


# Murr and Wisconsin: The Badger State's Take on Regulatory Takings

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>

 Part of the [Environmental Law Commons](#), [Government Contracts Commons](#), [Land Use Law Commons](#), [Natural Resources Law Commons](#), [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), and the [Water Law Commons](#)

---

### Repository Citation

*Murr and Wisconsin: The Badger State's Take on Regulatory Takings*, 102 Marq. L. Rev. 261 (2018).  
Available at: <https://scholarship.law.marquette.edu/mulr/vol102/iss1/10>

This Response or Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

# MURR AND WISCONSIN: THE BADGER STATE’S TAKE ON REGULATORY TAKINGS

*Property 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.*

— Justice Anthony Kennedy<sup>1</sup>

*Ronald Reagan said, ‘Freedom is never more than one generation away from extinction . . . . It must be fought for, protected, and handed on [to our children] to do the same . . . .’ So it is with property rights. They must always be fought for, through good times and bad. Even with victory, defenders of this core liberty can never rest.*

— John M. Groen<sup>2</sup>

I. INTRODUCTION .....	262
II. TAKINGS CLAUSE SUMMARY: THE FOUNDATIONS OF REGULATORY TAKINGS.....	264
A. Early English Roots and Pre-Takings Clause Colonial Practice	264
B. The Original Understanding of the Takings Clause .....	266
C. Early Judicial Interpretation and the Incorporation of the Takings Clause .....	268
D. The Regulatory Takings Revolution: <i>Pennsylvania Coal Co. v. Mahon</i> .....	271
III. THE REGULATORY TAKINGS DOCTRINE PRIOR TO <i>MURR</i> .....	273
A. <i>Penn Central</i> Analysis.....	274
B. Denominator of the Fraction.....	278
IV. THE <i>MURR</i> PROBLEM .....	279
A. Wisconsin Courts and Regulatory Takings.....	280
B. <i>Murr</i> ’s Regulatory Background .....	282
C. Factual and Procedural Background.....	284
V. <i>MURR</i> AT THE SUPREME COURT .....	287
A. The Arguments of the Murr Family and the State of Wisconsin ..	287

---

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

2. John Groen, *Supreme Court Setback Spurs New Drive to Defend Property Rights Nationwide*, FORBES (Oct. 3, 2017), <https://www.forbes.com/sites/realspin/2017/10/03/supreme-court-setback-spurs-new-drive-to-defend-property-rights-nationwide/2/#696c98364d42> [https://perma.cc/SE9H-8HWL].

B. <i>Murr v. Wisconsin</i> : The Decision.....	288
VI. RESPONSE TO THE DECISION.....	293
A. Academic Reaction to the Decision .....	293
B. Wisconsin Law in the Wake of <i>Murr</i> .....	295
1. Wisconsin Homeowners' Bill of Rights .....	295
2. The Wisconsin Supreme Court and the New <i>Murr</i> Standard .	297
a. New Federalism: Independent Interpretation of the Takings	
Clause Under the Wisconsin Constitution.....	298
b. Narrow Interpretation and Application of <i>Murr</i> 's Multi-	
Factor Test.....	302
VII. CONCLUSION.....	306

## I. INTRODUCTION

On November 27, 2017, the Wisconsin Legislature significantly weakened state and local regulations along the pristine St. Croix River.<sup>3</sup> While Wisconsin has prioritized deregulation over the past decade,<sup>4</sup> there was something markedly different about this specific action. The Wisconsin Homeowners' Bill of Rights, formally titled Act 67,<sup>5</sup> was a swift legislative response to *Murr v. Wisconsin*.<sup>6</sup> In *Murr*, the United States Supreme Court upheld pervasive governmental regulations restricting the Murr family's rights to freely use or dispose of its waterside property along the St. Croix River.<sup>7</sup> The Wisconsin Homeowners' Bill of Rights restored these property rights by pulling back on

---

3. See H. Sterling Burnett, *Wisconsin Legislature Passes "Homeowners' Bill of Rights"*, THE HEARTLAND INST. (Jan. 2, 2018), <https://www.heartland.org/news-opinion/news/wisconsin-legislature-passes-homeowners-bill-of-rights> [https://perma.cc/SE9H-8HWL].

4. See, e.g., Mary Spicuzza, *Telecom Deregulation Bill gets State Legislature's OK*, WIS. STATE JOURNAL (May 12, 2011), [http://host.madison.com/wsj/news/local/govt-and-politics/telecom-deregulation-bill-gets-state-legislature-s-ok/article\\_f4ceb314-7bf8-11e0-8887-001cc4c03286.html](http://host.madison.com/wsj/news/local/govt-and-politics/telecom-deregulation-bill-gets-state-legislature-s-ok/article_f4ceb314-7bf8-11e0-8887-001cc4c03286.html) [https://perma.cc/4FC5-UBB6]; Steven Verburg, *Wisconsin Republicans Launch New Rollback of Air, Water Protections*, WIS. STATE JOURNAL (Oct. 3, 2017), [http://host.madison.com/wsj/news/local/govt-and-politics/wisconsin-republicans-launch-new-rollback-of-air-water-protections/article\\_81101a90-56a2-5841-aa7a-aef12037c77c.html](http://host.madison.com/wsj/news/local/govt-and-politics/wisconsin-republicans-launch-new-rollback-of-air-water-protections/article_81101a90-56a2-5841-aa7a-aef12037c77c.html) [https://perma.cc/Y5V7-BYQB]; Laurel White, *Wisconsin Assembly Approves Deregulation of Rent-To-Own Companies*, WIS. PUB. RADIO (Feb. 20, 2018), <https://www.wpr.org/wisconsin-assembly-approves-deregulation-rent-own-companies> [https://perma.cc/QHQ7-YSMV].

5. 2017 Wis. Act 67.

6. 137 S. Ct. 1933.

7. *Id.* at 1950.

key statewide land use regulations, bringing substantial change to Wisconsin's regulatory framework related to land use.<sup>8</sup>

From a broader jurisprudential perspective, *Murr* is simply another in a long line of cases that fails to clarify the regulatory takings doctrine.<sup>9</sup> Indeed, the majority in *Murr* doubles down on an already incoherent doctrine, doubtless thrusting lower courts around the nation into further confusion on the issue.<sup>10</sup> Nonetheless, state governments can minimize the damage of this complex, factor-ridden decision: state legislatures by following Wisconsin's lead and actively working to preserve individual property rights, and state courts by either (1) independently analyzing the Takings Clause pursuant to parallel provisions of their own state constitutions or (2) narrowly construing *Murr*'s multi-factor test.<sup>11</sup>

This comment examines the current state of the regulatory takings doctrine at both the federal and state level, analyzes the Supreme Court's decision in *Murr v. Wisconsin*, and discusses the need to set up structural protections to preserve the rights of private property owners. Specifically, Part II discusses the fascinating origins and background of the Takings Clause and the regulatory takings doctrine. Part III examines the regulatory takings doctrine as it was structured when the Supreme Court decided *Murr*. Part IV provides background analysis of the regulatory framework and Wisconsin regulatory takings law that undergirds *Murr*. Part V describes the *Murr*'s factual background, discusses the parties' arguments, and analyzes the Supreme Court's opinion. Part VI analyzes the general reaction to this landmark decision, evaluates Wisconsin's Homeowners' Bill of Rights, and provides direction for Wisconsin courts in their handling of the post-*Murr* regulatory takings doctrine. Part VII concludes with a brief overview and presents two important takeaways from *Murr*.

---

8. 2017 Wis. Act 67; see also ANNA HENNING & SCOTT GROSZ, WISCONSIN LEGISLATIVE COUNCIL ACT MEMO: 2017 WISCONSIN ACT 67 1-4 (Dec. 1, 2017), <http://docs.legis.wisconsin.gov/2017/related/lcactmemo/act067> [<https://perma.cc/5TR7-XPWA>].

This legislation has garnered harsh criticism from some. See, e.g., Greg Seitz, *Wisconsin Legislature Weakens St. Croix River Scenic Protections*, ST. CROIX 360 (Nov. 9, 2017), <https://www.stcroix360.com/2017/11/wisconsin-legislature-weakens-st-croix-river-scenic-protections/> [<https://perma.cc/3B6P-ZC8A>]; Greg Seitz, *50th Anniversary: December Dates Mark Milestones in St. Croix River Conservation*, ST. CROIX 360 (Nov. 30, 2017), <https://www.stcroix360.com/2017/11/50th-anniversary-december-dates-mark-milestones-in-st-croix-river-conservation/> [<https://perma.cc/4KHD-XSC7>].

9. See discussion *infra* Part III.

10. See discussion *infra* Section VI.A.

11. See discussion *infra* Parts VI, VII.

## II. TAKINGS CLAUSE SUMMARY: THE FOUNDATIONS OF REGULATORY TAKINGS

### A. *Early English Roots and Pre-Takings Clause Colonial Practice*

The origins of the Takings Clause can be traced to Article 39 of Magna Carta,<sup>12</sup> which states that “[n]o free man shall be . . . stripped of his rights or possessions . . . except by the lawful judgment of his equals or by the law of the land.”<sup>13</sup> Article 39 created procedural limitations “against arbitrary infringements of personal liberty and rights of property.”<sup>14</sup> But these protections were limited to the physical appropriation of property and failed to place any limitations on governmental regulation of private property.<sup>15</sup> Indeed, governmental land use regulations “designed to promote the public benefit” were left unrestricted.<sup>16</sup> Additionally, there was generally no compensation requirement even for the physical appropriation of property; Article 39 and subsequent common-law protections only provided property owners the right to due process.<sup>17</sup>

Around the time of the founding of the American colonies, the works of Sir Edward Coke helped revitalize an emphasis on personal rights, liberties, and

---

12. FRED BOSSELMAN ET AL., *THE TAKINGS ISSUE* 56 (1973).

13. MAGNA CARTA ART. 39, <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> [<https://perma.cc/B2J4-8KN3>]. Magna Carta is a great place to start this analysis of the Takings Clause because it is “generally regarded as one of the great common-law documents and as the foundation of constitutional liberties.” *Magna Carta*, BLACK’S LAW DICTIONARY (10th ed. 2014).

14. W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW: VOLUME II* 215 (3d ed. 1923) (noting the importance of this provision considering the fact that arbitrary infringement on property rights was one of the chief grievances against the King of England at the time); *see also* BOSSELMAN ET AL., *supra* note 12, at 57.

15. *See* BOSSELMAN ET AL., *supra* note 12, at 60–75. In fact, the government widely utilized land use regulations such as lot-size minimum requirements and construction guidelines and limitations. *Id.* at 62, 66; *see also* DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 18 (2002).

16. BOSSELMAN ET AL., *supra* note 12, at 76. “[J]ustice was not offended” where the government regulated private land use for a legitimate government purpose. *Id.*

17. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785–86 (1995). The predominant early colonial legal structure left the determination of compensation to the political processes; compensation was not a generally recognized “right” prior to the Fifth Amendment’s Takings Clause. *See id.* at 785–86. Yet, government seizure of private property—limited for many years only to improved or enclosed property—generally did result in compensation. *See id.* at 787; *see also* BOSSELMAN ET AL., *supra* note 12, at 85; DANA & MERRILL, *supra* note 15, at 16–18. Additionally, there was a generally accepted emergency exception for the compensation of developed lands. BOSSELMAN ET AL., *supra* note 12, at 86.

due process of law.<sup>18</sup> Through Coke's works and, more generally, the Common Law's influence on the colonies,<sup>19</sup> the right to due process in relation to personal property became one of the defining rights in the New World.<sup>20</sup> Consequently, many colonial laws and early drafts of state constitutions demanded compensation for actual physical appropriations—even where those appropriations were for the public's benefit.<sup>21</sup>

Despite this focus on personal property rights, the government's authority to regulate land use remained unquestioned.<sup>22</sup> Indeed, early governments extensively regulated land use and “no colonial charter or state constitution recognized that regulations could give rise to a requirement of compensation.”<sup>23</sup> Without so much as the “recogni[tion] [that] regulations gave rise to a requirement of compensation,” land use regulation remained an accepted and ever-present limitation on property rights.<sup>24</sup> In sum, property right protections through this era were limited to procedural defenses—merely “echo[ing] Article 39 of Magna Carta.”<sup>25</sup>

---

18. See BOSSELMAN ET AL., *supra* note 12, at 77.

19. *Id.* at 80. See generally ROSCOE POUND, HISTORY AND SYSTEM OF THE COMMON LAW (1939); W. Hamilton Bryson, *English Common Law in Virginia*, 6 J. LEGAL HIST. 249 (1985); Louis E. Zuckermann, *The Common Law of America*, 53 AM. L. REV. 577 (1919).

20. See BOSSELMAN ET AL., *supra* note 12, at 82.

21. See Treanor, *supra* note 17, at 785–86. One early example is the 1669 “Fundamental Constitutions of Carolina,” which—although never fully implemented—called for compensation for seized property. See *id.*; see also BOSSELMAN ET AL., *supra* note 12, at 93 (an early Massachusetts colonial law required compensation for the taking of livestock). Massachusetts's original state constitution was the first ratified with a compensation clause. See *id.* at 95; Treanor, *supra* note 17, at 790–91. Vermont's 1777 draft of its state constitution called for compensation for government takings. See BOSSELMAN ET AL., *supra* note 12, at 94; Treanor, *supra* note 17, at 790; THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 374 (Neil H. Cogan ed., 1997). Additionally, the Northwest Ordinance required compensation for the taking of property. See Treanor, *supra* note 17, at 791; THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS, *supra*, at 374. The colonies often still allowed for either uncompensated or non-value-based compensation where takings were for governmental use. See Treanor, *supra* note 17, at 787–88.

22. See Treanor, *supra* note 17, at 785. Even Sir Edward Coke recognized the government's authority to regulate private property to the point of depriving the land of all productive use. BOSSELMAN ET AL., *supra* note 12, at 80–81.

23. Treanor, *supra* note 17, at 785, 787–89. Local governments during the colonial and early statehood period freely regulated business operations and personal and economic decisions related to personal property. *Id.* at 787–89.

24. *Id.* at 785.

25. *Id.* at 789. Though real or personal property was protected by colonial charters, these protections were largely procedural rather than substantive in nature. *Id.* at 786.

### B. *The Original Understanding of the Takings Clause*

The inclusion of property protections in the Bill of Rights is unsurprising considering the central status of personal property rights in the colonies. The Takings Clause—the last clause of the Fifth Amendment—states, “nor shall private property be taken for public use, without just compensation.”<sup>26</sup> Considering the text alone, there is no indication that the Takings Clause was intended to provide protection for anything less than actual direct physical appropriations.<sup>27</sup> However, speculation regarding its origins, intent, and even why this specific provision ended up in the Constitution, have muddied the waters and made this provision particularly difficult to parse.<sup>28</sup>

One difficulty when analyzing the Takings Clause is the lack of founding era debate surrounding its implementation.<sup>29</sup> The Clause was introduced, amended, and adopted without significant discussion regarding its content.<sup>30</sup> One plausible theory as to why there was no debate surrounding the Takings Clause seems to be that the Founders were quite content with what it appeared to propose: the “status quo” of takings law at the time—procedural protection from, and compensation for, *only* direct physical appropriations.<sup>31</sup> Thus, though still open to debate, many scholars believe there was no objection to the creation and adoption of the Takings Clause because it only appeared to prohibit direct physical appropriations, not the government’s widely accepted authority to regulate property rights.<sup>32</sup>

---

26. U.S. CONST. amend. V.

27. See Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENVTL. L.J. 247, 256 (2015).

28. See DANA & MERRILL, *supra* note 15, at 9, 13–16, 20; David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 519–20 (2004).

