Not for the Taking: Murr v. Wisconsin and the Denominator Problem

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INTRODUCTION

Some of the earliest fundamental privileges in American jurisprudence are the bundle of rights we call "property rights."[1] Private landowners with farms, oil fields, and mineral deposit claims, for example, rely substantially on these rights to make a living. As regulations have come into conflict with property land-use rights, however, it has grown increasingly important to protect them from undue government burdens. In 2017, the United States Supreme Court attempted to clarify the scope of property—also known as the denominator—by evaluating several variables to determine if a regulatory taking had occurred.[2] Unfortunately, the Court's multifactor test only serves to muddle the already complex nature of regulatory takings, while limiting Fifth Amendment protections afforded to property owners. Thus, as the makeup of the Supreme Court evolves, it is vital that the Court reconsider its approach. To uphold and protect property rights, the Court must look to state-defined property lot lines—not litigation-specific definitions—to determine how government regulations have impacted private property.

Regulations limiting land-use across the United States have expanded in all levels of government over the last century.[3] Courts initially sought to limit the administrative state by narrowly interpreting federal power under the Commerce Clause.[4] When courts began to broaden the scope of federal

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[1] *See* Will Sarvis, *Land and Home in the American Mind*, 22 J. NAT. RESOURCES & ENVTL. L. 107, 108 (2009).

[2] *See generally* Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

[3] Jonathan Wood, *Standing Up to the Regulatory State: Is Standing's Redressability Requirement an Obstacle to Challenging Regulations in an Over-Regulated World?*, 86 UMKC L. REV. 147, 148 (2017).

[4] *Id.*

power, however, the creation of regulations began to explode.[5] Now, in the twenty-first century, administrative agencies on the federal and state levels have broad powers to regulate.[6] As the administrative state's regulatory powers have grown, it has also come into conflict with many rights enjoyed by private citizens. Landowners, in particular, have seen encroachments on their use and enjoyment of property.[7]

Serving as an attempt to protect property owners from government intrusion, the Takings Clause of the Fifth Amendment to the United States Constitution states that "… property [shall not] be taken for public use, without just compensation."[8] Accordingly, under the Fourteenth Amendment, this protection of private property rights applies not only to the federal government but extends to states and municipalities as well.[9] Though initially only physical takings were protected, courts began to recognize the concept of regulatory takings—or inverse condemnation—as the regulatory state grew.[10] Indeed, courts have found that administrative regulations can limit a landowner's use and enjoyment of their property so much that the value of the property is effectively "taken" from the landowner.[11]

Among the many issues to arise in regulatory takings jurisprudence, a source of recent debate is the issue of what property is relevant for a partial takings analysis.[12] This concept, known as the "parcel as a whole" rule looks at the proportionate size of the loss, or denominator, compared to the property that was not impacted.[13] As a consequence, this denominator problem is vital to a regulatory takings claim for both the landowner and the government.[14]

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[5] *Id.* at 147.

[6] *Id.* at 149; *See also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

[7] Lawson *supra* note 6 at 1236.

[8] U.S. CONST. amend. V.

[9] U.S. CONST. amend. XIV.

[10] *See generally* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[11] *Id.* at 415.

[12] *See* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994).

[13] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

[14] *See* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L. J. 663, 713 (1996).

Consider a hypothetical farmer who holds two adjacent parcels of land, one with five acres (Parcel A) and the other with forty-five acres (Parcel B). Suppose the Environmental Protection Agency (EPA) determines that the land on Parcel A is protected under the Clean Water Act, barring any development of that property. When the farmer files a regulatory takings claim against the EPA, if the court weighs Parcel A against the combined size of both parcels, only one-tenth of the property has been impacted, and the court is unlikely to hold that a regulatory taking has occurred. Conversely, if the court looks at the parcels separately and only weighs the impacted land against itself, now all of the property has been impacted, and the court is likely to hold there was a regulatory taking. Thus, defining the denominator is important because it is in the landowner's interest for it to be large and in the government's interest to limit it.

