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From a Muddle to a Mudslide: Murr v. Wisconsin

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Murr v. Wisconsin was not an easy case, but it was a straightforward one. That is, the answer to the question presented in the case was not self-evident, but the question itself was not complicated. *Murr* was a so-called "regulatory takings" case. The Fifth Amendment's Takings Clause provides "nor shall private property be taken for public purposes without just compensation." Compensation is always required when the government uses the power of eminent domain to take property for public uses. But in a line of cases dating to the early 20th century, the Court also has held that property regulations that go "too far" are tantamount to takings and require compensation.[1]

The regulatory takings doctrine seeks to articulate the line between the vast universe of constitutionally permissible regulations restricting the use of private property, many of which impose financial burdens on property owners, and regulatory outliers that impose burdens so severe that the Fifth Amendment's Takings Clause requires the government to compensate the owners for their losses. The protection provided by the Takings Clause is not robust. As Chief Justice William Rehnquist once said, he saw no reason why the Takings Clause, "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."[2] *Murr* proved no exception. Indeed, it further undermined the already enfeebled constitutional rights enjoyed by property owners against regulatory excess.

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[1] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[2] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

In *Murr*, the Court squarely confronted tension inherent in the Court's regulatory takings canon. On one hand, the Court has long insisted that state laws define the contours of property rights.[3] On the other, it also has admonished that state laws that impose particularly harsh burdens on property owners for other than traditional health and safety reasons will be treated as takings for which the regulated property owners are entitled to compensation.[4] These two ideas are not easily reconciled. If state laws define the contours of property rights, it is reasonable to ask why state laws that restructure those contours—restricting or reshaping property rights—ought ever be considered compensable takings. In other words, if states have the power to define what property *is*, why can't they *redefine* what it is without compensating property owners? Conversely, giving states *carte blanche* to regulate away all the value of private property would render the protection provided by the Fifth Amendment's Takings Clause a dead letter.

Murr illustrates this conundrum. The Murrs, four siblings, received as a gift title to two adjoining lots on the St. Croix River that their parents had purchased at separate times in the 1960s. The parents built a cabin on one and kept the other as an investment property. The two lots have always been deeded and taxed separately, and remain so to the present.

But in 1975, a local zoning ordinance combined the lots. The effect, as the Murrs discovered in 2004 when they sought to sell the investment lot (valued at $410,000), was to prohibit them from doing so unless they sold the other lot and cabin with it. They argued that the law preventing them from selling or developing the undeveloped parcel effected a regulatory taking of their property, since it extinguished rights their parents had enjoyed. The Supreme Court disagreed on the ground that the economic impact of the regulation should be measured not by treating the lots separately but by considering them together. This conclusion sealed the Murrs' fate, since the total value of the lots together was only slightly lower than the two lots valued separately.

[3] Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J. dissenting) ("Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.").

[4] Pennsylvania Coal, 260 U.S. at 415.

Commentators have for years complained that the Supreme Court's regulatory takings doctrine is an indeterminate muddle.[5] *Murr* need not have added to the confusion. The Court might reasonably have held, based on the principle that state law defines the contours of property rights, that the merged lots were the relevant parcel for regulatory takings analysis. Alternatively, it might have held that property rights are not so malleable that the state can erase them simply because title changes hands. Unfortunately, the *Murr* decision does more than simply compound the confusion of takings law. In an effort to reconcile the tension between state laws as the source of property rights and the Takings Clause's prohibition on regulatory takings, the majority took the opportunity not simply to answer the relatively straightforward question presented in *Murr*, but also to articulate a multifactor balancing test that seeks, for the first time, to define "property" as *a matter of federal constitutional law*. The factors in this new definition of property are not only subjective and malleable, but decidedly pro-government. As a result, the majority opinion transforms the "muddle" of regulatory takings law into a mudslide that threatens to undermine the very foundation of property rights. Thus, all property owners—not just the Murrs—lost in the litigation.