29. See Treanor, *supra* note 17, at 791; DANA & MERRILL, *supra* note 15, at 11, 25; Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2078 (2004).

30. See generally COGAN, *supra* note 21, at 361–72.

31. Treanor, *supra* note 17, at 785.

32. See Harrington, *supra* note 29, at 2053, 2063. Indeed, many attending the Philadelphia Convention supported governmental regulation of economic and property rights. See *id.*; see also DANA & MERRILL, *supra* note 15, at 19 (noting that there is no affirmative evidence supporting this assertion, but rather just an uncontradicted body of evidence); BOSSELMAN ET AL., *supra* note 12, at 104; J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 735 (2017); Treanor, *supra* note 17, at 785. But see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553–55 (2003) (arguing that those in the founding era did intend to protect against regulatory intrusions); Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1212 (1996) (noting that regulatory takings law was introduced prior to *Mahon*).

This position is further supported by the writings of two key figures whose work undoubtedly influenced the content of the Takings Clause: Sir William Blackstone<sup>33</sup> and James Madison.<sup>34</sup> Blackstone—a champion for individual liberties and property rights—believed that personal property rights were fundamental, stating, “[s]o great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.”<sup>35</sup> But like Sir Edward Coke, Blackstone understood that this “absolute right” was nonetheless subject to diminution “by the laws of the land,” thereby indicating that governmental regulation should not be restricted.<sup>36</sup> Many Founding Fathers echoed Blackstone’s view of property rights.<sup>37</sup> In particular, James Madison—the man who seemingly *sua sponte* introduced the Takings Clause<sup>38</sup>—believed that the United States should “pride[] itself in maintaining the inviolability of property . . . provid[ing] that none shall be *taken directly* even for public use without indemnification to the owner.”<sup>39</sup> The Founders, then, seem to have largely understood that the Takings Clause reached only direct physical appropriations and not governmental regulations.<sup>40</sup>

---

33. See BOSSELMAN ET AL., *supra* note 12, at 90–91 (noting that the work of Blackstone profoundly influenced the Founders as they constructed the Constitution).

34. See Treanor, *supra* note 17, at 784.

35. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134–35, 140–41 (1st ed. 1765). Blackstone did note, however, that such action could be justified where the owner is given “full indemnification” for the property. *Id.*

36. *Id.* at 134 (“The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land.*”) (emphasis added).

37. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787: VOLUME I (Max Farrand ed., 1937). Madison stated, “The primary objects of civil society are the security of property and public safety.” *Id.* at 147. Hamilton stated, “One great obj[ective] of [g]ov[ernment] is personal protection and the security of [p]roperty.” *Id.* at 302. Morris stated, “Men don’t unite for liberty or Life, they possess both in the savage state in the highest perfection they unite for the protection of property.” *Id.* at 536 (emphasis omitted). Early Supreme Court precedent further supports these views. *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304, 311 (1795) (stating that “[t]he Constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable”).

38. DANA & MERRILL, *supra* note 15, at 10, 13; Treanor, *supra* note 17, at 834.

39. JAMES MADISON, PROPERTY (Mar. 29, 1792), <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html> [<https://perma.cc/LJ5D-B6Z7>]. (emphasis added); see also Treanor, *supra* note 17, at 838 (“*Property* was one of the series of essays that Madison published in the *National Gazette* newspaper in response to Hamilton’s economic program . . .”).

40. But this view was not unanimously held. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787: VOLUME II (Max Farrand ed., 1937). For example, John F. Mercer criticized this absolute position, stating that “[i]t is a first principle in political science, that whenever the rights of property are secured, an aristocracy will grow out of it.” *Id.* at 284. For a thorough analysis of the original understanding of the Takings Clause, see generally Treanor, *supra* note 17.



The work of St. George Tucker, a historian and contemporary of the Constitution's adoption, also indicates that the Takings Clause was meant to be limited in application to physical appropriations:

That part of the [Fifth Amendment] which declares that private property shall not be taken for public use, without just compensation, was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, *by impressment*, as was too frequently practi[c]ed during the revolutionary war, without any compensation whatever.<sup>41</sup>

Thus, in Tucker's view, the Takings Clause only mandated compensation for physical seizure of property, an issue that was common throughout the Revolutionary War.<sup>42</sup>

Viewed together, the limited text of the Takings Clause, the lack of recorded debate on the issue, and the then-predominant view of governmental regulations suggests that the Founders intended the Takings Clause to merely provide procedural protections, requiring compensation only for the government's direct physical appropriation of private property.<sup>43</sup>

### *C. Early Judicial Interpretation and the Incorporation of the Takings Clause*

Through the dawn of Supreme Court jurisprudence, the Court had little opportunity to develop its own Takings Clause analysis due to the limited power of the federal government and the fact that the Fifth Amendment was not

---

41. See ST. GEORGE TUCKER, NOTES OF REFERENCE 305–06 (electronic ed. 2003) (emphasis added).

42. See Treanor, *supra* note 17, at 791–92; see also Harrington, *supra* note 29, at 2073–74 (noting the prevalence of such involuntary impressment of property throughout the revolutionary war); DANA & MERRILL, *supra* note 15, at 11–12. But see Thomas, *supra* note 28, at 545.

43. See Harrington, *supra* note 29, at 2078 (noting that Madison only intended to deal with direct and not regulatory takings issues); see also Treanor, *supra* note 17, at 838–39. Since the Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it is clear that “[h]istorical arguments have played virtually no role in the actual interpretation of the clause.” RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1057–58 (1992) (Blackmun, J., dissenting) (“[T]he Fifth Amendment’s Takings Clause originally did not extend to regulations of property, whatever the effect.”). Even Justice Scalia, a great champion of originalism, accepted regulatory takings as merely part of our “constitutional culture.” *Id.* at 1028. While the Court addressed the original understanding of the Takings Clause in *Lucas*, that discussion only showed that the Court has lost its way on the issue of regulatory takings and the original understanding of the clause no longer has any bearing on modern regulatory takings law. *Id.* at 1055–60 (Blackmun, J., dissenting).

yet applicable to the action of state governments.<sup>44</sup> Nonetheless, those early state and Supreme Court opinions that did analyze the Takings Clause restricted its scope to the direct physical appropriation of property—seemingly consistent with the original understanding of the clause.<sup>45</sup>

In the *Legal Tender Cases*,<sup>46</sup> the Supreme Court discussed the basis for this limited interpretation of the Takings Clause: “[The Takings Clause] has *always been understood* as referring *only to a direct appropriation*, and not to the consequential injuries resulting from the exercise of lawful power. It has *never* been supposed to . . . inhibit laws that *indirectly work harm* and loss to individuals.”<sup>47</sup> Generally limiting compensation to physical invasions,<sup>48</sup> the Court allowed regulatory limitations—even those stripping the property of all or nearly all value—so long as those regulations were within the non-arbitrary execution of the extraordinarily broad police power.<sup>49</sup> Indeed, during this time, any argument for compensation resulting from action short of direct a physical appropriation was hardly rational in the Court’s eyes.<sup>50</sup>

The exception to this narrow line of interpretation is *Pumpelly v. Green Bay Co.*,<sup>51</sup> a case in which the Supreme Court for the first time applied the Takings Clause to governmental action short of taking title.<sup>52</sup> Specifically, the Court in *Pumpelly* held that the continuous flooding of property by a government dam was an unconstitutional taking that required compensation.<sup>53</sup> Analyzing the

---

44. See *Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833) (“[The Fifth Amendment] contain[s] no expression indicating an intention to apply them to the state governments. This Court cannot so apply them.”); see also JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 13 (2018); BOSSELMAN ET AL., *supra* note 12, at 114–15; Treanor, *supra* note 17, at 794 n.69. State courts, on the other hand, dealt with the takings issue a fair amount through their own state constitutions. See BOSSELMAN ET AL., *supra* note 12, at 106–14.

45. See Treanor, *supra* note 17, at 792, 795; Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 53 (2017). But see Thomas, *supra* note 28, at 532–33 (arguing that compensation for takings consistently extended not only to land that was actually physically taken).

46. 79 U.S. 457 (1870).

47. *Id.* at 551 (emphasis added); see also Treanor, *supra* note 17, at 796.

48. Also known as the power of eminent domain. See DANA & MERRILL, *supra* note 15, at 4.

49. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 667–70 (1887) (holding that private property could be regulated pursuant to the police power without compensation, regardless of the impact on the property’s value); see also DANA & MERRILL, *supra* note 15, at 4; BOSSELMAN ET AL., *supra* note 12, at 117–20.

50. *Legal Tender Cases*, 79 U.S. at 552 (stating that only a “bold man” would assert such a theory).

51. 80 U.S. 166 (1871).

52. Treanor, *supra* note 17, at 795 n.74 (noting that *Pumpelly* served as the limit to the Court’s strict interpretation).

53. *Pumpelly*, 80 U.S. at 181.

takings issue, the Court stated that an absolute physical taking is not required for there to be a compensable taking where private property is “actually invaded . . . or . . . [has] any artificial structure placed on it, so as to effectually destroy or impair [the] usefulness” of the property.<sup>54</sup>

Straying little from the strict rule of the *Legal Tender Cases*,<sup>55</sup> *Pumpelly* is nonetheless quite significant because of its previously unrecognized rationale.<sup>56</sup> While promptly limited in scope and application,<sup>57</sup> *Pumpelly* revealed a changing perception of the Takings Clause. Through its deference to circumstantial equity, the Court showed its willingness to broaden the application of the Takings Clause—a willingness fully realized roughly fifty years later in *Pennsylvania Coal Co. v. Mahon*.<sup>58</sup>

---

54. *Id.*

55. Treanor, *supra* note 17, at 796 n.74 (noting that *Pumpelly* still required sustained actual or consequential physical interference with the property—a “de facto physical taking”—to trigger the compensation requirement).

56. *Pumpelly*, 80 U.S. at 177–78, 181. Even the dissent recognized that the majority’s analysis—finding a taking in something less than an actual physical appropriation—was a “very curious and unsatisfactory result,” going “to the uttermost limit of sound judicial construction.” *Id.*

57. *See, e.g.*, *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878) (noting that *Pumpelly* was the “extremest qualification of the [takings] doctrine” which to that point did not limit “acts done in the proper exercise of governmental powers, and not directly encroaching upon private property”); *see also* BOSSELMAN ET AL., *supra* note 12, at 117–19 (explaining how the Court’s decision in *Mugler* expressly limited the holding in *Pumpelly*).

58. 260 U.S. 393 (1922). It is also important to note that the incorporation of the Takings Clause helped set the stage for the Court’s decision in *Mahon*. Indeed, the incorporation of the Takings Clause in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1896), was a major breakthrough for the incorporation of the Bill of Rights. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977). In the regulatory takings context, application of the Takings Clause to state action through incorporation pushed more state regulatory issues to the fore of the takings analysis, forcing the courts to address issues such as that presented in *Mahon*. *E.g.*, *Mahon*, 260 U.S. at 412 (analyzing a state law issue on review from a state supreme court).

As a side, it is also interesting to note that there is some disagreement regarding whether *Chicago, Burlington & Quincy Railroad v. Chicago* formally incorporated the Takings Clause. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 141 n.3 (Rehnquist, J., dissenting) (1978) (stating summarily that *Chicago, Burlington & Quincy Railroad v. Chicago* incorporated the Takings Clause); EPSTEIN, *supra* note 43, at 18 (noting that the Takings Clause was incorporated through *Chicago, Burlington & Quincy Railroad v. Chicago*). *C.f.*, Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle”*, 90 MINN. L. REV. 826, 829–30, 875–93 (2006) (noting that the *Chicago, Burlington & Quincy Railroad v. Chicago* case failed to even mention the Fifth Amendment or the Takings Clause and was decided solely on Fourteenth Amendment due process terms).

#### D. *The Regulatory Takings Revolution: Pennsylvania Coal Co. v. Mahon*

The Supreme Court's generally narrow construction of the Takings Clause continued until the revolution that was Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*<sup>59</sup>—"perhaps the single most important decision in the takings literature."<sup>60</sup> Indeed, it is difficult to overstate the jurisprudential significance of this shift away from the limited and generally accepted understanding of the Takings Clause.<sup>61</sup>

*Mahon* began as a suit over the statutory diminution of property value and contract rights for a coal mining company conducting operations in and around Scranton, Pennsylvania.<sup>62</sup> The statute at issue, the Kohler Act, prohibited coal mining that threatened certain surrounding structures by placing substantial regulatory restrictions on the pre-existing rights of mining companies.<sup>63</sup> Rather than adhere to the predictable baseline established by the *Legal Tender Cases*, Justice Holmes trained the Court's analysis on the *extent* to which such purely regulatory restrictions are justified.<sup>64</sup> The Supreme Court thus admitted—for the first time in its Takings Clause jurisprudence—that there are limits to the government's purely regulatory power.<sup>65</sup>

Unfortunately, the Court provided no clear test for the determination of when a regulation is of such a "magnitude" as to require compensation.<sup>66</sup> Instead, Justice Holmes applied a subjective, fact-intensive inquiry that weighed the government's interest against the property interest at stake.<sup>67</sup> Out of this pliable balancing test focused on the ill-defined "question of degree,"<sup>68</sup>

59. 260 U.S. 393 (1922).

60. Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 12.

61. See Harrington, *supra* note 29, at 2055. Chief Justice William Rehnquist called *Mahon* "the foundation of our 'regulatory takings' jurisprudence," *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting), and the Court rightly stated that Justice Holmes's opinion "gave birth to our regulatory takings jurisprudence." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325 (2002).

62. See *Mahon*, 260 U.S. at 412, 414.

63. *Id.* at 412, 416 (Brandeis, J., dissenting).

64. *Id.* at 413 ("One fact for consideration . . . is the extent of the diminution" of the value resulting from the regulation.). Justice Holmes believed that, if the Takings Clause were to be limited only to physical takings, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappears." *Id.* at 415.

65. *Id.* at 413. Interestingly, *Mahon* was perhaps the culmination of a career in which Holmes sought a limitation on the police power. See Treanor, *supra* note 17, at 798–99.

66. *Mahon*, 260 U.S. at 413.

67. *Id.* at 413–16.

68. *Id.* at 416; see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Justice Holmes extracted a “cryptic”<sup>69</sup> rule: “while property may be regulated to a certain extent, *if regulation goes too far* it will be recognized as a taking.”<sup>70</sup> Thus, in one fell swoop, Justice Holmes and the Court unceremoniously disposed of decades of Supreme Court precedent by holding that purely regulatory actions were within the purview of the Takings Clause.<sup>71</sup> Holmes reasoned that this approach was justified because even “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.”<sup>72</sup>

*Mahon* signaled two significant changes in the Takings Clause doctrine. First, it recognized that purely regulatory governmental action may rise to the level of an unconstitutional taking that requires just compensation.<sup>73</sup> Second, Holmes’s formulation, requiring compensation when regulations go “too far,”<sup>74</sup> has left the Court without clear direction for nearly a century.<sup>75</sup> Yet today, the Court’s continued struggle to clearly define terms and provide a cogent framework is an unfortunate characteristic of the regulatory takings doctrine.<sup>76</sup>

69. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

70. *Mahon*, 260 U.S. at 415 (emphasis added).