In its attempt to bring clarity to the denominator problem, the Supreme Court muddied the issue even more in *Murr v. Wisconsin*.[15] In *Murr*, the Court created a multi-factor balancing test that looks at: "(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."[16] Unfortunately, in articulating this vague test for determining the denominator of regulatory takings claims, the Court failed property owners.[17] Rather than bringing clarity and predictability, the Court created a convoluted test that is likely to create more litigation, while granting strong deference to government at the expense of citizens' rights.[18]

This Note proposes the creation of a new bright-line test to determine the relevant parcel based on state-defined property lines when courts evaluate regulatory takings claims. Part I will examine the constitutional development of regulatory takings under the Fifth Amendment. Part II will analyze the Court's current multi-factor test as applied in *Murr* and explain why the

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[15] *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017).

[16] *Id.* at 1945–46.

[17] *See* Ilya Somin, *A Loss for Property Rights in Murr v. Wisconsin*, WASH. POST: VOLOKH CONSPIRACY (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=.a02e8412bf69 [https://perma.cc/2T4K-3YQD].

[18] *Id.*

test is detrimental to farm and mineral land-use interests. Finally, Part III proposes a new test that utilizes preexisting state-defined property lines, which will give better protection to private property and agricultural owners.

I. CONSTITUTIONAL HISTORY OF REGULATORY TAKINGS

Although this Note does not serve as a critique of regulatory takings, to understanding *Murr* and its application, it is important to survey the constitutional development of regulatory takings in the United States.

*A. Pre-*Pennsylvania Coal *Takings*

The primary type of government action covered by the Takings Clause of the Fifth Amendment for most of American history was a physical invasion, appropriation, or use of eminent domain over a person's property.[19] There were few legal remedies for limitations of land use and no such thing as a "regulatory taking."[20] During the nineteenth century, regulations could bar activities that were of public health, safety, or moral concern without providing compensation.[21] These types of regulatory powers were justified being a core part of the state's police power, allowing states to regulate for the common good.[22] In distinguishing between state takings and regulatory police powers, Justice John Marshall Harlan wrote:

> The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state

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[19] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 328 (2017).

[20] Meltz, *supra* note 19, at 328.

[21] *See* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 182–83 (2004); *see also* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 832 (1998).

[22] *See* Jacobson v. Massachusetts, 197 U.S. 11, 24–27 (1905).

> must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use …[23]

State legislatures were allowed to regulate land use as long as the regulations were promulgated in pursuit of public interest.[24] The Court's deference toward state police power remained its preferred approach, even in cases where land-use requirements eliminated private property interests.[25] This continued to be the common treatment of government regulatory power and takings claims until the early twentieth century.[26]

During the latter part of the nineteenth century and the early twentieth century, federal and state regulatory powers began to expand.[27] Populist and Progressive Era politics generally embraced a larger view of the government's regulatory police powers.[28] Accordingly, many states began to pass laws to increase public health and safety.[29] The concept of a regulatory taking grew out of this expanded regulatory role of government.

B. Pennsylvania Coal Co. v. Mahon

The Supreme Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon* signaled a major shift in modern takings jurisprudence and the beginning of the Court's recognition of

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[23] Mugler v. Kansas, 123 U.S. 623, 669 (1887).

[24] *Id.*

[25] Ron von Lembke, *Keystone Bituminous Coal Association v. Debenedictis and the Status of Coal in Pennsylvania*, 11 HARV. J.L. & PUB. POL'Y 227, 228 (1988).

[26] *See Mugler*, 123 U.S. 623; *see also* Powell v. Pennsylvania, 127 U.S. 678 (1888); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[27] *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (explaining the rise of the regulatory state and its impact on the judicial system).

[28] *Id.* at 1191–92.