I. The Murrs' Merger Problem

The petitioners in *Murr* were four siblings who had received as gifts from their parents two adjacent lots (given the sophisticated names "Lot E" and "Lot F") along the St. Croix River in northwestern Wisconsin. The Murrs' parents purchased Lot F in 1960 and placed the title in the name of Mr. Murr's business, William Murr Plumbing, Inc., on the advice of their accountant. Soon after purchasing the property, they built a small vacation cabin on Lot F. Three years later, they purchased the adjacent Lot E, planning eventually to develop or sell it. For whatever reason, they did neither. Lot E remains undeveloped to this day, although most of the other lots in the subdivision have been developed with homes, many of which are occupied by year-round residents. In 1994, the Murr parents transferred title to

[5] See, e.g., Carol M. Rose, *Mahon* Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561 (1984).

Lot F and the cabin to their children as a gift. They transferred title to Lot E to the children the following year.

A decade later, the Murr siblings began to explore the possibility of selling Lot E, valued at $410,000, to fund upgrades to the family cabin. At this point, they learned that they were no longer legally entitled to sell or develop Lot E unless they sold Lot F and the cabin with it. The reason was that state and county regulations enacted in 1975 include identical provisions that automatically "merge" contiguous lots whenever they come under common ownership. Thus, Lots E and F were "merged" when the parents gave their children title to Lot F in 1995. These regulations also provide that lots merged under this provision "may not be sold or developed as separate lots" unless they have at least one acre of developable land. Unfortunately for the Murrs, Lot E does not. While the lot's size is approximately 1.25 acres, other regulations and topographical features restrict its developable space to less than an acre.

The fact that they no longer had a right to sell or develop Lot E must have come as quite a shock to the Murrs. Although the government claimed that the two lots had been legally "merged," the Murrs never received any notice of this action. Moreover, they continued to hold separate title to the lots and pay separate tax bills for them. Their parents obviously had the right to transfer Lot E individually, since the Murr siblings received title to the lot in exactly such a transfer. Moreover, the Murrs only had to look around the neighborhood to realize that their neighbors also had the right to develop and sell lots no bigger than Lot E, since most similar lots in the neighborhood are occupied by residences.

Unfortunately for the Murrs, the "merger" regulations extinguished rights their neighbors continue to enjoy. Before the gifts to the Murr siblings, when the lots were owned separately (by the Murr parents and the plumbing company), a grandfather clause in the regulations permitted their separate sale and development—probably because the government was concerned that eliminating these rights might be unconstitutional. But upon receiving the gift of the adjacent lots, the siblings lost valuable rights enjoyed by their parents (and virtually all of their neighbors) because the state law "merged" the two separate, legally distinct, parcels.[6]

[6] Murr, 137 S. Ct. at 1940–42.

The Murrs believed that the regulations extinguishing their rights to sell or develop Lot E separately from Lot F had confiscated their property rights, so they filed a regulatory takings action against the state of Wisconsin. Based upon prior precedent, they appeared to have a very strong case. Twenty-five years ago, in *Lucas v. South Carolina Coastal Council*, the Supreme Court ruled in favor of a developer in an almost identical situation. Mr. Lucas had purchased two beachfront parcels in a high-end residential subdivision, intending to build a home for himself on one and a home to sell on the other. Before he could do so, South Carolina enacted a coastal preservation law that prevented construction of any "permanent habitable structure" on Mr. Lucas's property, even though all the other lots in the subdivision had been developed with large homes.[7] After finding that the prohibition rendered the regulated parcels "valueless," a state trial court held that the regulation effected a taking. The South Carolina Supreme Court disagreed, holding instead that the regulation was a valid exercise of the police power "designed to prevent serious public harm."[8] The U.S. Supreme Court reversed. Writing for the majority, Justice Anton Scalia concluded that regulations that "den[y] all economically beneficial or productive use of land" are automatically compensable unless they inhere in the "restrictions that background principles of the state's law of property and nuisance already placed upon land ownership."[9] Except that the Murrs' lots were contiguous, and Mr. Lucas's were not, the Murrs' situation was analogous. They argued that the lot merger regulation had exactly the prohibited effect—that is, it "depriv[ed] . . . them of 'all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.'"[10] Therefore, they asserted, citing *Lucas*, they were categorically entitled to compensation for the value of Lot E.

The state of Wisconsin argued that the economic effect of the regulation on Lot E was irrelevant because the Murrs' no longer owned it separately from Lot F. The state claimed that the Murrs could not claim a "total taking" of their property since the regulation only slightly reduced the value of their property considered as a whole:

[7] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1007 (1992).