71. See Harrington, *supra* note 29, at 2055. In dissent, Justice Brandeis put up a commendable fight, stating that “[r]estriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put.” *Mahon*, 260 U.S. at 418 (Brandeis, J., dissenting). Justice Brandeis also argued that the state is not required to resort to eminent domain for regulatory takings. *Id.* at 418. Additionally, Justice Brandeis shrewdly identified analytical issues in Justice Holmes’s opinion, including the difficulties of determining the base value of the property to be considered under this new regulatory takings doctrine—an issue that would come to be known as the denominator factor. *Id.* at 419.

72. *Mahon*, 260 U.S. at 416.

73. Property rights proponents argue that this development positively changed conceptions about property rights and private use. See Treanor, *supra* note 17, at 811–12.

74. *Lingle*, 544 U.S. at 537 (2005).

75. Treanor, *supra* note 17, at 782; see also *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (“Resolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic.”); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984) (“As has been admitted on numerous occasions, this Court has generally been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action must be deemed a compensable taking.”) (internal quotation marks omitted).

76. See Treanor, *supra* note 17, at 782; see also Shelby D. Green, *One Parcel Plus One Parcel Equals a “Parcel as a Whole”*: Murr v. Wisconsin’s *Fluid Calculations for Regulatory Takings*, PROB. & PROP., Jan.–Feb. 2018, at 10 (2018). Wisconsin courts have also expressed their frustration with the lack of clear standards. See *Noranda Exploration, Inc. v. Ostrom*, 335 N.W.2d 596, 602 (1983) (“The problem of how to distinguish between an unconstitutional taking and a police power regulation is a difficult one, and the decisions of the Supreme Court have not made it less difficult.”).

III. THE REGULATORY TAKINGS DOCTRINE PRIOR TO *MURR*

Although consistently applied in subsequent Supreme Court decisions,<sup>77</sup> *Mahon* was not significantly extended or developed until *Penn Central Transportation Co. v. City of New York*,<sup>78</sup> a case which sparked rapid, often unpredictable changes to the regulatory takings doctrine. This section attempts to make sense of the confusing muddle<sup>79</sup> of regulatory takings law as it stood when the Supreme Court took up *Murr*—particularly those aspects relevant to the Supreme Court’s decision in *Murr*.

The oft-repeated, judicially created “purpose of the Takings Clause . . . is to prevent the government from ‘forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.’”<sup>80</sup> To these ends, case law indicates that courts conducting a regulatory takings analysis should “aim[] to identify regulatory actions that are *functionally equivalent to the classic taking in which government directly appropriates private property* or ousts the owner from his domain.”<sup>81</sup> With this unsatisfyingly amorphous basis in mind, regulatory takings cases can generally be placed in one of four categories: (1) the regulatory taking that is also counterintuitively “physical” in nature, (2) “a *Lucas*-type total regulatory taking,” (3) “a *Penn Central* Taking,” or (4) “a land-use exaction violating the” *Nollan–Dolan* standards.<sup>82</sup> This section provides the relevant considerations and analysis for the first three.<sup>83</sup>

---

77. See, e.g., *Delaware, Lackawanna, & W. R.R. v. Town of Morristown*, 276 U.S. 182, 193 (1928) (citing *Mahon* favorably in the context of takings and the police power); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (noting that the test for takings claims is circumstantial pursuant to *Mahon*); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (observing that governmental regulation can “be so onerous as to constitute a taking which constitutionally requires compensation”).

78. 438 U.S. 104 (1978); see also Blais, *supra* note 45, at 54.

79. See Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, CATO SUP. CT. REV. 2016-2017, at 131, 133 (2017). Regulatory takings law has, perhaps, best been characterized as “a mix of per se rules and balancing tests, with an ample amount of ambiguity thrown in.” Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L. Q.* 307, 328 (2007); see also Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 *U. PA. L. REV. ONLINE* 53, 54–55 (2017).

80. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

81. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (emphasis added); see also Robert Meltz, *Substantive Takings Law: A Primer* 18 (Oct. 6, 2017) (unpublished manuscript) (on file with author).

82. *Lingle*, 544 U.S. at 548 (internal quotation marks omitted).

83. The fourth category, largely controlled by the Court’s decision in *Horne v. Dep’t of Agriculture*, 135 S. Ct. 2419, 2431 (2015), is irrelevant to the Court’s analysis in *Murr* and is therefore

The first two categories are distinct because a regulatory action falling within either “generally will be deemed [a] per se taking[] for Fifth Amendment purposes.”<sup>84</sup> First, regulations that compel property owners “to suffer a *permanent physical invasion* of her property—however minor” demand just compensation.<sup>85</sup> Second, compensation is required where the regulation denies “*all economically productive or beneficial uses* of land.”<sup>86</sup> The precise analytical underpinnings of this second “total takings” approach, however, remain unclear and any analysis typically requires substantial factual background to determine whether *all beneficial use* of the *relevant parcel* has been denied by the regulation.<sup>87</sup>

#### A. Penn Central Analysis

The third and most conceptually problematic category—still largely informed by the Court’s analysis in *Penn Central*<sup>88</sup>—asks whether a government regulation goes *too far*, resulting in a compensable taking.<sup>89</sup> The difficulties here spring from the noted absence in *Penn Central* of any “set formula” to guide the analysis and the admitted “considerable difficulty” in

---

outside the purview of this comment. For further analysis of this category, see Meltz, *supra* note 79, at 366–70.

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

85. *Id.* (emphasis added). Just compensation is required for permanent physical appropriations because such action “does not simply take a single ‘strand’ from the ‘bundle’ of property rights: *it chops through the bundle*, taking a slice of every strand.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (emphasis added).

86. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (emphasis added). As clarified by *Tahoe-Sierra*, “[a]nything less than a ‘complete elimination of value,’ or a ‘total loss’” still requires the *Penn Central* “ad hoc,” fact intensive analysis. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326, 330 (2002) (citing *Lucas*, 505 U.S. at 1019–20 n.8); *see also Lingle*, 544 U.S. at 538; Blais, *supra* note 45, at 59, 62–65; Meltz, *supra* note 79, at 331–32. There is a significant exception to this rule where the regulations simply supplement background principles already in place when the property owner acquired the land. *See* Meltz, *supra* note 79, at 329, 352–54. Additionally, temporary moratoriums on property use do not necessarily result in a taking because time is only one factor when considering whether there has been a total taking. *See Tahoe-Sierra*, 535 U.S. at 321; *see also* Meltz, *supra* note 79, at 331 (noting that “use” in this situation is interchangeable with “value”). Thus, a moratorium rising to a level of a taking—a “relatively rare” situation, *Lucas*, 505 U.S. at 1018—can only take place where the regulations are “of prospectively indefinite duration.” Meltz, *supra* note 81 (manuscript at 18); *see also Tahoe-Sierra*, 535 U.S. at 332.

87. *See Lucas*, 505 U.S. at 1030–31. To determine whether a “total takings” has taken place, courts must be able to identify the relevant parcel—the denominator of the fraction—a difficult task in its own right. *See* discussion *infra* Section III.B.

88. It is, of course, frustrating that the Supreme Court continues to rely on a forty-year-old framework still mired in “*ad hocery*.” Meltz, *supra* note 81 (manuscript at 21) (emphasis added).

89. *See Lingle*, 544 U.S. at 537.

determining what constitutes a taking.<sup>90</sup> But, in an effort to provide some analytical framework, the Court introduced “several factors” to serve “as the principal guidelines for resolving regulatory takings claims.”<sup>91</sup> These factors—(1) “[t]he economic impact of the regulation on the claimant,” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations,” and (3) “the character of the governmental action”<sup>92</sup>—require a “careful examination and weighing of all the relevant circumstances.”<sup>93</sup> Unfortunately, as the following discussion demonstrates, these standards are themselves “mere guideposts” and do not give clear direction for determining when a regulation results in an unconstitutional taking.<sup>94</sup>

The *Penn Central* analysis “turns in large part”<sup>95</sup> upon the first factor: the “economic impact of the regulation.”<sup>96</sup> Consistent with Justice Holmes’s analysis in *Mahon*, courts must consider the *degree* of loss to determine whether a taking has occurred.<sup>97</sup> A “mere diminution in property value”—even depriving a parcel of its most profitable use—is not enough to work a taking.<sup>98</sup> Rather, courts must determine whether the regulation is the “functional equivalent” of a physical taking.<sup>99</sup>

The second *Penn Central* factor considers whether the regulation has deprived the property owner of reasonable “investment-backed expectations.”<sup>100</sup> While the Court in *Penn Central* unsurprisingly failed to specify exactly what this means—or even whose investment-backed expectations were to be considered—it did focus the analysis on the original cost basis of the property right rather than the fair market value of the property

---

90. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–24 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)); *see also Lingle*, 544 U.S. at 538–39.

91. *Lingle*, 544 U.S. at 538–39.

92. *Penn Cent.*, 438 U.S. at 124.

93. *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring).

94. Meltz, *supra* note 81; Meltz, *supra* note 79, at 329–30, 333. The indeterminacy of these standards may be why the Court has never found a taking where this framework has been applied. *See* Meltz, *supra* note 81 (manuscript at 20).

95. *Lingle*, 544 U.S. at 540.

96. *Penn Cent.*, 438 U.S. at 124.

97. *See* Meltz, *supra* note 79, at 334; *see also* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

98. Meltz, *supra* note 81 (manuscript at 21); *see also Penn Cent.*, 438 U.S. at 131; *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 645 (1993).

99. *See* Meltz, *supra* note 79, at 334; *Lingle*, 544 U.S. at 539. The first factor also requires that the degree of economic impact be balanced against the government’s interest in the regulation. *Mahon*, 260 U.S. at 413 (“Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law.”).

100. *Penn Cent.*, 438 U.S. at 124.



right at stake at the time of the alleged taking.<sup>101</sup> This “rate-of-return” formula requires that “investment-backed expectations” be (1) more than a “unilateral expectation or an abstract need”<sup>102</sup> and (2) consistent with the conditions under which the expectations were developed.<sup>103</sup> Furthermore, it has been recognized that no taking occurs simply because the governmental regulation “ends an economically beneficial circumstance that [the property owner] would like to continue”—there must be some “investment-backed expectation” supporting that benefit.<sup>104</sup> The second *Penn Central* factor thus encompasses a host of considerations for determining the reasonableness of a property owner’s expectations.<sup>105</sup>

The third *Penn Central* factor analyzes “the character of the government action.”<sup>106</sup> This—the most flexible and least important *Penn Central* factor<sup>107</sup>—strikes closely at the “purpose” of regulatory takings doctrine: “prevent[ing] 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>108</sup> Under this factor, the government cannot merely “recharacterize as public property what was previously private property”; that is no less a compensable taking “than if the state had physically appropriated it or destroyed its value by regulation.”<sup>109</sup> Additional principles indicate that

101. See Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean up Takings Law in Murr v. Wisconsin*, 11 N.Y.U. J. L. & LIBERTY 151, 169 (2017); Meltz, *supra* note 81 (manuscript at 25) (“The reasonableness of expectations was probably intended by *Penn Central* to be assessed under law existing when the property was acquired.”).

102. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005–06 (1984) (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

103. *Id.* at 1007. Thus, to the extent buyers are *or should be* aware that their holdings are subject to regulation, their reasonable expectations cannot be contrary to those background principles. Meltz, *supra* note 79, at 340. In this way, the expectations must be (1) actual and (2) objectively reasonable. Meltz, *supra* note 81 (manuscript at 24).

104. Meltz, *supra* note 79, at 317 (emphasis omitted).

105. Timing considerations also play a role in the development of reasonable investment-backed expectations. Although the taking of title post-regulation does not per se deprive the new owner of the right to assert a claim, see *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), such timing will make the demonstration of reasonable investment-backed expectations exceedingly difficult, see Meltz, *supra* note 79, at 323–24.

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

107. Meltz, *supra* note 79, at 341–42.

108. *Palazzolo*, 533 U.S. at 617–18 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

109. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 713, 715 (2010); see also *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . .”).

governmental action must have a direct adverse impact on the property to constitute a taking,<sup>110</sup> and takings need not be permanent to be compensable.<sup>111</sup>

This third *Penn Central* factor is particularly difficult because it requires courts to balance public interest against the burden of the regulation upon the private property owner.<sup>112</sup> Justice Holmes focused on this balancing in *Mahon*, framing regulatory takings as an express limitation on the otherwise legitimate police power.<sup>113</sup> But the practical working out of this limitation is quite difficult. In *Lingle*, the Court stated that “if a government action is found to be impermissible . . . that is the end of the inquiry.”<sup>114</sup> Nevertheless, the Court also noted that judges must “remain cognizant that government regulation—by definition—involves the adjustment of rights for the public good.”<sup>115</sup> In short, while the extent to which “police power” considerations contribute to this analysis remains unclear, recognizing and understanding the weight of the police power interests at play is important for a thorough takings analysis.<sup>116</sup>

---

110. Meltz, *supra* note 79, at 321.

111. *See* Ark. Game and Fish Comm’n v. United States, 568 U.S. 23 (2012); *see also id.* at 38 (“When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.”).

112. *See* Meltz, *supra* note 81 (manuscript at 27); *see also* Thomas, *supra* note 28, at 546 (discussing the complexities of the “police power,” and concluding that the police power is traditionally limited to nuisance suppression and does not justify a regulatory “taking” without just compensation).

113. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“The question is whether the police power [has been] stretched [too] far.”). With this focus, *Mahon* should perhaps have been read as a due process case rather than a Takings Clause case. *See* Karkkainen, *supra* note 58, at 862–65, 870, 874. The balancing against the police power approach reached its peak in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), where the Court required an analysis of whether the applicable regulation “substantially advance[s] legitimate state interests,” *Id.* at 260; *see also* Meltz, *supra* note 79, at 356. This test, however, proved too involved and the Court pared it back in *Lingle*, stating that the police power analysis is derived from due process principles rather than a Takings Clause analysis. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005); *see also* Meltz, *supra* note 79, at 313. The overlap between these two theories still exists and presents an interesting question: What role should the police power hold in the regulatory takings analysis? *Id.* at 314.

114. *Lingle*, 544 U.S. at 543.

115. *Id.* at 538.

116. *See* Meltz, *supra* note 79, at 324–27; Thomas, *supra* note 28, at 516 (noting that “the modern U.S. Supreme Court has not been clear or consistent about what it believes is the operating basis of the police power,” especially in the regulatory takings context). One theory is that any analysis of the legitimacy of the government’s actions in the Takings Clause context should focus solely on the *Armstrong* principles: considering whether there is an arbitrary singling out of individuals or discrete and insular classes of property owners for harsher treatment than the rest—whether to benefit other identifiable individuals or classes or to benefit the public generally. *See* Karkkainen, *supra* note 58, at 912. Another theory is that, as the police power was originally understood as limited to dealing with nuisance abatement, any governmental regulation on property that extends beyond this traditional

### B. Denominator of the Fraction

Perhaps the most critical consideration in evaluating whether a regulation works a total taking or goes too far is the determination of what makes up the “parcel as a whole”—the “denominator of the fraction”—the base against which the economic impact of the regulation is weighed.<sup>117</sup> This often outcome-determinative issue<sup>118</sup>—the central issue in *Murr* and applicable to three of the four categories of regulatory takings<sup>119</sup>—is rooted in *Penn Central*’s statement that courts must consider the parcel as a whole rather than “divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”<sup>120</sup> The Court elaborated on this “anti-segmentation” principle in *Andrus v. Allard*: “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its

---

boundary requires compensation. Thomas, *supra* note 28, at 546. Regardless of the precise analysis, one thing seems clear: “virtually all regulatory takings controversies today” result from some alleged over-expansive use of what is often labeled as the “police power.” *Id.* at 500.

117. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The Court identified the denominator issue as a “difficult, persisting question.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *see also Leading Cases: Constitutional Law*, 131 HARV. L. REV. 223, 253 (2017).

118. *See* Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603, 622 (2012). Indeed, “[a] court’s determination of the parcel as a whole may easily decide the case.” Meltz, *supra* note 79, at 347.

119. The exception is the *Loretto v. Teleprompter Manhattan CATV Corp.*, physical invasion principle. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (noting that “a permanent physical invasion . . . however minor” requires just compensation); *see also Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2429 (2015).

120. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978). This statement and the Court’s subsequent practice of identifying the relevant parcel was a “necessar[y] depart[ure]” from Justice Holmes’s formulation in *Mahon* which concluded that there was a regulatory taking where it became “commercially impracticable” to conduct the desired activity on the land. Epstein, *supra* note 101, at 164.

entirety.”<sup>121</sup> While generally supporting this anti-segmentation principle,<sup>122</sup> the Court has nonetheless failed to provide a solid definition for the parcel as a whole.

One of the primary suggestions for a consistent denominator formula was grounded in Justice Scalia’s analysis in *Lucas*:

The answer to this difficult [denominator] question may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—i.e., whether and to what degree the relevant State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.<sup>123</sup>

This elaboration, however, was subsequently critiqued as only “dictum”<sup>124</sup> based on suggestions and “[g]eneral[ities].”<sup>125</sup> In the face of this incoherence, the arguments before the Supreme Court in *Murr* presented an opportunity to clarify this important aspect of the regulatory takings doctrine.<sup>126</sup>

#### IV. THE *MURR* PROBLEM

The discussion now turns to the Wisconsin state courts’ approach to the regulatory takings issue, the substantial regulatory framework behind the *Murr* case, and the facts that led to the case.

121. See 444 U.S. 51, 65–66 (1979). The anti-segmentation principle is based on the Court’s statement that the “‘bundle’ of property rights” must be viewed as a whole and “the destruction of one ‘strand’ of the bundle,” or the total “denial of one traditional property right” does not necessarily work a taking. *Id.* The test for regulatory takings requires a comparison of the value taken to the value that remains in the property, emphasizing the importance of determining the denominator of the fraction. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). For example, there was no taking in *Tahoe–Sierra* because the Court refused to segment the value of the property based on time. See *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002). Similarly, in *Concrete Pipe*, the Court reiterated the need to focus on the whole property. See *Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 644 (1993).

122. It is important to note that “[t]he Supreme Court holds out a few property rights as being of a particularly fundamental nature,” such that any regulation of that “strand” constitutes a taking. Meltz, *supra* note 79, at 320, 350, 360. These include: (1) the right to “physically exclude others” and (2) the right to “pass on property to one’s heirs.” *Id.* at 320–21.

123. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992); see also *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (noting that “[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law”); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984) (noting that property rights are informed by rights created under state law).

124. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017).

125. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 707 (2010).

126. See *infra* Section V.A.

### A. Wisconsin Courts and Regulatory Takings

A regulatory takings claim in Wisconsin is brought pursuant to either the Fifth Amendment in the U.S. Constitution<sup>127</sup> or the substantively similar Article I, Section 13 in the Wisconsin Constitution.<sup>128</sup> “Although phrased in slightly differing terms,” Wisconsin’s regulatory takings jurisprudence largely mirrors United States Supreme Court precedent.<sup>129</sup> Specifically, there are three relevant areas in which Wisconsin’s regulatory takings jurisprudence mirrors that of the Supreme Court.

First, Wisconsin law allows for a regulatory taking claim where the governmental regulation has the same effect as a physical appropriation.<sup>130</sup> Second, the *Penn Central* factors—(1) “the character of the governmental action,” (2) “the economic impact of the regulation on the claim[],” and (3) “the extent to which the regulation has interfered with distinct investment-backed expectations”<sup>131</sup>—are also central to the regulatory takings analysis under Wisconsin Law.<sup>132</sup> Third, the threshold determination for when the regulation

---

127. “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

128. “The property of no person shall be taken for public use without just compensation therefor.” WIS. CONST. art. I, § 13.

129. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374, 548 N.W.2d 528, 531 (1996). The procedure for bringing a takings claim is, however, unique under Wisconsin law. First, inverse condemnation claims must be brought under Wisconsin Statutes section 32.10 (1983)—a statute providing a remedy when the government fails to follow procedure in acquiring private property—where there is “a government-imposed restriction depriv[ing] the owner of all, or substantially all, of the beneficial use of his property.” *E-L Enters. v. Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, ¶ 37, 326 Wis. 2d 82, 112–13, 785 N.W.2d 409, 425 (2010) (The court did note, however, that use of the statute is not required to enforce one’s right to just compensation.). Within this framework, Wisconsin Courts only recognize a regulation as a “taking” where (1) there is a legally imposed restriction upon the property’s use, *id.* ¶ 41, by (2) a governmental entity with the authority to impose such a restraint. *Howell Plaza, Inc. v. State Highway Comm’n*, 92 Wis. 2d 74, 86, 284 N.W.2d 887, 893 (1979). Thus, simple consequences of government regulatory action do not rise to the level of a taking. *E-L Enters.*, 2010 WI 58, ¶ 41. Additionally, under the second factor, the police power justifications of the government’s actions still seem to carry some weight within Wisconsin’s regulatory takings framework. Brian W. Ohm, *Towards a Theory of Wisconsin Regulatory Takings Jurisprudence*, 4 WIS. ENVTL. L.J. 173, 191–93 (1997).

130. *Compare E-L Enters.*, 2010 WI 58, ¶ 22 (A claim for a taking exists where the government enacts a regulation that is “so onerous that *its effect is tantamount to a direct appropriation.*”) (emphasis added) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)), *with Lingle, supra*, at 539 (2005) (stating that courts must determine whether the regulation is the “functionally equivalent” to a physical taking).

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

132. *See Zealy*, 201 Wis. 2d at 374.

has reached the level of a taking is extremely high under both Wisconsin and Supreme Court jurisprudence.<sup>133</sup>

The Wisconsin Supreme Court has independently developed its own unique take on certain aspects of the regulatory takings doctrine.<sup>134</sup> For example, Wisconsin courts have taken a distinct approach to the analysis of a property owner's reasonable investment-backed expectations. Under Wisconsin case law, an owner "has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."<sup>135</sup> Thus, reasonable investment-backed expectations—even those expectations held at the time of the investment—cannot include the unnatural development of land; that the owner can still use the land for uses consistent with its "essential natural character" is enough to insulate the government from a takings claim.<sup>136</sup> Although "limited to the context of environmental legislation,"<sup>137</sup> this extremely narrow formulation of investment-backed expectations severely limits property rights by charging the property owners with knowing that their

---

133. The critical question under Wisconsin's regulatory takings framework is whether the property owner has been denied "all or substantially all practical uses of [the] property." *Id.* The owner's retention of some "substantial use[]"—any regulatory deprivation of value that falls short of the unspecified and characteristically vague "all or substantially all" threshold—relieves the government of the burden to pay just compensation. *Id.* at 380. Additionally, it is irrelevant which specific productive uses are denied: all uses must be considered together and "all or substantially all" must be denied by the regulation. *Zinn v. State*, 112 Wis. 2d 417, 429, 334 N.W.2d 67, 73 (1983). Note the slight variation from *Lucas*, in which the consideration was whether the regulation "denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); Gregory S. Alexander, *Takings' Jurisprudence in the U.S. Supreme Court: The Past 10 Years*, in CORNELL LAW FACULTY PUBLICATIONS, 857, 864 (1996) (noting that the Supreme Court's application of the *Penn Central* Standards has rarely resulted in the Court finding that a regulation is a "taking").

134. Ohm, *supra* note 129, at 175–76 (1997). Indeed, the Wisconsin Supreme Court has often developed standards later adopted by the U.S. Supreme Court. Brian W. Ohm, *Wisconsin Takings Law—A Brief Historical Perspective*, U. OF WIS.-MADISON DEP'T OF URBAN AND REG'L PLANNING 12–13 (1995), <https://dpla.wisc.edu/sites/dpla.wisc.edu/files/inline-files/ohm%20wisconsin%20takings%20law%20a%20brief%20historical%20perspective%2095-6.PDF> [https://perma.cc/KPM3-9NT7] [hereinafter *Wisconsin Takings Historical Perspective*].

135. *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972); see also Ohm, *supra* note 129, at 208 (noting that this formulation is known as the "public harm/benefit rule"); *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 32, 244 Wis. 2d 497, 517, 628 N.W.2d 781, 791 (2001).

136. *Just*, 56 Wis. 2d at 17; see also Ohm, *supra* note 129, at 211.

137. *Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 85, 284 N.W.2d 887, 892 (1979). This narrow formulation is not limited to the public trust doctrine; but also extends to other types of environmental regulations. Ohm, *supra* note 129, at 208.

land may be “heavily regulated from the get-go,” forcing the owners to assume the risk for severely limiting regulations.<sup>138</sup>

Also unique to Wisconsin’s regulatory takings framework is its approach to the denominator question. When determining the property at issue, Wisconsin courts often aggregate contiguous property segments as whole parcels<sup>139</sup>—taking to an extreme the Supreme Court’s anti-segmentation principle. To justify the aggregation of parcels, Wisconsin courts have highlighted the Supreme Court’s refusal to endorse any test that segments property or individual property rights for valuation purposes by placing significant emphasis on the value of the “property . . . as a whole.”<sup>140</sup> This formulation further tilts the analysis in favor of the government. By aggregating contiguous lots, courts give the government increased flexibility in land use regulation, thereby decreasing the likelihood that a regulation limits “all or substantially all” practical use of their property.<sup>141</sup>

#### B. Murr’s Regulatory Background

The St. Croix River area along the Wisconsin–Minnesota border is “one of the most unspoiled and picturesque areas in the United States.”<sup>142</sup> But nearly from the point of discovery by French Explorers in 1697, widespread exploitation of natural resources in the riverbed area have threatened the pristine state of this beautiful river and the surrounding woodlands.<sup>143</sup> Over time, the riverbed area has changed drastically at the hands of industry: from a thick pine forest,<sup>144</sup> to a fruitful farmland,<sup>145</sup> to a recreation destination cherished for its natural beauty.<sup>146</sup>

In the mid-1960s, increased urbanization in the Twin Cities metropolitan area gave rise to contrasting visions for the future of the St. Croix River area.<sup>147</sup>

---

138. *R.W. Docks and Slips*, 2001 WI 73, ¶ 29.

139. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 375–76, 548 N.W.2d 528, 532 (1996).

140. *Id.* at 375–76.

141. *Id.* at 374.

142. *Great Rivers Confluence Symposium 2018: Valuing 50 Years of the Wild and Scenic Rivers Act*, ST. CROIX 360 (Jan. 17, 2018), <https://www.stcroix360.com/2018/01/great-rivers-confluence-symposium-2018-valuing-50-years-of-the-wild-and-scenic-rivers-act/> [<https://perma.cc/9D6Z-QK7F>].

143. *See* EILEEN M. MCMAHON & THEODORE J. KARAMANSKI, *NORTH WOODS RIVER: THE ST. CROIX RIVER IN UPPER MIDWEST HISTORY* 21, 43–46, 56–59, 73–79, 85–120, 133–38 (2009).

144. *Id.* at 73.

145. *Id.* at 150–60.

146. *Id.* at 211–20.

147. *Id.* at 268–70.

On one hand, environmentalists and recreationalists sought to preserve and promote the natural beauty of the region.<sup>148</sup> On the other hand, regional energy companies sought to capitalize on the river's resources and proposed the construction of a coal-fired power plant and power-producing dams along the river.<sup>149</sup> In the face of this conflict, Wisconsin Senator Gaylord Nelson introduced federal regulations for the preservation of the St. Croix River area.<sup>150</sup> These efforts were rewarded in 1968 when President Lyndon Johnson signed the Wild and Scenic Rivers Act into law.<sup>151</sup> The Scenic Rivers Act, an effort to "further the cause of conservation," gave "immediate protection to portions of eight rivers and a ribbon of land along each river bank" in order to "prize and to protect God's precious gifts" of an unspoiled environment for future generations.<sup>152</sup> The Upper St. Croix River was one of the original eight rivers designated for preservation under the Act.<sup>153</sup> Protection was extended to the Lower St. Croix River in 1972.<sup>154</sup>

The regulatory framework impacting the St. Croix River and underlying the controversy in *Murr* is quite extensive. To most effectively preserve the natural state of the St. Croix, the Wild and Scenic Rivers Act emphasized collaboration between state and federal agencies, "[encouraging] [s]tates and their political subdivisions . . . to cooperate in the planning and administration of components of the system."<sup>155</sup> Wisconsin, consistent with this call for collaboration, enacted Wisconsin Statutes section 30.27 to "guarantee the protection of the wild,

---

148. *Id.* at 269–70.

149. *Id.* at 270.

150. *Id.* at 270–75.

151. Wild and Scenic Rivers Act, Pub. L. No. 90–542, 82 Stat. 906 (1968) (codified at 16 U.S.C. § 1271 (1968)). This Act created a national policy for the preservation of "certain selected rivers . . . which . . . possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." *Id.* § 1(b); see also *Lyndon B. Johnson and the Environment*, NAT'L PARK SERV., <https://www.nps.gov/lyjo/planyourvisit/upload/environmentcs2.pdf> [<https://perma.cc/8NEN-SM5G>]. President Johnson stated the need to "sustain an environment suitable for man [by] keep[ing] these [wild rivers] we have"; "[t]here is no excuse . . . to [use] our major rivers as pipelines for toxic waste." *Id.*

152. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1968–1969, Book II—July 1, 1968 to Jan. 20, 1969, at 1000, 1002 (1970).

153. Wild and Scenic Rivers Act § 3(a)(6).

154. Lower Saint Croix River Act of 1972, Pub. L. No. 92–560, sec. 2, § 9, sec. 3, 86 Stat. 1174 (1972) (codified at 16 U.S.C. § 1271 (1968)); see also Classification of a Small Scenic Riverway, 40 Fed. Reg. 43,244 (Sept. 19, 1975) ("[T]he Lower St. Croix River and its immediate environment possess outstanding scenic and esthetic, recreational, and geologic values" and "should be protected for the benefit and enjoyment of present and future generations.").