[29] *Id.*

regulatory takings.[30] In *Pennsylvania Coal*, the Court questioned the extent to which a state's police power could conflict with existing property rights, thereby creating the modern framework for regulatory takings cases.[31]

Government regulatory powers were greatly enhanced during the Progressive Era, often in an attempt to limit public health and safety risks.[32] One safety risk the Pennsylvania legislature sought to protect the public from was surface subsidence.[33] By the end of the nineteenth century, coal companies owned much of the land in the northern part of the state.[34] In this region, it was common for coal companies like Pennsylvania Coal to sell land to people with stipulations allowing the companies to reserve mineral rights while waiving any liability for property damage or personal injury.[35] Consequently, Pennsylvania enacted the Kohler Act in 1921, which prevented coal companies from mining under inhabited land in a way that would weaken the surface structure.[36] In *Pennsylvania Coal*, the Mahons' deed included a mineral right stipulation, which inspired them to file for an injunction against Pennsylvania Coal to prevent it from removing coal under their home.[37] Ultimately, the Court held that the Kohler Act was an inappropriate use of police power.[38] Writing for the majority, Justice Oliver Wendell Holmes Jr. noted that:

> 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. As long recognized, some values are enjoyed under an implied limitation and must yield to police power. However, the implied limitation must have its limits, or the contract and due

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

[31] *Id.* at 413.

[32] Rabin, *supra* note 27, at 1229.

[33] *Mahon*, 260 U.S. at 412–13.

[34] Neal S. Manne, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447, 1451–52 (1980).

[35] *Id.*

[36] *Mahon*, 260 U.S. at 412–13 (determining that the Kohler Act is unconstitutional).

[37] *Id.* at 412.

[38] *Id.* at 414.

> process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.[39]

Because the value of mineral rights included the right to mine it, the Court reasoned that the Kohler Act had the same effect of appropriating Pennsylvania Coal's property interest for itself; to the Court, even a strong public interest to improve public safety was not enough to create an eminent domain shortcut.[40]

Justice Holmes famously declared that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[41] This marked a major shift in the Court's Takings Doctrine from favoring state police power to favoring private property protections.[42] Justice Holmes, however, failed to provide guidance as to when a regulation has gone "too far" and did not explain how much diminution in value is enough to limit regulation.[43] Thus, *Pennsylvania Coal* not only created a foundation for modern regulatory takings cases, but it also opened the door for continued legal debates over how far regulations must go in order to be "too far."

C. Penn Central Transport Company v. New York City

For close to half a century after *Pennsylvania Coal*, the Supreme Court heard few major cases concerning constitutional checks on state regulatory power over property, validating most land-use regulations.[44] In *Penn Central Transportation Company v. New York City*, however, the Court finally articulated a

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[39] *Id.* at 413.
[40] *Id.* at 416.
[41] *Id.* at 415.
[42] von Lembke, *supra* note 25, at 230.
[43] *Id.* at 231; *see also* Manne, *supra* note 34, at 1452; Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017).
[44] *See* Wright, *supra* note 21, at 184; *see also* Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20-FALL KAN. J.L. & PUB. POL'Y 1, 7 (2010).

substantive test for determining when a regulation has gone too far.[45]

In 1965, the New York City Council passed the Landmarks Preservation Law in an attempt to protect historic landmarks and structures across the city.[46] Effectively, this limited land-use decisions and prohibited renovation or demolition of buildings in protected areas without approval from the city.[47] At the time, Penn Central Transportation Company owned Grand Central Station and sought to construct an office building above it, which it planned to lease.[48] As a historic landmark, Penn Central was required to obtain city approval before making any structural changes.[49] After two of its proposals were denied, Penn Central filed suit claiming that the New York law had effectively "taken" its property by prohibiting it from using its building rights.[50] Specifically, Penn Central argued that the law deprived it of "air rights," significantly diminishing its property value.[51]