[8] *Id.* at 1009–10.

[9] Lucas, 505 U.S. at 1029.

[10] Murr, 137 S. Ct. at 1941.

the Murrs could use, develop, and sell the merged Lot E/F. In such "diminishment-in-value" cases, the plaintiffs are not categorically entitled to compensation. Instead, courts must consider three factors first articulated in the 1978 case, *Penn Central Transportation Company v. City of New York*.[11] These factors are: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-back expectations," and (3) "the character of governmental action."[12]

Although the *Penn Central* factors have assumed talismanic significance in regulatory takings cases, their precise meaning remains unclear—other than that they strongly favor government regulations (for reasons that are not themselves self-evident). Not surprisingly, therefore, their application by the lower courts resulted in losses for the Murrs. The trial court agreed with the state that the relevant parcel for purposes of takings analysis was the merged Lot E/F rather than Lot E individually and that the Murrs had not been deprived of all economic value of their property since they retained many options for using their property, considered as a whole. In fact, comparing the value of the merged lots to the lots valued separately, the court concluded that the merger regulations devalued the Murrs' property by less than 10 percent.[13]

The Wisconsin Court of Appeals affirmed. It also rejected the Murrs' argument that it should analyze the effect of the regulations on Lot E only. Instead, it held that the takings analysis was "properly focused" on the regulations' effect "on the Murrs' property as a whole," that is, both lots together. The court concluded that the Murrs could not reasonably have expected to use the lots separately after they came under common ownership because they were charged with knowing how the merger law would affect their development rights. The "expectation of separate treatment became unreasonable," the court concluded, "when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994."[14] Using this framework, the court of appeals held that the merger regulations did not effect a taking. The court acknowledged the trial court's finding that

[11] 438 U.S. 104 (1978).

[12] *Id.* at 124–25.

[13] Murr, 137 S. Ct. at 1942.

[14] Murr v. State of Wisconsin, 359 Wis. 2d 675 (2014), at ¶ 30 (unpublished) (per curiam).

the regulations diminished the total value of the Murrs' property (that is, Lots E and F considered together) by less than 10 percent. After the Wisconsin Supreme Court declined to hear the case, the U.S. Supreme Court granted the Murr's petition for certiorari.

II. *Murr*'s Mudslide

The outcome in *Murr* turned on whether the Court should assess the effect of the challenged regulations on Lot E alone or on the lots considered together. The Court answered by invoking the parcel-as-a-whole rule, first announced in *Penn Central*. There, the Court considered a regulatory takings challenge to a historic preservation law that prohibited the owner of New York City's Grand Central Station—the Penn Central Transportation Company—from erecting a high-rise office building above the terminal. Penn Central claimed that the regulation had taken 100 percent of its airspace, causing it to suffer a financial loss of hundreds of millions of dollars.[15] The Court rejected the claim that the regulation confiscated the whole of the airspace above the terminal. It reasoned instead that the impact of a regulation must be measured against the regulated "parcel as a whole," which, in *Penn Central*, was "the city tax block designated as the landmark site."[16] The Court characterized the historical preservation regulation as merely a use restriction on that parcel (that is, the ground and the air considered together). Since the regulation preserved Penn Central's original "investment backed expectations" (to operate a railway station), the Court concluded—despite the magnitude of the loss caused by the regulation—that Penn Central had not suffered a compensable regulatory taking.[17]

The parcel-as-a-whole rule seeks to prevent property owners from gaming the system by engaging in what Margaret Radin has called "conceptual severance"—that is, separating for regulatory takings analysis the portion of its property impacted by a regulation from the remaining portion that is unaffected by the challenged regulation.[18]

[15] Penn Central had entered into a contract worth hundreds of millions of dollars with a developer for the sale of the airspace, which was contingent upon securing regulatory permission to build a high rise above Grand Central.

[16] Penn Central, 438 U.S. at 130–31.

[17] *Id.* at 131–34.

