹³³ The parcels at issue there were separated by seventeen nautical miles of water,¹³⁴ and yet the court correctly focused on the owner's joint use of the land as a sugar cane plantation to conclude the taking of one could have damaged the other. The court rejected the government's argument "that no damages for severance can ever be allowed unless the property taken is physically contiguous to the property of the owner remaining after the taking."¹³⁵ The court held:

Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of unity of use. Tracts physically separated from

¹²⁸ *Id.* ("The basic issue to be decided here is whether Lots 65, 59 and 60 comprise one parcel or tract of land.")

¹²⁹ *Id.* at 166 ("It is clear to us that the owners not only by choice and design had separated the use of Lot 65 from Lots 59 and 60.")

¹³⁰ *Id.* (footnote omitted).

¹³¹ *Id.* (quoting *Peck v. Superior Short Line Ry. Co.*, 31 N.W. 217, 218 (Minn. 1887)); see also *Barnes v. N.C. State Highway Comm'n*, 109 S.E.2d 219 (N.C. 1959); *City of Menlo Park v. Artino*, 311 P.2d 135 (Cal. App. 1957).

¹³² *Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir. 1944) (noting that "tracts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use"), *cert. denied*, 323 U.S. 772 (1944).

¹³³ *Id.*

¹³⁴ *Id.* at 393 n.1.

¹³⁵ *Id.* at 393.

one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges.¹³⁶

Baetjer is one example of a court properly recognizing the on-the-ground realities rather than adhering to amorphous factors that are effectively rendered impractical and unrealistic when applied in real situations. The owner in *Baetjer* actually used the parcels together, in accordance (apparently) with existing laws and regulations, or at least not in violation of existing law. Having done so, it would not have been surprising if it had claimed that a determination of whether a different or new regulation rendered one parcel worthless, the value of the other parcel could be taken into account.

A decision I discussed earlier, *Lost Tree Village Corp. v. United States*,¹³⁷ is an example of the determination of the denominator in a regulatory takings case properly focused on an owners' integrated use. After the Corps of Engineers denied a Clean Water Act ("CWA") permit which would have allowed Lost Tree to dredge and fill wetlands on Plat 57, Lost Tree brought a takings action in the U.S. Court of Federal Claims ("CFC"). Lost Tree purchased Plat 57 in 1974.¹³⁸ Over the next two decades, Lost Tree developed its other parcels in what the CFC found was a "'piecemeal' manner, by 'opportunistic progression,' rather than strictly following any master development plan."¹³⁹ The court also found that the development of Plat 57 was "physically and temporally remote" from its development of its other nearby parcels.¹⁴⁰ But the CFC concluded that as a matter of law that Lost Tree's "property" for purposes of its takings claim was not only Plat 57, but an adjacent separately-platted lot, plus "scattered wetlands still owned by Lost Tree within the community of John's Island."¹⁴¹ That placed the court's takings analysis on the merits within *Penn Central*, and not *Lucas*, because Lost Tree alleged the Corps' denial of the CWA permit reduced the value of Plat 57 standing alone from over \$4 million to \$27,500, a loss of 99.4%.¹⁴²

The Federal Circuit focused on the economic realities and how owners such as Lost Tree—a sophisticated land developer—actually had used the parcels. It concluded Lost Tree treated Plat 57 separately, not as in conjunction with its

¹³⁶ *Id.* at 395 (footnote omitted).

¹³⁷ See *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

¹³⁸ *Lost Tree Vill. Corp.*, 707 F.3d at 1288.

¹³⁹ *Id.* at 1289 (quoting *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412, 431-32 (2011)).

¹⁴⁰ *Id.* at 1291.

¹⁴¹ *Id.*

¹⁴² *Lost Tree Vill. Corp.*, 787 F.3d at 1114.

other parcels as a “single economic unit.”¹⁴³ Because the CWA permit application was not part of an integrated project and the owner’s actual conduct revealed it used Plat 57 as a stand-alone lot, the takings analysis should use Plat 57 alone as the denominator.¹⁴⁴ Although the court did not label its analysis as applying the three unities test, it examined titling and contiguity, and ultimately focused on Lost Tree’s objectively-measurable intent (originally as investment and not development). In other words, use.¹⁴⁵

Some courts have declined to apply the three unities test because they view regulatory takings analysis as different from eminent domain, and the three unities test is used determine severance *damages*, and not *liability* for a taking:

The County acknowledges that these cases concern damages in condemnation actions. It suggests that ‘they are the only available judicial analysis of this issue and plaintiff is suing in inverse condemnation.’ We reject this suggestion. The issue is not the same in condemnation cases and in inverse condemnation cases. In condemnation cases the issue is damages: How much is due the landowner as just compensation? In inverse condemnation the issue is liability: Has the government’s action effected a taking of the landowner’s property? In the latter the boundaries of the property allegedly taken must be determined by taking jurisprudence rather than the law of eminent domain.¹⁴⁶

But that is not really accurate. The test is employed in eminent domain cases where the owner claims the government is actually taking or damaging more land than it is affirmatively condemning, which is very much the same in regulatory takings as in the eminent domain context. The only difference is that the power which the government is exercising in condemnation is the eminent domain power, and in regulatory takings cases is some other power. As the Court has reminded, the core question in a regulatory takings case is trying to determine whether a regulation is so restrictive that it limits the owner’s rights so severely that it has an impact similar to the government’s exercise of eminent domain.¹⁴⁷

¹⁴³ See *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) (quoting *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999)).

¹⁴⁴ *Id.* at 1293-94.

¹⁴⁵ *Id.* at 1294-95. On remand, the CFC determined the Corps’ denial of the permit reduced the value of Plat 57 alone from over \$4 million, to \$27,500, a loss of 99.4%, and the Federal Circuit affirmed. The Federal Circuit rejected the federal government’s claim that leaving land with 0.6% of value in its regulated state isn’t a *Lucas* taking, because “residual value” isn’t an economically beneficial use. *Lost Tree Vill. Corp.*, 787 F.3d at 1114-15.

¹⁴⁶ *Am. Sav. & Loan Assoc. v. Cty. of Marin*, 653 F.2d 364, 369 (9th Cir. 1981).

¹⁴⁷ In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005), the Court noted that “government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster[.]”

VII. STATE COURTS AS THE BULWARKS OF PROPERTY

Nearly all regulatory takings cases which challenge state or local regulations must be brought in state court and apply state takings law.¹⁴⁸ State courts applying their own takings and compensation requirements are not bound by *Murr*, except as a floor below which they may not go.¹⁴⁹ And it is an exceedingly low floor, which means that state courts in applying state takings law need not utilize *Murr*'s factors. Applying the three unities test in those courts would have several advantages.

First, the three unities test comports with common understandings of property and keeps courts well away from reviewing the reasonableness of the regulations. The Murrs argued that their separately-platted parcels should have been treated separately, at least as the starting point. Moreover, the Murrs argued that before they could be considered as a single parcel in order to measure the impact of the regulations, the government needed to show more than the fact that the same owners owned the two adjoining parcels which the regulations themselves rendered "substandard." The *Murr* majority placed great stock in the reasonableness of Wisconsin's regulations, because similar regulations are employed nationwide and have been for decades.¹⁵⁰ But what is that when compared to a millennium of expectations in distinct land title and boundaries? Title to fee simple parcels is the foundation on which our concept of private property is built:

Nearly all privately owned real estate in the United States is held in fee simple absolute, or fee simple for short. Every law student learns that the fee simple is the most extensive of all the estates in land—endless in duration, unencumbered by future interests, alienable, bequeathable, and inheritable. Behind these descriptive elements lies the implicit normative message that the fee simple represents the endpoint of real property's evolution, a more or less final answer to the question of how a modern society should structure access to land.¹⁵¹

¹⁴⁸ See *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1984).

¹⁴⁹ See Ilya Somin, *A Floor Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in Danforth v. Minnesota*, 102 N.W. U. L. REV. 365 (2008) ("Few doubt that states can provide greater protection for individual rights under state constitutions than is available under the Supreme Court's interpretation of the Federal Constitution.").

¹⁵⁰ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1938 (2017) ("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 government merger regulations that originated nearly a century ago.").

¹⁵¹ Lee Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1458-59 (2016) (footnotes omitted).

Land titles are measured by their boundaries.¹⁵² They have been the building block on which property law and ownership, and common understandings of what it means to own land, has been built. Ask a real person (not a lawyer, a local agency regulator, or a judge) about ownership of land, and chances are they will talk about a parcel as defined by its metes-and-bounds.