In response, the Supreme Court created two of the most important concepts in regulatory takings jurisprudence. First, the Court established a balancing test used to determine if a regulation has gone "too far."[52] Such questions, the Court acknowledged, are "essentially ad hoc, factual inquiries."[53] Following Justice Holmes' approach in *Pennsylvania Coal*, the *Penn Central* Court avoided a bright-line test and instead identified three relevant factors to be balanced: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with investment-backed expectations, and (3) the character of the government's action.[54] In applying the new test, the Court rejected Penn Central's attempt to bifurcate air rights from its property interest in the preexisting structure and recognized a doctrine that has come to be known as the "parcel as

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[45] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123–39 (1978).
[46] *Id.* at 109
[47] *Id.*
[48] *Id.* at 115–16.
[49] *Id.* at 116.
[50] *Penn Cent. Transp. Co.*, 438 U.S. at 119.
[51] *Id.* at 130.
[52] *Id.* at 123–24.
[53] *Id.* at 124.
[54] *Id.* at 124–28; *see also* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 517 (2004).

a whole" or relevant-parcel doctrine.[55] In explaining this doctrine, the Court said: "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[56] Instead, when determining if government action is a taking, Justice William Brennan wrote that courts should focus on "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[57]

With this doctrine in mind, the Court continued its analysis by applying the new balancing test to the terminal property as a whole.[58] Ultimately, the Supreme Court held that the New York law did not constitute a taking.[59]

D. Post-Penn Central

Despite the Court's attempt to bring more clarity and fairness to regulatory takings cases in *Penn Central*, its balancing test has been criticized for its lack of coherence and ad hoc nature of its application.[60] In addition to these criticisms, its recognition of the relevant-parcel doctrine has also been criticized for the lack of guidance in defining what property is actually relevant for a takings inquiry.[61] Thus, the applicability of the balancing test and the definition of the parcel as a whole became a source of confusion and significant debate in the years following *Penn Central*.[62]

The Court remained silent on exactly how to determine what the relevant parcel is.[63] Except for articulating a separate test for total takings of property in *Lucas v. South Carolina*

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[55] *Penn Cent. Transp. Co.*, 438 U.S. at 130–31.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 132-38.

[59] *Id.* at 138; Tipton F. McCubbins, *Regulatory Takings: What Did Penn Central Hold? Three Decades of Supreme Court Explanation*, 21 S. L.J. 177, 178 (2011).

[60] *See* R. S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 ECOLOGY L. Q. 731, 735 (2011); *See also* Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339 (2006); Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601 (2014).

[61] Laura J. Powell, *The Parcel as a Whole: Defining the Relevant Parcel in Temporary Regulatory Takings Cases*, 89 WASH. L. REV. 151, 160 (2014).

[62] *Id.* at 154.

[63] *Id.* at 159.

Coastal Council,[64] the Court provided little to no guidance for partial-takings cases beyond its balancing test in *Penn Central*.[65] This left the question of the denominator an implicit inquiry, even among many lower courts.[66] Coincidentally, Justice Antonin Scalia explicitly acknowledged the conundrum of defining the denominator in dicta of the *Lucas* opinion:

> Regrettably, the rhetorical force of our . . . rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90 [percent] of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[67]

Unfortunately, the Court ignored any denominator analysis because of the nature of the claim in *Lucas*, leaving the problem unanswered.[68]

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[64] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (a regulation which denies "all economically beneficial or productive use of land" will require compensation under the Takings Clause); *see also* Palazzolo v. Rhode Island, 553 U.S. 606, 617 (2001).

[65] *See* Benjamin Allee, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 FORDHAM L. REV. 1957, 1972 (2002).

[66] *Id.*

[67] *Lucas*, 505 U.S. at 1045, n.7.