155. Wild and Scenic Rivers Act § 10(e); Lower Saint Croix National Scenic Riverway, 41 Fed. Reg. 26,236–37 (June 25, 1976); see also 16 U.S.C. § 1273(a) (2012).



scenic and recreational qualities of the river for present and future generations.”<sup>156</sup> Recognizing that land development “poses the greatest single threat to maintaining a pleasant and scenic river environment,”<sup>157</sup> section 30.27(2) directed the Wisconsin Department of Natural Resources (DNR) and impacted local governments to adopt zoning guidelines and standards that “apply to the banks, bluffs and bluff tops of the Lower St. Croix River.”<sup>158</sup>

Pursuant to these legislative directives, the Wisconsin DNR adopted Wisconsin Administrative Code NR 118.<sup>159</sup> St. Croix County eventually followed, adopting an ordinance in lock-step with the State’s code.<sup>160</sup> The language contained in the identical provisions and relevant to *Murr*’s issue of non-conforming substandard lots<sup>161</sup> stipulates that “[a]djacent 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.*”<sup>162</sup> The ordinance defined “net project area” as the “[d]evelopable land area minus slope preservation zones, flood plains, road rights-of-way, and wetlands.”<sup>163</sup> Mitigating the impact of these regulations, a grandfather clause exempted “substandard” lots already owned at the time of the implementation of the regulations.<sup>164</sup> These regulations constitute the regulatory framework at issue in *Murr*.

### C. Factual and Procedural Background

The Murr family has long treasured its property on a bend of the beautiful St. Croix River.<sup>165</sup> The Murrs’ parents purchased Lot F in 1960 and built a

---

156. WIS. STAT. § 30.27(1) (2018).

157. Classification of a Small Scenic Riverway, 40 Fed. Reg. at 43,246.

158. WIS. STAT. § 30.27(2)(a) (2018); *see also* WIS. STAT. § 30.27(3) (2018) (noting that the State legislation required the impacted county, city, village, or town to adopt guidelines and standards consistent with the DNR rules). Subsection 3 also enabled the DNR to adopt and enforce ordinances where the local governing body failed to do so. *Id.*

159. *See* Joint Appendix at 7, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 13–214), 2016 WL 1459531; *see also* WIS. ADMIN. CODE NR § 118 (July 1980).

160. *See* Joint Appendix, *supra* note 159, at 7; *see also* ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE AND DEVELOPMENT ch. 17, sub. III.V., § 17.36(I)(4) (2005).

161. *See* discussion *infra* Section IV.C.

162. ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE AND DEVELOPMENT ch. 17, sub. III.V., § 17.36(I)(4)(a)(2) (2005) (emphasis added).

163. WIS. ADMIN. CODE NR § 118.03(27) (November 2004); Joint Appendix, *supra* note 159, at 26; ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE AND DEVELOPMENT ch. 17, § 17.09(160) (2017).

164. WIS. ADMIN. CODE NR § 118.08(4) (February 2012); ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE AND DEVELOPMENT ch. 17, sub. III.V., § 17.36(I)(4)(I)(4)(a)(2) (2005).

165. *See* Joint Appendix, *supra* note 159, at 32.

cabin on the land before transferring the property to the family’s plumbing company in 1961.<sup>166</sup> In 1963, the parents also purchased Lot E—the lot at issue in the litigation—this time holding the lot in their own names, intending to use it as an investment property to be developed or sold separate from Lot F.<sup>167</sup> The Murrs held the two lots separately<sup>168</sup> until the parents transferred the properties in 1994 and 1995, respectively, to the joint ownership of their children.<sup>169</sup>

The two lots are very similar in layout: each has two plots of developable land—an upper and lower plot—divided by a steep 130-foot bluff, and each consists of approximately 1.25 acres in total area.<sup>170</sup> But the *combined* “net project area” is only .98 acres.<sup>171</sup> Consequently, the transfer of the two lots to the joint ownership of the children in 1995 triggered the aforementioned merger provisions and the two lots effectively became one under state law.<sup>172</sup>

Around 2004, the family grew tired of repeated flooding at their communal summer refuge and began discussions with the St. Croix Zoning Board in efforts to “flood-proof” their cabin.<sup>173</sup> To fund the necessary upgrades, the family planned to sell the undeveloped Lot E.<sup>174</sup> They were, however, “quite flabbergasted” when the St. Croix Zoning Board informed them that Lot E could not be sold or developed as a separate lot because the merger provisions had combined Lot E and Lot F.<sup>175</sup> The Murrs sought review of the Board’s determination and applied for six variances and two special exception

---

166. *Id.* at 6; *Murr v. Wisconsin*, 137 S. Ct. 1933, 1940 (2017).

167. Joint Appendix, *supra* note 159, at 6; *Murr*, 137 S. Ct. at 1940.

168. Joint Appendix, *supra* note 159, at 6. Lot F was held by the family business and Lot E was held by the parents. *See id.* Additionally, the properties were taxed separately through the end of 2012. *Id.* at 24.

169. *Id.* at 6; *Murr*, 137 S. Ct. at 1941.

170. Joint Appendix, *supra* note 159, at 29–30; *Murr*, 137 S. Ct. at 1940; *Murr v. St. Croix Cty. Bd. of Adjustment*, 2011 WI App 29, ¶ 4, 332 Wis. 2d 172, 176–78, 796 N.W.2d 837, 841.

171. *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, ¶ 5 (Wis. Ct. App. Dec. 23, 2014) (per curiam) (unpublished). Lot E itself only has .5 acres of net project area. Joint Appendix, *supra* note 159, at 76.

172. *Murr v. St. Croix Cty. Bd. of Adjustment*, 2011 WI App 29, ¶ 14 (citing WIS. ADMIN. CODE NR § 118.08(4)(a)(i) (February 2012)) (noting that, upon the transfer of the property, the grandfather clause no longer applied). The transfer of the property to joint ownership of the “substandard” properties triggered the merger under both ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE AND DEVELOPMENT ch. 17, sub. III.V., § 17.36(I)(4) (2005) and WIS. ADMIN. CODE NR section 118.08(4) (February 2012).

173. Joint Appendix, *supra* note 159, at 76.

174. *Id.*

175. *Id.* at 93.

permits.<sup>176</sup> The Zoning Board rejected all applications, finding that they were inconsistent with the objectives of the National Wild and Scenic Rivers Act.<sup>177</sup> On appeal, the Wisconsin courts affirmed the Board's decision and held that the merger of the two substandard lots properly preserved both "property values and the environment."<sup>178</sup>

After exhausting the available administrative remedies, the Murrs were left in a situation where Lot E was essentially rendered useless as an independent parcel: the property could not be sold, developed, or even used for agricultural purposes.<sup>179</sup> Hoping to solve their dilemma, the Murr family brought a claim seeking just compensation for the unconstitutional taking of its land.<sup>180</sup> The family argued that the merger provision artificially melded Lot E and Lot F under state law and deprived Lot E "of all, or practically all" beneficial uses, thus triggering an unconstitutional taking.<sup>181</sup>

The Wisconsin courts disagreed. The circuit court granted the government's motion for summary judgment, concluding that the Murrs' property—when viewed as a whole—retained some beneficial use.<sup>182</sup> The Wisconsin Court of Appeals then took up the case and provided a thorough analysis of the State's takings jurisprudence.<sup>183</sup> Focusing on the state courts' unique jurisprudential twist on the *Penn Central* parcel as a whole terminology,<sup>184</sup> the court of appeals affirmed the circuit court and held that the contiguous lots should be viewed as a whole and, when viewed as such, the

---

176. *Id.* at 24; *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941 (2017); *Murr v. St. Croix Cty. Bd. of Adjustment*, 2011 WI App 29, ¶ 5.

177. *See Murr v. St. Croix Cty. Bd. of Adjustment*, 2011 WI App 29, ¶ 15; Joint Appendix, *supra* note 159, at 66.

178. *Murr v. St. Croix Cty. Bd. of Adjustment*, 2011 WI App 29, ¶ 14. The circuit court that initially reviewed the Board's decision agreed with the rejection of the special exception permits (denial to use or sell the lots separately) but disagreed with the rejection of the variances. *Id.* ¶¶ 2–3. The Murrs appealed this decision and the court of appeals affirmed regarding the special exception permit. *Id.* The court of appeals, however, did reverse the circuit court's decision regarding the variances, thereby affirming the Board's decision in all respects. *Id.* ¶ 3. The Wisconsin Supreme Court denied the petition for review. *Murr v. St. Croix Cty. Bd. of Adjustment*, 2011 WI App 29, *cert. denied*, 2011 WI 86, 335 Wis. 2d 146, 803 N.W.2d 849 (2011).

179. Joint Appendix, *supra* note 159, at 9.

180. *Id.* at 10; *see also* Petition for Writ of Certiorari at 6, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15–214), 2015 WL 4932231.

181. Joint Appendix, *supra* note 159, at 9–10.

182. *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, ¶ 31 (Wis. Ct. App. Dec. 23, 2014) (per curiam) (unpublished).

183. *See id.* ¶¶ 16–19.

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

parcel “retains beneficial and practical use as a residential lot.”<sup>185</sup> The court reasoned that the Murrs were wrong to assume that “they had an unfettered right to use their land as they pleased at the inception of their ownership.”<sup>186</sup> The 1995 transfer brought the lots under common ownership and “the Murrs *knew or should have known* that their lots were ‘heavily regulated’” and effectively merged by law at that point.<sup>187</sup>

Following denial of review at the Wisconsin Supreme Court,<sup>188</sup> the United States Supreme Court granted the Murrs’ writ of certiorari.<sup>189</sup>

## V. MURR AT THE SUPREME COURT

### A. *The Arguments of the Murr Family and the State of Wisconsin*

In their petition for writ of certiorari, the Murrs argued that this case presented the perfect opportunity for the Supreme Court to resolve its long-standing “discomfort” with the definition of the “denominator in the takings fraction” against which the decrease in value must be measured.<sup>190</sup> Considering the “importance of the issue,”<sup>191</sup> the precise set of facts presented in the case,<sup>192</sup> and the fact that state and federal law seem to conflict on this precise issue,<sup>193</sup> the Murrs argued that the Supreme Court should “finally address” the “critical question” of what makes up the parcel as a whole in the takings analysis.<sup>194</sup> The Murrs suggested that, just as the Court has refused to adopt a principle of segmentation,<sup>195</sup> the Court should also reject Wisconsin’s “rule” of aggregating

185. *Murr v. State*, 2014 WL 7271581, ¶ 31. The “contiguousness” of the Murrs’ property was the “key fact” supporting the “well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.” *Id.* ¶¶ 19–20.

186. *Id.* ¶ 29.

187. *Id.* (emphasis added).

188. *Murr v. State*, 2014 WL 7271581, ¶ 31, *cert. denied*, 2015 WI 47, 366 Wis. 2d 59, 862 N.W.2d 899 (2015).

189. *Murr v. State*, 2014 WL 7271581, *cert. granted*, 136 S. Ct. 890 (Mem.) (2016).

190. Petition for Writ of Certiorari, *supra* note 180, at 13–14.

191. *Id.* at 15.

192. *Id.* at 14–17.

193. *Id.* at 17–21.

194. *Id.* at 11–12, 15.

195. As discussed previously, segmentation refers to the idea that individual rights within the bundle of sticks can be separated and analyzed independently in light of the government’s regulation. *See* Petitioners’ Brief on the Merits at 13–15, *Murr v. Wisconsin* 137 S. Ct. 1933 (2017) (No. 15–214), 2016 WL 1459199.

contiguous properties.<sup>196</sup> Instead, the Murrs submitted, “the *entire fee title of a single parcel* is the parcel as a whole—the relevant takings unit.”<sup>197</sup> This “geographically defined parcel,” they argued, would be most “consistent with traditional understandings of property law” and the Court’s jurisprudence.<sup>198</sup>

The State, on the other hand, argued that state law should control the parcel as a whole analysis.<sup>199</sup> The State focused its analysis on the Court’s suggestion in *Lucas* that “the relevant parcel should be identified by property owners’ objectively ‘reasonable expectations’ as ‘shaped by the State’s law of property.’”<sup>200</sup> As the “Court has uniformly identified the property rights protected by the Takings Clause as those recognized by state law,” the State submitted that it would be “entirely sensible to look to the reasonable expectations shaped by that same state law when determining the relevant ‘parcel.’”<sup>201</sup> The State claimed that this “objective baseline” would create much needed clarity in the regulatory takings doctrine.<sup>202</sup>

#### B. *Murr v. Wisconsin: The Decision*

##### *Justice Kennedy’s Majority Opinion*

Following a summary of *Murr*’s factual and regulatory background, Justice Kennedy noted the painfully obvious: *Mahon* failed to provide any “detailed guidance for determining” when a regulation had gone too far.<sup>203</sup> The Justice then framed the opinion by discussing the Court’s regulatory takings jurisprudence—characterized by “its flexibility”—in light of “two competing objectives”: (1) “the individual’s right to retain the interests and exercise the freedoms at the core of private property ownership,”<sup>204</sup> and (2) “the

196. *Id.* at 16–19. Indeed, the Murrs argued that the Wisconsin court’s “rule” that contiguous parcels under common ownership must be combined is contrary to the Court’s jurisprudence. *Id.* at 19.

197. *Id.* at 23.

198. *Id.* at 24–29.

199. Brief for Respondent State of Wisconsin at 1, *Murr v. Wisconsin*, 137 S. Ct. at 1933 (2017) (No. 15–214), 2016 WL 3227033. The State argued that this was especially true “[g]iven that [the] takings analysis has traditionally been guided by the understandings of our citizens regarding the content of . . . the ‘bundle of rights’ that they acquire when they obtain title to the property.” *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)) (emphasis omitted).

200. *Id.* at 2 (quoting *Lucas*, 505 U.S. at 1016–17 n.7).

201. *Id.* at 24.

202. *Id.* at 25, 35.

203. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).

204. *Id.* at 1937. “[Private] [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.” *Id.* at 1943.

government's well-established power to adjust rights for the public good."<sup>205</sup> The balancing of these two considerations "requires a careful inquiry informed by the specifics of the case [with the analysis] driven 'by the purpose of the Takings Clause.'"<sup>206</sup> This introduction, focused on the inherent "flexibility" of the regulatory takings analysis, only hinted at the vague test the majority was about to produce.

Justice Kennedy then turned to the all-important denominator question: "[w]hat is the proper unit of property against which to assess the effect of the challenged governmental action?"<sup>207</sup> Refusing to implement a clear standard<sup>208</sup> and rejecting the arguments of both the Murr family and the State of Wisconsin as too formulaic,<sup>209</sup> Justice Kennedy instead adopted a multi-factor test—doubling down on the indeterminacy of the already problematic *Penn Central* analysis.<sup>210</sup> This test, objective in nature with reasonable expectations derived

---

205. *Id.* at 1937 (internal quotation marks and brackets omitted) (highlighting Justice Holmes's famous declaration that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). *Id.* at 1943; *see also* Thomas, *supra* note 28, at 498–99 (discussing the arguments for and against a strict regulatory taking doctrine).

206. *Murr*, 137 S. Ct. at 1943 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001)). As discussed previously, this "purpose of the Takings Clause . . . 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.'" *Palazzolo*, 533 U.S. at 617–18 (quoting *Armstrong v. Unites States*, 364 U.S. 40, 49 (1960)).

207. *Murr*, 137 S. Ct. at 1938.