Second, the three unities would steer federal constitutional analysis clear of an area it has always purported to shy away from: defining property. Or, more precisely, it would continue federal constitutional respect for state property rules. The Court's long-established maxim in this regard is that while the Constitution protects property interests, it does not define them, and therefore allows state law to establish its boundaries.¹⁵³ In *Kaiser Aetna v. United States*,¹⁵⁴ for example, the Court recognized that the owner's reasonable reliance on a state's unusual property law (as odd as it might seem to an outsider) gave rise to certain expectations which "had the law behind it," and thus could not be interfered with in the absence of compensation.¹⁵⁵ That the *Murr* majority messed it up perhaps should not surprise us. This is the Court, after all, which informed us in 1984 in *Williamson County* that a Tennessee property owner could not raise its regulatory takings claim in federal court because Tennessee's courts would entertain an inverse condemnation claim for compensation under Tennessee law.¹⁵⁶ It turned out this was not entirely correct: it was not until nearly three decades later that the Tennessee Supreme Court actually held that a right to recover for regulatory takings existed under state inverse condemnation law.¹⁵⁷ My point is not that the U.S. Supreme Court is a good predictor of how state courts treat state law, but that it can be a rather poor one. It should avoid, where possible, guessing about what state law is, especially

¹⁵² See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 7 (2000) (arguing that the certainty which comes with a system of land titling and deeds is one of the reasons why capitalism has succeeded).

¹⁵³ *Damon v. Hawaii*, 194 U.S. 154, 158 (1904) ("A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right.").

¹⁵⁴ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

¹⁵⁵ *Id.* at 178.

¹⁵⁶ *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196 (1984) ("Under Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances.").

¹⁵⁷ See *Beech v. City of Franklin*, 687 Fed. App'x 454, 457 (6th Cir. 2017) (noting that until 2014, the Tennessee Supreme Court had not recognized a right under Tennessee law to recover for regulatory takings, and limited inverse condemnation actions to cases involving only physical occupation and "nuisance type" takings) (citing *Phillips v. Montgomery Cty.*, 442 S.W.3d 233 (Tenn. 2014)).

regarding property law.¹⁵⁸ The three unities test is squarely grounded in existing state law that considers which interests a property owner possesses are integrated enough that interfering with them results in an obligation to pay compensation. State courts—the courts which would be applying the regulatory takings tests if *Williamson County* remains the law—are already very familiar with the three unities test in eminent domain cases. *Murr* plunges courts into this question of local law and on-the-ground facts as a question of law, which by itself is not problematic, except that after *Murr*, it is a question of *federal* law.

Third, title and lot lines—the “dirt”—are not alone dispositive, and focusing on an owner’s actual use of multiple parcels also takes into account that property is a bundle of interests.¹⁵⁹ There are fundamental background principles of a state’s “property and nuisance” law, for example, that transcend a state’s ability to redefine them by regulating them out of existence without just compensation.¹⁶⁰ These include the right to physically exclude,¹⁶¹ the right to transfer, and, most importantly, the right to make economically beneficial use of property,¹⁶² regardless of state definitions.¹⁶³ Thus, whether the *Murr* siblings actually used Lots E and F together as a single economic parcel should have been the dispositive proof in the case, and the Court should have sent it back to the state courts to make that determination. This would also limit *Murr* to the circumstances presented in the case. Under the majority’s multifactors, regulators will not necessarily be limited by the circumstances presented there, because nothing in the opinion limits application of its multifactor property test only to those cases in which the plaintiff owns multiple, contiguous parcels. The *Murr* “parcel as a whole” test could be applied to a single parcel, since the focus is on the

¹⁵⁸ Cf. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (Sotomayor, J., concurring) (federal courts should certify uncertain questions of state law to state courts).

¹⁵⁹ *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (“property” as used in the Constitution includes “the right to possess, use and dispose of it”); see also *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427 (2015) (same).

¹⁶⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (“Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”).

¹⁶¹ See, e.g., *Palmer v. Atl. Coast Pipeline, LLC*, 801 S.E. 2d 414, 418-419 (Va. 2017) (fundamental right to exclude may also be subject to certain common law privileges, such as the right of a potential condemner to enter the land for a survey to determine its suitability).

¹⁶² *Lucas*, 505 U.S. at 1017 (“Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.”) (citing *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

¹⁶³ See *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) (“Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way.”); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl Prot.*, 560 U.S. 702, 713 (2010) (noting “[s]tates effect a taking if they recharacterize as public property what was previously private property”).

reasonableness of the regulations in place at the time of the owner's acquisition, segmenting the owner's expectations temporally.