[18] Margaret Jane Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988). This is often referred to

Since, due to the *Lucas* holding, a property owner's likelihood of succeeding in a regulatory takings case increases dramatically if the regulation at question effects a "total" taking, property owners have an incentive to define the relevant private property affected by a regulation narrowly. As Chief Justice John Roberts observed in his dissent in *Murr*, "Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant 'private property' narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes . . . . And so we do not allow it."[19] The Court has reiterated in a number of subsequent cases that the impact of a challenged regulation will be measured against the regulated "parcel as a whole." It has also made clear that property owners cannot claim that a regulation effects a "total taking" of a portion of their regulated property as long as development is permitted on the remainder of it.[20]

The difficulty in *Murr*, however, was that the Court had to decide what the relevant parcel was—Lot E or the merged Lot E/F. The Supreme Court had never before confronted the question of what the relevant "parcel" is in a takings case when the government *changed* parcel boundaries (in the Murrs' case, by merging legally distinct lots). The answer to the question was critical—indeed, outcome-determinative: Either the Murrs had lost all value of Lot E or they had suffered a minor reduction in value in their property considered as a whole. Ultimately, the Court affirmed the Wisconsin Court of Appeals' ruling that the relevant parcel was the merged Lot E/F. It

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as the "denominator problem" in regulatory takings law. See Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 497 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property to the value that remains in the property, one critical question is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'").

[19] Murr, 137 S. Ct. at 1952 (Roberts, C.J., dissenting).

[20] See Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002) (refusing to allow property owners to "effectively sever" the 32 months during which a regulatory moratorium prevented all development in order to claim that the regulation effected a "temporary total taking" of their property); Palazzolo v. Rhode Island, 533 U.S. 606, 631–37 (2001) (holding that a wetlands regulation did not effect a total taking because development was permitted on an upland portion of the plaintiff's property).

therefore concluded that the Murrs had not suffered a regulatory taking.

On its face, there is nothing earth-shattering about the Court's *holding* in *Murr*. As Chief Justice Roberts observed in dissent:

> The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of land owners and the public alike.[21]

Unfortunately, the path that the majority took to reach this, in my view, erroneous conclusion effectively rewrites the law of takings and replaces one of the few clarifying principles in the regulatory takings muddle—that state laws are the source of property rights—with a new balancing test that seeks to define the meaning of property for the first time as a matter of federal law. That new test is subjective and unpredictable, and it decidedly tips the scales in favor of the government, further undermining the Takings Clause's already limited protection against regulatory excess.

A. The Majority

Justice Anthony Kennedy's majority opinion began by reviewing the Court's regulatory takings canon, with a particular emphasis on the division between ad hoc and categorical review. As a general matter, Justice Kennedy observed, the Court has refrained from elaborating definitive rules that govern the analysis of takings claims. Instead, regulatory takings cases generally involve "ad hoc, factual inquiries, designed to allow careful examination and weighing all of the relevant circumstances."[22] This pattern was established in what is widely regarded as the Court's first regulatory takings case, *Pennsylvania Coal Company v. Mahon*, which announced the oft-repeated but completely unhelpful principle that "while property

[21] Murr, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).

[22] *Id.* at 1942 (majority op.) (quoting Tahoe Sierra, 535 U.S. at 322).

may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[23]

As Justice Kennedy observed, however, the Court has over the years articulated a number of principles that guide the analysis of whether a regulation "goes too far." Two of these principles were of particular relevance in *Murr*. The first is the rule articulated in *Lucas*: Except in certain narrow circumstances, such as nuisance abatement, a regulation which "denies all economically beneficial or productive use of land" is categorically compensable.[24] The second is the multi-part balancing test announced in *Penn Central*, which applies to "partial takings" or "diminution in value" cases: "[W]hen a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a 'complex of factors,'" which include, "(1) the 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."[25]

As discussed previously, the merger rule challenged in *Murr* created confusion over which rule the Court should use to analyze the Murrs' regulatory takings claim: If the relevant parcel was Lot E alone, then the case would seem to involve a fairly straightforward application of the categorical prohibition on "total takings" announced in *Lucas*. The regulations that prevented the Murrs from developing or selling Lot E appeared to impose a total taking of Lot E, in which case the Murrs would be categorically entitled to compensation. If the relevant parcel was the "merged" Lot E/F, however, then the regulations did not effect a total taking, since the Murrs retained the right to develop and sell the "merged" parcel. In other words, if the merger regulation expanded the relevant parcel to include both lots, considered together, then the case was transformed from a total-takings claim, which the Murrs should win, into a diminution-in-value challenge, which the Murrs should lose.