[68] Though not covered in this Note, it is worth mentioning the Court's ruling in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). *Palazzolo* involved an inverse condemnation action brought by the landowner of property that was in a partial wetland, protected by state regulations. While there was no denominator analysis, the Court rejected the landowner's "loss of all economically and beneficial use" *Lucas* claim, finding that the property still maintained a large value. In addition to this ruling, and perhaps more importantly, the Court also held that regulations pre-dating ownership do not absolve the state from a regulatory taking claim. For example, a landowner may purchase property that is partially protected by state environmental regulations, and that in and of itself does not necessarily prohibit them from challenging the regulations. As will later be discussed, knowledge of pre-ownership regulations is likely a factor considered under *Murr v. Wisconsin*.

II. SOLVING THE DENOMINATOR PROBLEM

After years of applying the *Penn Central* and *Lucas* tests to regulatory takings cases, the Court finally looked poised to answer the denominator problem in *Murr v. Wisconsin*.[69] While not necessarily outcome determinative in and of itself, the question of the relevant property is ultimately linked to whether a regulatory taking has occurred.[70] As noted in an earlier case, determining the denominator is important "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property."[71] The Court's solution to the problem, however, has only served to muddle an already complicated area of jurisprudence further.

A. Background of Murr v. Wisconsin

The *Murr* case involved a regulatory takings challenge to a county ordinance in Wisconsin.[72] In the 1970s, certain areas in Wisconsin were given federal protection under the Wild and Scenic Rivers Act to protect the wild, scenic, and recreational qualities for present and future generations.[73] In accordance with this law, Wisconsin passed an ordinance preventing development on any lot under one acre, known as a substandard lot.[74] The regulatory language included a merger provision that prevented adjacent substandard lots under common ownership from being sold separately.[75] These rules also included a grandfather clause that relaxed restrictions on property owners as of January 1, 1976.[76]

The Murr family, petitioners, owned two contiguous parcels of land along the St. Croix River, which was protected

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[69] Murr v. Wisconsin, 137 S. Ct. 1933, 1939 (2017).

[70] *Id.* at 1943–44.

[71] *Id.* (quoting Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497 (1987)).

[72] *Murr*, 137 S. Ct. at 1940.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

under these parcel regulations.[77] Although each lot was more than 1.25 acres in size, the St. Croix waterline and the steep banks overlooking the river severely limited the buildable land area to about 0.98 acres.[78] Thus, these lots were subject to the parcel regulations.

In the 1960s, before the regulations, the parents of the petitioners purchased Lot F and Lot E separately.[79] The title for Lot F was transferred to the family's plumbing company where a cabin was built, while Lot E was held in their names as a family investment.[80] These lots remained under separate ownership until the 1990s when the lots were conveyed to the petitioners and after the parcel regulations had been promulgated.[81]

Years after the conveyance, the Murrs wanted to move the cabin on Lot F to a different portion of the lot because of flooding difficulties with the cabin.[82] To fund this project, the Murrs sought to sell Lot E.[83] However, because the lots were subject to the parcel regulations, the Murrs had to obtain variances from the county.[84] When the county denied their variance requests, the Murrs filed suit claiming that the parcel regulations operated as a regulatory taking.[85]

Before applying any categorical or balancing test, the first task in a regulatory taking inquiry is to determine what property is at issue.[86] With this in mind, the Wisconsin court identified the combined property—Lot E and F together—as the relevant property for its analysis.[87] The Wisconsin Court of Appeals rejected the petitioners' request to apply the tests only to Lot E and held that the lower court's takings analysis had "properly focused on the regulations' effect 'on the Murrs' property as a whole'—that is, Lots E and F together."[88] Ultimately, the

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[77] *Murr*, 137 S. Ct. at 1940.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1940–41.
[81] *Id.* at 1941.
[82] 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, 160 (2017).
[83] *Murr*, 137 S. Ct. at 1941.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1941–42.
[88] *Murr*, 137 S. Ct. at 1941 (quoting App. to Pet. For Cert. A-12).