208. *Id.* at 1945. Indeed, Justice Kennedy noted that "no single consideration can supply the exclusive test for determining the denominator." *Id.*

209. *Id.* at 1946. In so doing, Justice Kennedy dismissed as "unduly narrow" concepts both (1) the simple segmentation of individual property rights and (2) the idea that "property rights under the Takings Clause should be coextensive with those under state law." *Id.* at 1944. First, the Murrs' "presumption that lot lines define the relevant parcel in every instance" is flawed because it "contravenes the Court's case law, which recognizes that reasonable land-use regulations do not work a taking." *Id.* at 1947. Because merger provisions such as the one at issue in this case are generally a "legitimate exercise of government power," the "harshness of a merger provision may be ameliorated by the availability of a variance," and a strict adherence to state lot line would frustrate the efforts of local zoning commissions and create the risk of gamesmanship, the Murrs' argument is "problematic." *Id.* at 1947–48. Second, the State's argument was faulty because tying "the definition of the parcel to state law . . . simply assumes the answer to the question." *Id.* at 1946. "States do not have the unfettered authority to shape and define property rights and reasonable investment-backed expectations, leaving [property]-owners without recourse against unreasonable regulations" as that would "improperly . . . fortify the state law against a takings claim." *Id.* at 1944–45 (internal quotation marks omitted). Also, although the Court suggested in *Lucas* that state law may be determinative, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 n.7, Justice Kennedy held that this suggestion was only "dicta" and is merely one factor of consideration. *Murr*, 137 S. Ct. at 1946–47.

210. *See* Brady, *supra* note 79, at 55.

“from background customs and the whole of our legal tradition,” includes three factors: “[1] the treatment of land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land.”<sup>211</sup> Courts are to use these factors to “determine whether reasonable expectations about property ownership would lead a [property owner] to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.”<sup>212</sup>

First, courts must “give substantial weight” to “the treatment of the land under state and local law.”<sup>213</sup> Although a takings claim is not invalid per se because of preexisting regulations, “a reasonable restriction” that already exists or is triggered at the time property is transferred “can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.”<sup>214</sup> Thus, in the formulation of reasonable expectations, property owners must “acknowledge legitimate restrictions” at the state and local level that affect the “use and dispensation of the property.”<sup>215</sup>

Second, courts must consider the “physical characteristics” of the property.<sup>216</sup> Specifically, the courts should analyze “the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment.”<sup>217</sup> Special relevance is to be given where property is in areas “subject to, or likely to become subject to, environmental or other regulation.”<sup>218</sup>

Third, “courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.”<sup>219</sup> In this way, courts are to focus on whether any “special relationship”<sup>220</sup>—some type of value-based complementarianism, though not necessarily economic in nature<sup>221</sup>—between the holdings may mitigate any

---

211. *Murr*, 137 S. Ct. at 1945.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 1945–46. A reasonable critic of Justice Kennedy’s theory might ask, what areas are not “subject to, or likely to become subject to, environmental or other regulations?”

219. *Id.* at 1946.

220. *Id.*

221. *Id.* at 1949. “Though a use restriction may decrease the market value of the property, the effect 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.” *Id.* at 1946; *see also*

negative effect of a regulation. The absence of such a “special relationship . . . may counsel against consideration of all the holdings as a single parcel.”<sup>222</sup>

Applying this multifactor test, the Court concluded that Lot E and F should be aggregated and evaluated together as the relevant parcel.<sup>223</sup> Regarding the first factor, the Murrs’ “voluntary conduct in bringing the lots under common ownership after the regulations were enacted” triggered the merger under state and local law and created what should have been the “reasonable expectation” that the lots would be treated as a single parcel.<sup>224</sup> Applying the second factor, the contiguousness of the lot lines, the natural limitations of potential uses of the lots, and the location of the lots along a highly protected riverway were all physical characteristics that supported the treatment of the lots as a unified parcel.<sup>225</sup> The third factor—looking to the value of the property under the challenged regulations—also supported the consideration of the lots as a single parcel because the enhanced combined value of the lots, as opposed to their lower valuation when viewed independently, “shows their complementarity.”<sup>226</sup> In short, due to their own actions, the unique location of their land, and the complimentary value of the property, the Murrs should have expected that their land would be significantly burdened by governmental regulations.<sup>227</sup>

Justice Kennedy thus affirmed the Wisconsin Court of Appeals’ decision regarding the denominator: the Murrs’ property should be analyzed “as a single unit.”<sup>228</sup> And viewing the two lots together as a single parcel, the Murrs failed to “establish a compensable taking.”<sup>229</sup>

---

*Leading Cases: Constitutional Law, supra* note 117, at 253–54 (observing that this third factor is a “significant contribution to takings law”).

222. *Murr*, 137 S. Ct. at 1946.

223. *Id.* at 1948.

224. *Id.*

225. *Id.*

226. *Id.* at 1948–49.

227. Garnett, *supra* note 79, at 143.

228. *Murr*, 137 S. Ct. at 1949.

229. *Id.* Indeed, there was no taking under *Lucas*’ “total takings” framework because “[t]he property ha[d] not lost all economic value.” *Id.* Similarly, there was no taking under the *Penn Central* analysis because the economic impact of the regulations was not severe, the Murrs had no reasonable expectations to sell or develop the lots separately due to the regulations predating their ownership of the lots, and the “governmental action was a reasonable land-use regulation.” *Id.*



*Chief Justice Roberts's Dissent*<sup>230</sup>

Despite his agreement with the ultimate conclusion reached by the majority, Chief Justice Roberts authored a strong dissent.<sup>231</sup> The Chief Justice argued that the majority had “[gone] astray”<sup>232</sup> with its “elaborate test”<sup>233</sup> and “complex set of factors.”<sup>234</sup> In response to this “stand against simplicity,”<sup>235</sup> Chief Justice Roberts introduced exactly what Justice Kennedy and the majority said could not exist: a “simple test.”<sup>236</sup> Because “[s]tate laws define the boundaries of distinct units of land,” those state law boundaries should be used to determine the relevant parcel “in all but the most exceptional circumstances.”<sup>237</sup> The Chief Justice reasoned that this approach is “entirely consistent with *Penn Central*” and would not be susceptible to “gamesmanship”—as the majority suggested—at the hands of either property owners or the government.<sup>238</sup> State law, by “creat[ing] distinct parcels of land and defin[ing] the rights that come along with owning [these] parcels,” would be the ideal basis for determining the relevant parcel against which to weigh the effect of the governmental regulation.<sup>239</sup>

---

230. Justice Thomas also authored an insightful dissent, in which he suggested that the Privileges or Immunities Clause would provide a better basis for the regulatory takings claim. *See id.* at 1957 (Thomas, J., dissenting). *See generally* John Greil, *Second-Best Originalism and Regulatory Takings*, 41 HARV. J. L. & PUB. POL’Y 373 (2018); Jonathan H. Adler, *Should Regulatory Takings Doctrine be Reconsidered from the Ground Up?*, WASH. POST (June 23, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/should-regulatory-takings-doctrine-be-reconsidered-from-the-ground-up/?utm\\_term=.6dd2e3beb467](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/should-regulatory-takings-doctrine-be-reconsidered-from-the-ground-up/?utm_term=.6dd2e3beb467) [<https://perma.cc/6BL2-QKFJ>].

231. *Murr*, 137 S. Ct. at 1950. Indeed, under the existing regulatory takings doctrine, it would be difficult to come to the opposite conclusion. As Justice Kagan submitted at oral arguments, the *Murrs* could not take “half of State law”—the half defining lots lines—while ignoring the other half—the presumably legitimate governmental regulation at issue in this case. Transcript of Oral Argument at 16, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15–214), 2017 WL 1048381.

232. *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).

233. *Id.*

234. *Id.* at 1954.

235. *Id.*

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

237. *Id.* at 1953.

238. *Id.*

239. *Id.* at 1954. Moreover, this approach would be the only logical one considering the relevant parcel in the regulatory takings analysis has *always* been identified pursuant to principles of state property law. Garnett, *supra* note 79, at 133, 139. But the majority knocks this stable definition of property “loose from its foundation . . . and throws it into the maelstrom of multiple factors,” making the identification of the relevant parcel a takings-specific “judgment call” informed by the “reasonableness of the regulation.” *Murr*, 137 S. Ct. at 1955–57 (Roberts, C.J., dissenting).

Additionally, the Chief Justice noted that the majority opinion “undermines the effectiveness of the Takings Clause as a check on the government’s power” to infringe upon personal property rights.<sup>240</sup> The majority’s move away from the baseline of state property law principles allows the government to argue for, and courts to create, “a litigation-specific definition of ‘property’” that gives undue weight to the government’s regulatory interests.<sup>241</sup> Under this formulation, the “government’s goals shape the playing field before the contest over whether the challenged regulation goes ‘too far’ even gets underway.”<sup>242</sup> Indeed, the property owner is now forced to prove that the government’s regulations are unreasonable when simply seeking to identify the relevant parcel for the takings analysis.<sup>243</sup> Thus, in the clash between the government—representing the “common good”—and the interests of individual property owners, the already inherent imbalance against the property owner is only magnified, “double-counting to tip the scales in favor of the government.”<sup>244</sup>

## VI. RESPONSE TO THE DECISION

### A. Academic Reaction to the Decision

Many commentators have expressed disappointment in the Court’s failure to clean up this important aspect of the regulatory takings doctrine<sup>245</sup> and the decision’s particularly harsh impact on personal property rights.<sup>246</sup> Justice Kennedy, putting “legal ingenuity into intellectual overdrive,” introduced a flexible “laundry list of considerations” for the determination of the relevant parcel—for the first time defining property under the Takings Clause as a

---

240. *Murr*, 137 S. Ct. at 1954 (Roberts, C.J., dissenting).

241. *Id.* at 1955.

242. *Id.*

243. *Id.*

244. *Id.*

245. See generally Brady, *supra* note 79; Epstein, *supra* note 101, at 151–52; Garnett, *supra* note 79; Green, *supra* note 76; Charles M. Kassir, Note, *Murr-ky Waters: How Murr v. Wisconsin Creates Uncertainty in Attempting to Answer the “Denominator Question”*, 77 MD. L. REV. ENDNOTES 73 (2018).

246. See Ilya Somin, *A Loss for Property Rights in Murr v. Wisconsin*, WASH. POST (June 23, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/?utm\\_term=.9e252c35d65d](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/?utm_term=.9e252c35d65d) [<https://perma.cc/33XH-S7P2>]; see also Roger Pilon, *Another Bleak Supreme Court Decision for Property Rights*, WASH. EXAMINER (June 28, 2017), <http://www.washingtonexaminer.com/another-bleak-supreme-court-decision-for-property-rights/article/2627245> [<https://perma.cc/7RW5-H3JH>]. Indeed, *Murr* “further undermined the already enfeebled constitutional rights enjoyed by property owners against regulatory excess.” Garnett, *supra* note 79, at 131.

matter of federal common-law.<sup>247</sup> This unfortunate development fails to “advance any conception of fairness and justice,” but rather introduces new and “massive levels of *ad hocery*” into an already ill-defined framework.<sup>248</sup> Furthermore, the doubling down on factor tests only compounds the *Penn Central* indeterminacy, creating “*Penn Central* squared.”<sup>249</sup> It would have been far better to follow the Chief Justice’s approach that would “stabilize expectations as to the denominator of the regulatory-takings formula.”<sup>250</sup>

Particularly concerning is Justice Kennedy’s hijacking of the “reasonable expectations” of private property owners. In the Court’s new denominator analysis, the “reasonable expectations” of the property owner are “king.”<sup>251</sup> Yet somewhat counterintuitively, “[k]nowledge becomes surrender” in that the more an individual property owner knows—or *should know*—about the government’s regulation or intention to regulate in a given area, the more insulated they become from a successful takings claim.<sup>252</sup> The obvious danger of this approach is in its flexibility: the government and the courts can twist these vague standards to further cement as “reasonable” any state regulatory scheme that “purport[s] to advance the public interest” or that has a parallel in another jurisdiction.<sup>253</sup> Thus, perhaps the greatest question following *Murr* is whether courts will allow such manipulation or will rather give proper weight to the reasonableness of the property owner’s expectations.<sup>254</sup>

247. Epstein, *supra* note 101, at 175; see also Garnett, *supra* note 79, at 141–42; Brady, *supra* note 79, at 55–56. The holding in *Murr* also poses a severe risk to property federalism. *Id.* This is likely, however, the logical working out of the Court’s misplaced incorporation of the Fifth Amendment’s Takings Clause. See Karkkainen, *supra* note 58, at 831.

248. Epstein, *supra* note 101, at 175, 178.

249. Transcript of Oral Argument, *supra* note 231, at 35 (statement of Wisconsin Solicitor General Misha Tseytlin); see also *Leading Cases: Constitutional Law*, *supra* note 117, at 259; Brady, *supra* note 79, at 54–55.

250. Epstein, *supra* note 101, at 178.

251. Sara K. Beachy, *Regulatory Takings: U.S. Supreme Court Announces New Test in Wisconsin Case*, INSIDE TRACK (July 5, 2017), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=9&Issue=13&ArticleID=25710> [<https://perma.cc/S7RT-R8XT>].

252. Epstein, *supra* note 101, at 180. Notice, for example, that in the analysis of *Murr*, Justice Kennedy failed to consider actual expressed expectations of the Murrs, instead focusing on what the Murrs *should have* expected. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017).

253. Garnett, *supra* note 79, at 146–48; see also Luke A. Wake, *The Enduring (Muted) Legacy of Lucas v. South Carolina Coastal Council: A Quarter Century Retrospective* 25 (April 28, 2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2960341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960341) [<https://perma.cc/B5F2-YCQA>].

254. See Wake, *supra* note 253 (manuscript at 25). Also concerning for individual property owners is the Court’s limited analysis of whether the regulations were within Wisconsin’s police power. Epstein, *supra* note 101, at 179. Indeed, the Court only briefly noted that the land use regulation

In addition, the majority's decision only further muddles the regulatory takings doctrine in lower court systems across the nation. The shift away from the straightforward baseline of constitutional property federalism presents lower courts—especially at the state level—with a much more complex analysis.<sup>255</sup> *Murr*'s factor-driven approach to determining the objective reasonableness of the regulatory action will likely lead—although certainly not require<sup>256</sup>—courts to consider analogous regulatory frameworks employed by other jurisdictions.<sup>257</sup> This seemingly unrestricted analysis of “multi-state norms” would undoubtedly lead to inconsistent application by courts at every level and further tilt the scales against individual property owners.<sup>258</sup>

### B. Wisconsin Law in the Wake of *Murr*

#### 1. Wisconsin Homeowners' Bill of Rights

Though the Murrs' claim was ultimately denied by the Supreme Court, the ending to the family's story is a happy one thanks to the Wisconsin Legislature.<sup>259</sup> Even before the final decision in *Murr*, Wisconsin lawmakers had begun work on a bill to slow “the creep of overbearing government”

---

was legitimate, primarily focusing the discussion on the legitimacy of the government's action as it relates to the reasonableness of the property owner's expectations. *Murr*, 137 S. Ct. at 1945. This approach, signals the further erosion of any perceived restrictions on the police power within the context of regulatory takings doctrine. See discussion *supra* note 115.

255. See Brady, *supra* note 79, at 55–56; see also Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 92–101 (2005) (describing the value of state competition in property forms); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 954 (2000) (noting that because the Constitution does not “require that constitutional property be created in any particular form,” it “permits substantial experimentation and evolution of property institutions over time”); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 310 (1993) (“[I]t is a commonplace of Our Federalism that [rules of property] are left for definition by bodies of state law that the States are free to shape as they severally choose.”); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 217–18, 222–24 (2004) (noting scholarly inattention to this aspect of takings law and overweighing how states differently define constitutional property).

256. As noted in Section VI.B.2, it does not appear that courts are *bound* to consider regulations of other jurisdiction when conducting this part of the analysis. Therefore, focusing on the laws within the relevant jurisdiction would be a better baseline against which to determine whether the property owner's expectations are indeed reasonable.