The Murrs argument that they had suffered a total taking of Lot E was made stronger by the fact that their parents had the right to develop or sell Lot E before the transfer. In *Lucas,* Justice Scalia had

[23] Mahon, 260 U.S. at 415.

[24] Lucas, 505 U.S. at 1015.

[25] Murr, 137 S. Ct. at 1943 (citing Penn Central, 438 U.S. at 124).

clarified that the property owners cannot challenge regulations that "inhere" in the "background principles of . . . property and nuisance already placed upon land ownership."[26] This exception to the total takings rule makes sense—after all, property owners cannot lose rights they never had. But that does not mean that the Murrs could not challenge the merger rule merely because they assumed ownership subject to it. In fact, the Wisconsin Court of Appeals conclusion to the contrary squarely conflicted with the holding in the 2001 case *Palazzolo v. Rhode Island*. In that case, the U.S. Supreme Court rejected the claim that owners are barred from challenging regulations merely because they assume ownership subject to them. In *Palazzolo*, the plaintiff challenged wetlands regulations that prohibited him from developing much of his property. While the plaintiff assumed title to the property subject to the regulations, the previous owner had purchased the property before the regulations were imposed. The state of Rhode Island, citing *Lucas*, argued that the owner could not challenge the regulations since he knew or should have known about the development restrictions when he took title to the property. The Supreme Court disagreed, holding instead that states do not have unfettered discretion to "shape and define property rights."[27] In particular, the Court held that a state cannot construct legal rules that eliminate valid regulatory takings claims upon a transfer of ownership. Otherwise, the Court warned, "postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause."[28]

The Murrs' predicament was similar to the facts in *Palazzolo*. After all, before the transfer, their parents enjoyed the right to develop and sell Lot E separately from Lot F. Their children lost this right solely because the title to the lots changed hands. Unfortunately, the majority in *Murr* did not see it this way. Instead, Justice Kennedy construed *Palazzolo* to open the door to a new federal definition of property, one unhinged from the Court's previous insistence that state law defines the contours of property rights. Citing *Palazzolo*,

[26] Lucas, 505 U.S. at 1029.

[27] Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

[28] *Id.* at 627.

Kennedy argued that the Court has "expressed caution [about] the view that property rights should be coextensive with those under state law."[29] He warned, "defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations."[30]

Kennedy, therefore, refused to adopt either of the "formalistic rules" urged by Wisconsin or the Murrs to guide the parcel inquiry. Wisconsin's approach—to "tie the definition of the parcel to state law, considering the two lots here as a single whole due to their merger under the challenged regulation"—was flawed because it "simply assumes the answer to the question." The Murrs' approach—"a presumption that lot lines define the relevant parcel in every instance"—was flawed because it "ignored the fact that lot lines are themselves creatures of state law, which can be overridden by the State," and because it would require the Court to "credit the aspect of state law that favors their preferred approach (lot lines) and ignore that which does not (merger provision)."[31]

Kennedy concluded that no single consideration could be used to determine the relevant parcel in a regulatory takings challenge. Instead, he directed courts to consider an entirely new laundry list of inchoate, vague factors to decide the universe of property rights affected by a challenged regulation. The first consideration is the way that the law regulates the plaintiffs' property. While he insisted, citing *Palazzolo*, that "[a] valid takings claim will not evaporate just because a purchaser took title after the law was enacted," he also suggested that "[a] reasonable restriction that predates a landowner's acquisition . . . can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property" in light of "background customs and the whole of our legal tradition."[32] The second consideration is the "physical characteristics of the landowner's property," including "the relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment." He suggested that "it

[29] Murr, 137 S. Ct. at 1938.

[30] *Id.* at 1943.

[31] *Id.* at 1947.

[32] *Id.* at 1945.

may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation." The third consideration is how the challenged regulations affect not only the "value of the property under the challenged regulations," but also "the effect of burdened land on the value of other holdings." For example, he suggested, a use restriction may decrease the market value of the regulated property, but add value to the landowner's other holdings, such as "increasing privacy, expanding recreational space, or preserving surrounding natural beauty."[33] Rather ominously, Kennedy did not rule out the possibility that parcels that are clearly distinct legally under state law—including perhaps noncontiguous parcels—might be considered a single parcel in a regulatory takings case if the regulation of one parcel added "value" (including nonmonetary value) to the other.