Fourth, the three unities framework accounts for regulatory impacts on how owners actually use their multiple parcels without taking *Murr*'s parcel as a whole test to its logical limits. This would mean that the more affluent the plaintiff, the less the complete loss of a single separate parcel will have on her overall wallet. The more parcels owned, the less a taking of a single parcel hurts. There's some inherent appeal with the argument because eminent domain is focused on the loss to the owner and not the gain to the taker, but there does not seem to be a limiting principle, unless the Court is ready to say that the more wealthy a property owner is, the less she deserves Constitutional protection because she can absorb the impacts of regulation spread across all of her landholdings.¹⁶⁴ I doubt there are five votes for that. And even if the Court were inclined to go there, the practicalities would take over—the wealthier a property owner is, the more sophisticated she is likely to be; the more sophisticated she is, the more likely the property owner would be able to structure ownership of multiple parcels in such a way to avoid formal common ownership—so any such rule could fairly easily be avoided or overcome.

Finally, the three unities test disincentivizes the gamesmanship the majority was so worried about. Of course, in eminent domain takings, the owner is very likely looking for arguments that focus more on how his property is defined, while in regulatory takings cases the dynamic is exactly opposite, because the smaller the owner's denominator, the more likely it is that she can show a total *Lucas* wipeout. That does not mean the eminent domain rule I suggest is incompatible with regulatory takings, only that it can be equally applied to regulatory takings while minimizing the opportunities for the prospective gamesmanship which the majority seemed so concerned with. Not that there is anything inherently wrong with that, because certainty itself breeds “gamesmanship.” In other words, if the players know the rules ahead of time, they can conform their conduct to maximize the likelihood that their circumstances fit within whatever the governing rule is. Neither the majority nor the dissent explains why that is a bad thing, and neither the majority's nor the dissent's tests for property adequately account for the government's power to shape regulations in a way to minimize its liability for takings in specific cases.

It is the specific factors which the *Murr* majority settled on, and the way the Court applied them, that will create the difficulties down the road. There was nothing incompatible with the Murrs' argument that metes-and-bounds title is the presumptive starting point for analysis of the larger parcel in regulatory takings.

¹⁶⁴ See *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1292-93 (Fed. Cir. 2013) (“Second, the ‘parcel as a whole’ does not extend to all of a landowner’s disparate holdings in the vicinity of the regulated property,” because the Supreme Court in *Lucas* “characterize[ed] as ‘extreme’ and ‘unsupportable’ the state court’s analysis in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-34, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff’d*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), which examined the diminution in a particular parcel’s value in light of the total value of the takings claimant’s other holdings in the vicinity.”).

Title is the starting point in eminent domain cases, and it should be the starting point when determining the property in regulatory takings cases as well. *Murr*, by contrast, created a metaphysical, social-justice-warrior test for property that undercuts a millennium of common law principles, deprives juries of the opportunity to decide what is and what is not reasonable reliance on metes-and-bounds, and takes the power to define property away from both property owners and state and local legislators, handing it to judges. The *Murr* majority gives lower courts a chance to play Justice Kennedy for a day and decide what counts as property (for today, but may not be tomorrow), all based on what a judge believes is fair (or isn't), worthy of being compensated (or isn't), or whether the government can really afford to pay, all because a judge concludes the regulation is reasonable.

VIII. CONCLUSION

For more than a century, the Court has been telling us that it was not willing to provide definitive rules in regulatory takings cases, and it is time we start taking it at its word. As in many of these cases, *Murr* creates many more questions than it clears up, but it should remove any doubt whether a majority is looking for a new direction towards clarity because it was willing to make muddy waters even muddier.¹⁶⁵ After seeming to have abandoned the reasonableness of the regulation as a takings test in *Lingle*, the majority has now resurrected it as part of the preliminary “property” question. Under *Murr*, the analysis of whether a claimant owns property worthy of protection will inevitably focus on the challenged regulation and whether a judge considers it reasonable, rather than the actual use the owner has made of the parcels—something that is inherently more subject to objective review. In effect, *Murr* has transformed the property question from an objectively measurable factual determination by a jury (the actual use the owner makes of the parcels) into an issue resolved by a judge (whether the regulation is reasonable). Being more familiar with both property law and eminent domain principles, state courts may ultimately do a better job.

¹⁶⁵ *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).