257. See Brady, *supra* note 79, at 66–68.

258. See *id.* at 68–69.

259. See Mike Longaecker, *Top 10: Murrs 'Will Remember this Year for the Rest of Our Lives'*, HUDSON STAR OBSERVER (Dec. 29, 2017), <http://www.hudsonstarobserver.com/news/crime-and-courts/4379288-top-10-murrs-will-remember-year-rest-our-lives> [https://perma.cc/KZJ8-GMMA].

responsible for “imperiled property rights and homeownership.”<sup>260</sup> This proposed legislation included property rights reforms focused precisely on the types of regulations at issue in *Murr*.<sup>261</sup> The embattled Murr family became the face of this effort, helping push the legislature’s “common sense bill” across the Governor’s desk less than six months after the Supreme Court’s decision.<sup>262</sup>

The Act makes several significant changes to Wisconsin’s law by limiting the regulatory power of local government zoning boards.<sup>263</sup> For example, the Act *requires* local governments to grant conditional use permits—like those sought by the Murrs at the outset of their legal battle<sup>264</sup>—so long as the applicant “meets or agrees to meet all of the requirements and conditions specified in [that local government] ordinance.”<sup>265</sup> Furthermore, those imposed conditions or requirements must be “related to the purpose of the ordinance and be based on substantial evidence.”<sup>266</sup> As an added protection, the applicant may, following the required showings of the respective parties, directly appeal to the circuit court a local board’s decision to deny the permit or variance.<sup>267</sup>

Pertaining specifically to the Murrs are the Act’s additional protections for homeowners seeking to build on, or convey the ownership rights to, substandard lots.<sup>268</sup> Under the Act, no local government may prohibit a property owner from (1) “conveying an ownership interest in a substandard lot,” or (2) “[u]sing a substandard lot as a building site” so long as the necessary conditions or requirements have been met.<sup>269</sup> Additionally, the Act preempts lot merger provisions implemented “without the consent of the owners of the

---

260. Press Release, Wisconsin Legislature, Tiffany and Jarchow Roll Out “Homeowners’ Bill of Rights” 1 (June 8, 2016), <http://legis.wisconsin.gov/senate/12/tiffany/media/1351/2016-06-08-homeowner-bill-of-rights-pr-revised.pdf> [<https://perma.cc/FBW4-ZNJR>].

261. *Id.* at 1–2. Points 4, 5, and 9 of the memorandum all focused precisely on the types of regulations that led to the takings claim in *Murr*. *Id.*; *see also* Groen, *supra* note 2.

262. Longaecker, *supra* note 259. *See generally* 2017 Wis. Act 67.

263. Those aspects not relevant to the issue at hand and, therefore, not further discussed in this comment are (1) a strengthening of the individual property owner’s rights to continue to develop nonconforming structures, (2) a limited change to the treatment of variances, and (3) a prohibition on homeowners’ associations and housing cooperatives from issuing agreements restricting the rights of members to fly the United States flag. *See* HENNING & GROSZ, *supra* note 8, at 2–4; 2017 Wis. Act 67.

264. *See* Joint Appendix, *supra* note 159, at 8.

265. WIS. STAT. §§ 59.69(5e)(b), 60.61(4e)(b), 60.62(4e)(b), 62.23(7)(de)(2)(a) (2018).

266. WIS. STAT. § 60.61(4e)(b)(1) (2018).

267. HENNING & GROSZ, *supra* note 8, at 2; *see also* WIS. STAT. §§ 59.69(5e)(e), 60.61(4e)(e), 60.62(4e)(e), 62.23(7)(de)(5) (2018).

268. HENNING & GROSZ, *supra* note 8, at 3.

269. WIS. STAT. § 66.10015(2)(e) (2018).

lots that are to be merged.”<sup>270</sup> Thus, pursuant to these changes, the Murrs are now free to either sell or develop lot E as they see fit. More broadly, these provisions provide robust protections to property owners across the state and will serve as substantial barriers to the enforcement of unauthorized local regulations.<sup>271</sup>

## 2. The Wisconsin Supreme Court and the New *Murr* Standard

At least from a jurisprudential perspective, the Wisconsin courts seem to have gotten *Murr* right. Not only was the state court of appeals’ decision affirmed, but the Supreme Court also adopted a comprehensive, multi-factor test like that employed by the Wisconsin courts.<sup>272</sup> Nevertheless, the Wisconsin Supreme Court must now reconsider its regulatory takings analysis—especially that pertaining to the denominator factor—following *Murr*. This section analyzes two possible approaches: (1) creating a clearer definition of the denominator under Article I, Section 13 of the Wisconsin Constitution; or (2) narrowly construing *Murr*’s factor test to prevent further deterioration of personal property rights.

---

270. WIS. STAT. § 227.10(2p) (2018).

271. Those that question the validity or potential success of the Wisconsin Homeowners’ Bill of Rights should consider the continued success of similar legislation passed following *Kelo v. City of New London*, 545 U.S. 469 (2005), a landmark decision in which the Supreme Court decimated the “public use” requirement of the Takings Clause. *Id.* at 484, 489–90. (In *Kelo*, the court held that the transfer of property from one private property owner to a private company solely for “economic development” was justified as a “public use.”) Following that case, states—including Wisconsin—implemented their own version of a “homeowners’ bill of rights” tailored to address the Court’s decision. See HENNING & GROSZ, *supra* note 8, at 3–4; see also Nick Sibilla, *Landowner’s Bill of Rights Are Not “Suggested Guidelines,” Georgia Supreme Court Rules*, FORBES (Nov. 3, 2017), <https://www.forbes.com/sites/instituteforjustice/2017/11/03/landowners-bill-of-rights-are-not-suggested-guidelines-georgia-supreme-court-rules/#192bfd481ebe> [https://perma.cc/GE3V-Q5QL]. Considering the success of the acts in other states, Wisconsin residents should rest assured that their property rights have been effectively bolstered and will be upheld by courts should a political subdivision impose upon these newly established rights. For example, in *City of Marietta v. Summerour*, 807 S.E.2d 324 (Ga. 2017), the Georgia Supreme Court held that the State’s homeowners’ bill of rights passed in the wake of *Kelo* was not “merely suggested guidelines” for state and local ordinances, *id.* at 328, but rather is “most reasonably understood as mandatory,” *id.* at 331.

272. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945–46 (2017); see also discussion *supra* pp. 27–28 (discussing *Murr* at the court of appeals). Notably, Wisconsin courts have historically been a leader in the area of regulatory takings law. See Ohm, *supra* note 129, at 175–76. For example, seven years prior to the regulatory takings revolution in *Mahon*, the Wisconsin Supreme Court held that it was within “the judicial power to determine whether the interference goes *so far as to violate some guaranteed right*.” *Mehlos v. City of Milwaukee*, 156 Wis. 591, 601, 146 N.W. 882, 885 (1914) (emphasis added); see also *Wisconsin Takings Historical Perspective*, *supra* note 134, at 12.

a. *New Federalism: Independent Interpretation of the Takings Clause Under the Wisconsin Constitution*

“[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.”

— Justice William J. Brennan<sup>273</sup>

Through the incorporation of specific guarantees of the Bill of Rights, federal constitutional claims have inundated state courts,<sup>274</sup> thrusting them to the front lines of federal constitutional interpretation.<sup>275</sup> As a result, litigators and judges alike began to focus solely on federal constitutional claims in state courts and failed to analyze or even raise separate arguments under parallel state constitutional provisions.<sup>276</sup> The majority of states have even adopted a lockstep approach—or something very near it—to the interpretation of parallel state and federal constitutional provisions.<sup>277</sup> This development has unfortunately “arrested the development of state constitutional law” and individual rights under state constitutions have begun to lose their significance.<sup>278</sup>

The abandonment of protections under state constitutions has led some legal theorists, judges, and even state courts to embrace New Federalism—the belief “that the decisions of the [Supreme] Court are not, and should not be,

---

273. Brennan, *supra* note 58, at 491.

274. See Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1147–49 (1985) [hereinafter Abrahamson] (“The United States Supreme Court’s docket shows the pervasiveness of federal constitutional issues in state criminal cases.”).

275. See Brennan, *supra* note 58, at 492. Again, it is generally accepted that the Takings Clause was incorporated and made applicable to the states through *Chicago B. & Q.R. v. Chicago*, 166 U.S. 226 (1897).

276. See SUTTON, *supra* note 44, at 8–9; see also Shirley S. Abrahamson, *State Constitutional Law, New Judicial Federalism, and the Rehnquist Court*, 51 CLEV. ST. L. REV. 339, 345 (2004) [hereinafter *State Constitutional Law*].

277. See Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

278. See *State Constitutional Law*, *supra* note 276, at 345.

dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”<sup>279</sup> In short, “[s]tate courts have authority to construe their own constitutional provisions however they wish,”<sup>280</sup> and should look to “their own constitutions to determine individual civil liberties” rather than blindly proceeding in lockstep with Supreme Court jurisprudence.<sup>281</sup> New Federalism’s proponents argue that “one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens.”<sup>282</sup> They submit that New Federalism is logical considering that federal constitutional guarantees of individual rights originated in the states.<sup>283</sup> Furthermore, new federalism provides state courts the opportunity to have the final say on matters because decisions grounded solely on state constitutional provisions are unreviewable by the Supreme Court.<sup>284</sup>

Though traditionally employing a lockstep approach to the interpretation of the “state constitution’s Declaration of Rights” and parallel provisions in the Bill of Rights, the Wisconsin Supreme Court fully embraced New Federalism

---

279. Brennan, *supra* note 58, at 502; *see also* SUTTON, *supra* note 44, at 9. Proponents of New Federalism insist that “[s]tate courts needn’t shift with changes in the decisions of the U.S. Supreme Court.” *State Constitutional Law*, *supra* note 276, at 347. Theoretically, New Federalism provides valuable benefits to the constitutional system of dual federalism. The fact that (1) state courts may be freer in developing new rules and doctrines and (2) the Supreme Court would benefit from the judicial experimentation of various state courts when developing its own rules are just two of several reasons to seriously consider this approach. *See* SUTTON, *supra* note 44, at 17–18, 20. Even so, the “fundamental puzzle” of New Federalism is the determination of which questions are important for uniformity as “a matter of uniform national policy” and which “allow for state differences.” *State Constitutional Law*, *supra* note 276, at 348.

280. SUTTON, *supra* note 44, at 16; Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 995 (1985) (“Proponents of state court activism have argued vigorously that in interpreting their own constitutions, state courts legitimately may diverge from the authoritative interpretations of analogous provisions in the federal constitution.”).

281. *State Constitutional Law*, *supra* note 276, at 345. Under New Federalism, the constitutional decisions of federal courts are merely persuasive and state court judges “seriously err” if they adopt a lockstep approach without independently weighing the protections provided by their own state constitution. Brennan, *supra* note 58, at 502. Thus, pursuant to New Federalism, state courts should only follow federal court decisions to the extent they are logical and well-reasoned. *Id.*

282. Brennan, *supra* note 58, at 503 (noting that federal cases “that foreclose federal remedies constitutes a clear call to state courts to step into the breach”).

283. *See* SUTTON, *supra* note 44, at 8.

284. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (“If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”).



in the early 2000s.<sup>285</sup> For example, in *State v. Knapp*,<sup>286</sup> the court abandoned Wisconsin's lockstep approach to Fifth Amendment criminal due process protections in favor of more expansive protections under the State's parallel constitutional provision.<sup>287</sup> Similarly, in *State v. Dubose*,<sup>288</sup> the Wisconsin Supreme Court struck its own path—for the first time unmoored by parallel Supreme Court jurisprudence—on the issue of eyewitness identification evidence.<sup>289</sup>

These two opinions and the court's embrace of New Federalism were severely criticized throughout the Wisconsin legal community as "pure, unvarnished result-orientation."<sup>290</sup> For one, United States Court of Appeals Judge Diane Sykes—a former Justice on the Wisconsin Supreme Court—argued that the Wisconsin Supreme Court's failure to rest its independent constitutional analysis on either the "language or history of the state constitution's" provisions reflected a court pursuing its "own policy judgment" rather than a principled analysis and interpretation of the state's constitutional provision.<sup>291</sup> Truly, though there are several concerns with the doctrine,<sup>292</sup> the greatest might be that New Federalism undeniably "imbues the court with substantial authority"<sup>293</sup> and subjects state courts and constitutions "to the same vagaries as the interpretation of the federal constitution."<sup>294</sup> Such an aggressive

---

285. Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 MARQ. L. REV. 723, 733 (2006). See also *State Constitutional Law*, *supra* note 276, at 348 ("Wisconsin's relationship to the federal system can, for the most part, be described as lock step."). This change was likely stimulated by then-Chief Justice Abrahamson's embrace of the doctrine. See generally, Abrahamson, *supra* note 274; *State Constitutional Law*, *supra* note 276.

286. 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

287. See Rick Esenberg, *A Court Unbound? The Recent Jurisprudence of the Wisconsin Supreme Court* 9–10 (2007), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/lhZ6cE38iAto3CRWglIVqKrbM9j2IkM6y7zNZE56.pdf> [<https://perma.cc/RXG9-KHUW>] [hereinafter Esenberg White Paper]; see also Sykes, *supra* note 285, at 731–34.

288. 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582.

289. See Sykes, *supra* note 285, at 734.

290. *Id.* at 733.

291. *Id.*

292. For example, in addition to the aforementioned concerns with judicial activism, New Federalism also (1) restricts the flexibility of state government and (2) leads to unpredictable results. See Maltz, *supra* note 280, at 1002.

293. Esenberg White Paper, *supra* note 287, at 10.

294. Richard A. Epstein, *The Double-Edged Sword of State Constitutional Law*, 9 N.Y.U. J.L. & LIBERTY 723, 743 (2015) [hereinafter *Double-Edged Sword*]. Thus, just as Progressives on the Supreme Court swept away "all constitutional obstacles to the implementation of their political and social agenda," they could again take this quasi-legislative position in state courts. Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L.

approach to judging should be avoided lest state courts—like the Wisconsin Supreme Court following *Knapp* and *Dubose*—be justifiably labeled as “activist”—a disturbing characterization for any court.<sup>295</sup> While the Wisconsin Supreme Court should not simply “toe the line” of Supreme Court analysis merely for the sake of uniformity,<sup>296</sup> it should have *some* principled basis on which to justify a departure from Supreme Court analysis of parallel constitutional provisions.<sup>297</sup>

In the context of the Takings Clause, there appears to be no such basis for a divergent approach under the Wisconsin Constitution. Takings Clause provisions under the Wisconsin and federal constitutions are substantively nearly identical.<sup>298</sup> While, under New Federalism, similarities in both text and structure do not necessarily require consistent interpretations,<sup>299</sup> a differing approach—even if to further bolster personal property rights—would

---

REV. 1793, 1795 (2006). Those who initially championed New Federalism were not so concerned about correct decisions under the constitution, but rather believed that state courts “manifest purpose is to expand constitutional protections” where the Supreme Court failed to do so. *See* Brennan, *supra* note 58, at 503. Thus, this approach, without considering history or context or history of the constitutional provisions at issue, is merely results-orientation that is unbecoming of the role of the judiciary. *See* Sykes, *supra* note 285, at 733; *see also* Michael B. Brennan, *Are Courts Becoming too Activist: Wisconsin’s Supreme Court has Shown a Worrisome Turn in That Direction*, MILWAUKEE J. SENTINEL, Oct. 2, 2005, at J2 [hereinafter Michael B. Brennan].