Applying this new test, Kennedy concluded that the relevant parcel in the case was the "merged" Lot E/F. His reasoning was as circular and convoluted as the new test itself. First, he concluded that the Murrs' property should be treated as a whole because the state law that they were challenging treated it as a whole (and for a good reason). The "treatment of the property under state and local law," he concluded, "indicates petitioners' property should be treated as one when considering the effects of the restrictions." Kennedy emphasized the reasonableness of the merger provision, the prevalence of similar provisions in other states' laws, and the public-policy goals that merging small lots advanced—especially the elimination of substandard lots to encourage orderly and rational development. He also concluded that the Murrs' expectations were not unduly disrupted, since they voluntarily (albeit unknowingly) submitted to the merger regulation by assuming common ownership of both Lot E and Lot F. And, he observed that a contrary holding would throw into question numerous other merger and boundary-alteration provisions in state law, including some that allow informal adjustments with minimal government oversight.[34] Second, he opined that the Murrs should have expected their property to be regulated because it was the kind of property that often is regulated. The "physical characteristics of the property support its treatment as a unified parcel,"

[33] *Id.* at 1945–46.

[34] *Id.* at 1948.

he concluded, because the lots' "rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited."[35] He also opined, citing the history of land use regulation in the Lower St. Croix River area, that the lots' location along the river should have put the Murrs on notice that their property was likely to be regulated. Third, he concluded that the "prospective value that Lot E brings to Lot F supports considering the two as one parcel." He reasoned that the restriction on selling or developing Lot E was "mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements."[36]

Weighing the impact of the regulation against the totality of the Murrs' property, not surprisingly, resulted in a government victory. The majority concluded that the Murrs had not suffered a compensable taking: They were not categorically entitled to compensation under *Lucas* because the regulations had not deprived them of all the value of the combined parcels. And, they were not entitled to compensation under the *Penn Central* balancing factors because the regulation had, at most, minimally reduced the value of the parcels considered together. Indeed it was possible that the merger regulations increased the overall value of the Murrs' property.[37]

B. The Dissent

As noted previously, Chief Justice Roberts began his dissent by observing that he had no particular objection to the majority's holding that the merger regulation did not effect a taking of the Murrs' property. His dissent focused on the majority's decision to replace the presumption that state laws define the contours of property rights, which the Takings Clause in turn secures, with a new multifactor, takings-specific federal definition of property. "Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them," Roberts argued. "By securing such *established* property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1949–50.

new malleable definition of 'private property'—adopted solely 'for purposes of th[e] takings inquiry'—undermines that protection."[38]

The chief justice asserted that the Court should have adhered to the traditional approach, which relied on state law to define the boundaries of private property, and treated the question of whether the challenged regulation effected a taking as a separate issue. The Takings Clause, he urged, raises three distinct questions about regulatory action: The first is "what 'private property' the government's planned course of conduct will affect." The second is "whether that property has been 'taken for public use.'" And, if so, third, what compensation is due?

Murr was a "step one" case, which required the Court to identify the property interest at stake. Because the Takings Clause does not define "property," this first inquiry "requires looking outside the Constitution" to sources such as state law.[39] Admittedly, Roberts observed, the "enigmatic" parcel-as-a-whole rule "has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one lot of land. Should the impact of the regulation be evaluated with respect to each individual lot, or with respect to the adjacent lots grouped together as one unit?"[40] Clearly, this "confusion" was at the heart of the dispute in *Murr*. But Roberts correctly faulted the majority's conclusion that the answer to the question "what is the relevant parcel?" requires a new federal definition of property. He urged a more "straightforward" approach: "State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue."[41] Roberts rejected the majority's conclusion that reliance on state law to determine the contours of property rights creates an excessive risk of "gamesmanship." He reasoned, "States create property rights with respect to particular 'things.' And in the context of real property, those 'things' are horizontally bounded lots of land." Given this reality, he reasoned, courts are perfectly capable of sussing out strategic efforts to combine (on the part of states) or divide (on the part of property owners)

[38] *Id.* at 1950 (Roberts, C.J., dissenting) (citation omitted).

[39] *Id.* at 1951.

[40] *Id*. at 1952.

[41] *Id.* at 1953.

parcels to enhance the likelihood of succeeding in a regulatory takings case.

Roberts further criticized the majority for conflating the first inquiry in a takings case (determining the relevant universe of property rights at issue), with the second inquiry (determining whether a taking has occurred). In deciding that Lots E and F were a single parcel, as Roberts observed, the majority considered factors (such as the owners' regulatory expectations and the public-policy goals advanced by the regulations) that are irrelevant to the determination of the contours of the regulated property. These factors are properly considered after that determination has been made, when a court must decide whether a taking has occurred. By "cramming [these considerations] into the definition of 'private property,'" Roberts warned, the majority "undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals."[42] As Roberts observed, while it is true that regulatory takings inquiries are usually ad hoc, the takings inquiry "presuppos[es] that the 'relevant private property' has already been identified." He continued, "while ownership of contiguous parcels may bear on whether a person's plot has been 'taken,' *Penn Central* provides no basis for disregarding state property lines when identifying the 'parcel as a whole.'"[43]

The majority's decision to depart from state property principles to determine the scope of the Murrs' property rights, Roberts urged, opens the door to precisely the kind of gamesmanship that supposedly motivated the majority's decision to adopt a federal constitutional definition of property. "Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one 'parcel' solely for purposes of resisting a particular claim." And since the majority's new definition of the parcel-as-a-whole turns in part on the reasonableness of the regulation at issue, the government's interest unfortunately will come into play twice—both when identifying the relevant parcel and when determining whether the regulatory burden is so excessive as to constitute a taking.[44] "The result," Roberts worried, "is clear double counting to

[42] *Id.* at 1954.

[43] *Id.*

[44] *Id*. at 1955.

tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation." What's more, "In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, 'necessarily' in 'every' case, but surely in most."[45] Thus, the majority's "new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest."[46]

Roberts concluded by analyzing the Murrs' takings claim under the traditional approach, which looks to state law to determine the contours of the property rights at issue. In his view, the case was a relatively straightforward one. Faulting the Wisconsin Court of Appeals for, much like the majority, adopting a "takings-specific approach to defining the relevant parcel," he argued that the case should be remanded to determine whether Lots E and F are legally distinct parcels using "ordinary principles of Wisconsin property law."[47] At that point, after the court determines the relevant parcel, the real work of determining whether a taking had occurred—a necessarily fact-intensive task requiring the exercise of reasoned judgment—would properly begin. But, he admonished, "basing the definition of 'property' on a judgment call, too, allows the government's interests to warp the private rights that the Takings Clause is supposed to secure."[48]

C. Remediating Murr's *Mudslide*

Chief Justice Roberts is undoubtedly correct that all private property owners, not just the members of the Murr family, lost in the *Murr* case. For the reasons set forth in his dissent, the majority's multifactor redefinition of private property undermines the Fifth Amendment's already limited protection against expropriative regulations. In the future, courts and regulators alike will undoubtedly read *Murr* as an invitation to reject regulatory takings claims challenging the high costs imposed by regulations that purport to advance the public

[45] *Id.* at 1955–56.

[46] *Id.* at 1956.

[47] *Id.*

[48] *Id.* at 1957.

interest. There is a serious risk that *Murr* transforms the Court's prior admonition that the Takings Clause exists 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" into mere hortatory fluff.[49] The factors that the opinion requires courts to apply to define the property rights at issue in a regulatory takings case are not only vague and subjective; they also favor government regulators over property owners since they import public policy considerations into the definition of private property itself. Essentially, to answer the question "what property does the plaintiff own?" courts must now engage in guesswork about whether a plaintiff should have anticipated a regulation and weigh the owner's loss against the public policy goals of a challenged regulation. Those factors ought to be irrelevant to determining the scope of ownership rights.

The chief justice also is right that a continued reliance on state laws to define the contours of property rights would have averted the *Murr* mudslide. The traditional approach would have been vastly preferable to the constitutional detour taken by the majority. But Roberts overestimates the extent to which relying on state laws to define property rights clarifies the takings muddle. For the reasons discussed previously, the question posed in *Murr* is endemic to the takings puzzle: If state laws secure property rights, why can they also violate them? Commentators have faulted Justice Scalia for misapprehending in *Lucas* the nature of "background principles of property and nuisance"—by assuming that these principles are fixed and static when in fact they are fluid and evolving.[50] Chief Justice Roberts similarly is too sanguine that there are sufficiently fixed "ordinary principles" of state property law to resolve contested questions about the nature and extent of property rights affected by a challenged regulation. After all, the Wisconsin courts purported to apply settled Wisconsin law in holding that the Murrs' lots should be considered one parcel, yet Roberts faulted them for adopting a "takings specific" definition of property. It is unclear what in the nature of "ordinary principles" of state property law prevents state courts from adopting such a definition, or, for that matter, any definition.