295. *See* Michael B. Brennan, *supra* note 294; *see also*, Esenberg White Paper, *supra* note 287, at 10; Sykes, *supra* note 285, at 737–38.

296. Indeed, courts that do take this approach must do so thoughtfully and with much care. *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1503–04, 1530–31 (2005).

297. Judge Sykes contrasted the dangerous and aggressive approach to judging presented by New Federalism with the principled approach of judicial restraint:

[Under New Federalism,] longstanding legal standards are rewritten or simply disregarded at will, either by reference to less authoritative decisional resources—such as disputed social science research—or simply the court’s own subjective policy judgment and raw power to render a binding statewide decision. Judges who are sensitive to some limits on the scope of judicial authority and competence generally try to confine themselves to authoritative and objective sources of interpretation—the law’s language, structure, logic, and history—and are skeptical of broad appeals to the court’s policy judgment. Among other things, this approach has the virtue of constraining the judges to behave like judges rather than legislators.

Sykes, *supra* note 285, at 737; *see also* Michael B. Brennan, *supra* note 294 (noting that the practice of judicial restraint is the opposite of judicial activism).

298. Compare Amendment V in the U.S. Constitution (“[N]or shall private property be taken for public use, without just compensation.”), with article I, section 13 in the Wisconsin Constitution (“The property of no person shall be taken for public use without just compensation therefor.”).

299. *See* Brennan, *supra* note 58, at 500; *see also* SUTTON, *supra* note 44, at 16.

undoubtedly open the court to damaging charges of judicial activism.<sup>300</sup> Thus, absent some distinguishing language, context, or ascertainable intent, Wisconsin courts should primarily look to the analysis of the Supreme Court for guidance on the regulatory takings doctrine.

*b. Narrow Interpretation and Application of Murr's Multi-Factor Test*

“[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”

— Justice Joseph P. Bradley<sup>301</sup>

The second, more judicially conservative approach<sup>302</sup>—nonetheless capable of protecting individual property rights—would be to follow but narrowly construe *Murr*'s multi-factor test in order to protect “against any stealthy encroachments” on individual rights guaranteed by the Constitution.<sup>303</sup> Although the majority of the Wisconsin Supreme Court failed to address the denominator question in its first Takings Clause decision following *Murr*—*Adams Outdoor Advertising v. Madison*<sup>304</sup>—it will almost certainly soon have

300. While this cannot be confirmed “unless and until we know how state courts will exercise their new found constitutional powers,” it is not worth the potential damage to the integrity of the institution. *Double-Edged Sword*, *supra* note 294, at 725. Also, New Federalism appears to serve as a “double-edged sword” to be wielded by advocates of both limited federal government and big government. *Id.* at 743; *see also State Constitutional Law*, *supra* note 276, at 348–49 (The tide seems to turn based on the rights at stake); Michael B. Brennan, *supra* note 294 (“An activist court in one direction can turn activist in the opposite way. Unmoored from its constitutionally defined role, the court floats with the political tide. . . . [E]veryone is against judicial activism, but only as he or she defines it.”). *Id.* Criticism of judicial activism can just as easily be leveled by either side where a court steps outside the bounds of its role.

301. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

302. Judicially conservative not in the political sense, but only in the sense that such an approach adheres to the traditional bounds of judicial restraint rather than judicial activism. *See Brennan*, *supra* note 294.

303. *Boyd*, 116 U.S. at 635.

304. 2018 WI 70 (2018). At issue in *Adams Outdoor Advert. L.P. v. City of Madison* was whether Adams's property was taken when the City of Madison constructed a pedestrian bridge that blocked visibility from the highway of one site of the billboard. *Id.* ¶ 2. The majority held that “a right to visibility of private property from a public road is not a cognizable right giving rise to a protected property interest.” *Id.* ¶ 5. Summarily dismissing the “right to visibility” as not constitutionally protected, the majority failed to even cite *Murr* in its discussion of the relevant parcel. *Id.* ¶ 44. But

another chance to do so. Indeed, the *Adams Outdoor* majority's failure to even cite *Murr* leaves a blank slate on which the court can yet develop its iteration of the *Murr* test. Moving forward, there are two dangerous pitfalls that Wisconsin courts must avoid as they sort out this issue.

First, Wisconsin courts must not give too much weight to *Murr*'s first factor—the treatment of the land under state and local law. The Wisconsin Court of Appeals in *Murr v. State* focused on the “key” of the treatment of the land under state law, noting that the contiguousness of the lots and their merger under state law was a near-determinative factor that led to their aggregation for purposes of the takings analysis.<sup>305</sup> But the analysis under *Murr* is much more holistic in nature. While courts must give “substantial weight” to the treatment of the land under state law, there is no single factor that should dominate the analysis.<sup>306</sup> Rather than continuing to rely so heavily on the treatment of the land under state law, Wisconsin courts should carefully weigh this consideration together with the other two factors under the new analysis.

Furthermore, the scope of the analysis under this first factor should be narrowly construed when determining the “reasonableness” of Wisconsin property owners' expectations. Measuring these expectations based on laws or regulations on comparable property in other regions or states would place too high a burden on homeowners as they develop their own expectations.<sup>307</sup> This over-inclusive approach would further tilt the playing field against property owners, nearly guaranteeing that *some* analogous regulation can be found for each regulatory overreach at issue in a takings claim.<sup>308</sup> Rather, when

---

the dissent took a different view of the property right at issue, noting that the precise property right at issue was the permit for the single side of the billboard no longer visible from the road rather than a “right to visibility.” *Id.* ¶ 47 (Bradley, Rebecca J., dissenting). The dissent came to this conclusion despite the majority's erroneous belief that the plaintiffs had forfeited this argument. *See id.* ¶ 24 n.8.

Recognizing the importance of the denominator factor, *id.* ¶ 55, the dissent proceeded to conduct a thorough analysis of *Murr*'s multi-factor analysis to identify the precise parcel at issue, *id.* ¶¶ 59–66. The dissent carefully analyzed each *Murr* factor and determined that each “militate[d] in favor of designating” the permit for a single side of the billboard as the relevant parcel for the purposes of the analysis. *Id.* The dissent then completed the Takings Clause analysis by concluding that the bridge completely deprived the permit of its “only economically viable use,” *id.* ¶ 74, and therefore constituted in an unconstitutional taking for which the plaintiffs were due just compensation. *Id.* ¶ 75.

Thus, although the disagreement in *Adams* focused on the issue for forfeiture, *id.* ¶ 24 n.8, ¶ 75 n.6 (Bradley, Rebecca J., dissenting), the dissent laid a solid analytical foundation for future Takings Clause analyses at the Wisconsin Supreme Court.

305. *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, ¶¶ 19–20 (Wis. Ct. App. Dec. 23, 2014) (per curiam) (unpublished).

306. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

307. *See Brady*, *supra* note 79, at 66–68.

308. *Id.*

considering the reasonableness of the property owner's expectations, Wisconsin courts should consider only laws that currently exist *within* the State or the relevant region. This limited approach will ensure that property owners will have—or at least, are more likely to have—sufficient notice when developing their reasonable investment-backed expectations.

The second pitfall Wisconsin courts must navigate is the final *Murr* factor: balancing of the “economic synergies” put into play when considering the “effect of the burdened land on the value of other holdings.”<sup>309</sup> This particularly malleable factor may be easily manipulated by individual parties seeking to persuasively frame the property at issue. For example, regulators may cast this factor as a “far-reaching defense,” arguing that the presence of *some* value-based complementarianism is sufficient for the court to consider the property owner's properties as a whole.<sup>310</sup> This approach could open the balancing test to governmental abuse and lead to the neglect of the other factors where the court detects *any* “special relationship” or value-based complementarianism is found.<sup>311</sup>

Unfortunately, this argument could find a firm foundation in Wisconsin's regulatory takings law. Specifically, two Wisconsin cases—*Just v. Marinette County*<sup>312</sup> and *Piper v. Ekern*<sup>313</sup>—strengthen this argument in the context of environmental regulations. In *Just*, the court held that private property owners have absolutely no right “to change the essential natural character of his land” where those changes “injure[] the rights of others.”<sup>314</sup> Additionally, in *Piper*, the court held:

[W]hile . . . a material diminution in value may result, nevertheless a reciprocal advantage accrues which in many instances it is impossible to estimate from a financial standpoint, but which nevertheless constitutes a thing of value and a compensating factor for the interference by the public

---

309. *Leading Cases: Constitutional Law*, *supra* note 117, at 254, 256 (quoting *Murr*, 137 S. Ct. at 1946).

310. *Id.* at 254.

311. *Murr*, 137 S. Ct. at 1946, 1949.

312. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

313. 180 Wis. 586, 194 N.W. 159 (1923).

314. *Just*, 56 Wis. 2d at 17. The court reasoned that the takings analysis undergoes a shift where the owner's actions do “damage to the rights of the public”: “[w]hile loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.” *Id.* at 22–23.

with property rights.<sup>315</sup>

Therefore, under Wisconsin's current regulatory takings law, (1) property owners have no right to make unnatural alterations to their property,<sup>316</sup> (2) perceived "reciprocal advantage[s]" serve as a "compensating factor,"<sup>317</sup> and (3) as previously discussed, property owners are only due just compensation where "all or substantially all practical uses of the property" are denied.<sup>318</sup>

Applying these principles in a situation similar to *Murr*, the government could argue that the mere aesthetic enhancement of leaving a merged parcel undeveloped—otherwise rendered useless to the owner—is enough of a "reciprocity of benefits" to justify the regulation. So long as the properties have some value-saving "special relationship," that reciprocal relationship could arguably be construed as complimentary under the third *Murr* factor.<sup>319</sup> Under this formulation, it would be hard to see any regulation rising to the level of a taking.

On the other end of the spectrum, property owners may seek to manipulate the third *Murr* factor by arguing that economic complementarianism is *necessary* for the other holdings to be considered part of the parcel as a whole.<sup>320</sup> This second approach, likely focusing on Justice Kennedy's statement that "the absence of a special relationship . . . may counsel against consideration of all the holdings as a single parcel,"<sup>321</sup> will seek to make the lack of a value-based complementarianism outcome determinative rather than simply a part of the more comprehensive analysis suggested by the Court.<sup>322</sup>

315. *Piper*, 180 Wis. at 591. The Wisconsin Supreme Court held that even purely aesthetic considerations were a sufficient justification for the exercise of zoning powers because the limitations were mutually beneficial. *See State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 270, 69 N.W.2d 217, 222 (1955); *see also Wisconsin Takings Historical Perspective*, *supra* note 134, at 9.

316. *Just*, 56 Wis. 2d at 17.

317. *Piper*, 180 Wis. at 591.

318. *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 374, 548 N.W.2d 528, 531 (1996); *see also Zealy* discussion *supra* Section IV.A.

319. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946, 1949 (2017). Indeed, in *Murr*, the Court gave examples of what types of value adding "effect" courts should consider. *Id.* at 1946. These examples, unfortunately, only confirm the risk presented in this hypothetical, focusing on intangible benefits "such as . . . increasing privacy, expanding recreational space, or preserving surrounding natural beauty." *Id.* These benefits—subjective in nature and easily manipulatable—place the protection of private property rights wholly in the hands of the court.

320. *Leading Cases: Constitutional Law*, *supra* note 117, at 262.

321. *Murr*, 137 S. Ct. at 1946.

322. *Leading Cases: Constitutional Law*, *supra* note 117, at 254, 260–62.

Adoption of either extreme would circumvent the Court's intention that the parcel as a whole be determined by a variety of factors. Therefore, when considering the third *Murr* factor, Wisconsin courts should look for some direct impact or interplay between the parcels at issue. The adoption of this narrower approach would force the government to prove more than a tenuous relationship between the parties, thus protecting individual property owners—as much as is possible under *Murr*'s test—against capricious aggregation determinations by the courts.<sup>323</sup> Property owners could then better predict and formulate reasonable investment-backed expectations, ensuring that the scales in the regulatory takings analysis are not insurmountably stacked against them. This approach would also protect against manipulation at the hands of landowners.

While the Supreme Court's decision in *Murr* certainly does not bode well for individual property owners, state courts such as those in Wisconsin can minimize *Murr*'s impact through a narrow interpretation of its multi-factor denominator analysis.

## VII. CONCLUSION

The story of *Murr* is one of perseverance. The Murrs, just a regular family with a recreational cabin in northern Wisconsin, were told they could not sell their vacant lot to fund necessary renovations to their property.<sup>324</sup> The Murrs fought these regulations all the way to the Supreme Court only to lose—witnessing the further decimation of personal property protections at their expense.<sup>325</sup> Nevertheless, this was not the end of their story. State legislators responded to the *Murr* decision by passing the Wisconsin Homeowners' Bill of Rights,<sup>326</sup> giving the Murrs the right—after a more than fifteen-year legal fight—to dispose of their property as they see fit.<sup>327</sup>

The legal lesson from *Murr* is that states are in a unique position of influence when it comes to the protection of personal property rights. Although the regulatory takings doctrine has largely developed at the federal level, personal property rights—the rights at stake in a regulatory takings analysis—

---

323. As previously noted in this section, giving too much weight to the existence of any value-based complementarianism would invariably lead to the aggregation of parcels that exhibit even the most attenuated relationship—economic or otherwise.

324. See Groen, *supra* note 2.

325. *Id.*

326. See Bruce Vielmetti, *Wisconsin Cabin Owners Who Lost at U.S. Supreme Court Win in the Wisconsin Legislature*, MILWAUKEE J. SENTINEL ONLINE (Nov. 7, 2017), <https://www.jsonline.com/story/news/politics/2017/11/07/wisconsin-cabin-owners-who-lost-u-s-supreme-court-wins-wisconsin-legislature/841939001/> [<https://perma.cc/L7Q2-ANTN>].

327. *Id.*

have traditionally been defined pursuant to state law.<sup>328</sup> Thus, as Wisconsin's was here, state legislatures should be proactive about engaging the continuing deterioration of constitutional property rights. Furthermore, state courts should narrowly construe the *Murr*'s test. "Whether through the courts or the legislature, securing individual rights in property is fundamental to liberty"; state legislatures and courts must not ignore this responsibility.<sup>329</sup>

While Wisconsin's Homeowners' Bill of Rights has provided a template both for other states and for continued property rights protection within the State, Wisconsin courts have yet to establish their analysis of the denominator issue following *Murr*. As discussed, Wisconsin courts should not take an activist approach and develop an independent Takings Clause analysis pursuant to the Wisconsin Constitution absent some principled basis for that deviation. Rather, they should faithfully yet narrowly construe Justice Kennedy's test in *Murr* to ensure that the government does not become insulated from takings claims. By adopting this approach, Wisconsin courts can do their part to preserve the freedom of property owners "to shape and to plan their own destiny in a world where governments are always eager to do so for them."<sup>330</sup>

DAVID J. WENTHOLD\*

---

328. See discussion *supra* note 239.

329. Burnett, *supra* note 3.

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

\* J.D., 2019, Marquette University Law School. First, a special thank you to my beautiful wife, Natascha. You are my rock, and your patience through this season of life has truly been a blessing. Also, thank you to my family and mentors. Through each stage of life, you have helped provide a solid foundation on which I can stand. Finally, thank you to the staff of the *Marquette Law Review* for your hard work. All mistakes and omissions are my own.