[49] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[50] Louis A. Halper, Why the Nuisance Knot Can't Undo the Takings Muddle, 28 Ind. L. Rev. 329 (1995); William W. Fisher III, The Trouble with *Lucas*, 45 Stan. L. Rev. 1393 (1993).

And, while reliance on state law will lend more certainty in many takings cases—for example, the fact that the Murrs held separate title to Lots E and F and paid separate tax bills strongly suggests that the lots should be treated as legally distinct—it will not alone protect property owners from malleable rules that favor regulators. Moreover, even if state law provides a satisfactorily stable definition of property rights, the takings inquiry in diminution-in-value cases will continue to turn on the application of the elusive *Penn Central* factors, which themselves tip the scale in favor of regulators over property owners.

In his separate dissent in *Murr*, Justice Clarence Thomas questioned the wisdom of the entire regulatory-takings doctrine. He suggested that "it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."[51] In my view, Justice Thomas is correct that a historically grounded "fresh look" is the only principled way to clear the takings muddle. *Murr* further muddies the takings waters, but the entire doctrine has long been riddled with inconsistencies and relies more on *ipse dixit* assertions than reasoned analysis. The parcel-as-a-whole rule is a case in point. It is not at all clear why the proportion of an owner's loss resulting from a regulation should matter more to the Court than the magnitude of the loss. For example, if a rancher owning 1,000 acres was prevented by an environmental regulation from using 100 of them for any purpose, he would probably lose a regulatory takings challenge. But if he owned only the 100 regulated acres, then he might well win one (unless the regulation fell under *Lucas*'s narrow nuisance exception). Yet the regulatory burden is the same.[52]

Thomas did not elucidate what a rigorous historical analysis of the original public meaning of the Fifth and Fourteenth Amendments might reveal about the regulatory takings problem. Many scholars have suggested that the Takings Clause as originally understood

[51] Murr, 137 S. Ct. at 1957 (Thomas, J., dissenting).

[52] See David A. Dana, Why Do We Have the Parcel-as-a-Whole Rule? 39 Vt. L. Rev. 617 (2015); Richard A. Epstein, Physical and Regulatory Takings: One Distinction Too Many, 64 Stan. L. Rev. Online 99 (2012).

provided no protection against regulatory takings at all.[53] I am a skeptic of this claim.[54] Even if I am wrong—and I am admittedly in the minority—Thomas suggests that the Fourteenth Amendment's Privileges or Immunities Clause may provide an alternative source of protection against regulatory excesses. Scholars have demonstrated that, by the antebellum period, courts had begun to develop a fairly robust jurisprudence delineating the line between valid and expropriative regulations.[55] These jurisprudential concepts might have found a home in the Privileges or Immunities Clause had it not been eviscerated in the *Slaughter House Cases*.[56] It is unclear whether analyzing problems like the one posed in *Murr* under the Privileges or Immunities Clause, as properly understood, would lend greater clarity to the regulatory takings issue. But it is hard to imagine that it could compound the confusion any more than current law does. Unfortunately, since Thomas appears to be alone in his curiosity about the matter, the takings waters likely will remain muddied for the foreseeable future.

[53] John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, 109 Harv. L. Rev. 1252, 1252 (1996); John F. Hart, Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, 94 NW. U. L. Rev. 1099 (2000); Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782 (1995).

[54] Nicole Stelle Garnett, "No Taking without a Touching?'" Questions from an Armchair Originalist, 45 San Diego L. Rev. 761 (2008).

[55] Eric R. Claeys, Takings, Regulations, and Natural Property Rights, 88 Cornell L. Rev. 1549 (2003).

[56] Michael Rappaport, Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect against Regulatory Takings, but the Fourteenth Amendment May, 45 San Diego L. Rev. 729 (2008).