Wisconsin Court of Appeals found that the preexisting parcel regulations were not a taking because the petitioners could not have reasonably expected to bifurcate the lots and the economic impact was minor.[89]

B. Murr*'s Majority Opinion*

Upon the grant of certiorari, the Supreme Court was provided with an opportunity to resolve the denominator problem by defining what property is relevant for a takings analysis.[90] Indeed, many legal scholars anticipated a new approach and welcomed any clarity to the muddled jurisprudence of regulatory takings. Unfortunately, however, the Court's opinion in *Murr* has only added more confusion.

The Court was faced with three different approaches to the denominator analysis.[91] The Murrs argued for a bright-line rule that looked at the lot lines of the affected property to determine the relevant parcel.[92] The Murrs' argument would allow judges to deploy a more predictable analysis when determining what property is relevant in a regulatory taking. The State argued as well for a bright-line rule that looked to the property's treatment under State law, again making it a more predictable analysis.[93] The third and eventually prevailing approach, presented by the United States in amicus, favored a flexible, multifactor analysis.[94]

The majority followed the trend of providing strong deference to government regulatory powers, with Justices Anthony Kennedy, Stephen Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan holding 5-3 against the Murrs and in favor of the State.[95] Rather than create a simple test for determining the relevant property, however, the Court created

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[89] *Id.* at 1942.
[90] *Id.* at 1939.
[91] *Id.* at 1944–48.
[92] *Id.* at 1947–48.
[93] *Murr*, 137 S. Ct. at 1946.
[94] Brief for the United States as Amicus Curiae Supporting Respondents at 17–19, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214).
[95] Justice Gorsuch did not participate in this decision, as he had not yet joined the bench at the time of oral arguments.

yet another multifactor balancing test. Writing for the majority, Justice Kennedy explained:

> [N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include [1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.[96]

Consequently, the introduction of an additional three-part analysis to regulatory takings cases has led some to call the new analysis "*Penn Central* squared."[97] In practice, the Court's new test requires lower courts first to do a *Penn Central*-type three-part analysis to calculate the relevant parcel. Once the relevant parcel is determined, courts must then apply the three-part analysis from *Penn Central* to determine if there has been a regulatory taking on the relevant parcel.[98] Effectively, *Murr* requires two separate *Penn Central* analyses for each regulatory takings inquiry.

By applying the new test, Justice Kennedy held that the Murrs' two lots should be evaluated as a single parcel.[99] Under the first factor, Kennedy found the treatment of the property under state and local law indicated that the property should be treated as one because the regulatory burden preexisted the petitioner's ownership.[100] Under the second factor, he found the physical characteristics of the two parcels were contiguous and supported its treatment as a unified parcel.[101] Finally, Kennedy

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[96] *Murr*, 137 S. Ct. at 1945.

[97] 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, 55 (2017).

[98] *Id.*

[99] *Murr*, 137 S. Ct. at 1933.

[100] *Id.* at 1948.

[101] *Id.*

explained that the third factor was met because the value of the two lots was greater together than separate.[102]

C. The Roberts Dissent

The *Murr* majority has been highly criticized on both sides of the denominator debate for creating another confusing, unpredictable multifactor test. Among the critics were Chief Justice John Roberts, and Justices Clarence Thomas and Samuel Alito in their *Murr* dissents.[103] The Roberts dissent, in particular, is important to this discussion for its reliance on state-defined property rights.

While Roberts had no qualms with the majority's ultimate holding, he questioned its decision to effectively redefine principles of property rights.[104] He asserted that state law alone should define the boundaries of property.[105] Roberts reasoned that state laws already define property lines and distinct units of land; therefore, the Court ought not conflate the relevant parcel with the question of whether a taking had occurred because they are two entirely distinct questions.[106] By leaving behind state property principles, Roberts argued that the majority "authorizes governments to … create a litigation-specific definition of 'property' designed for a claim under the Takings Clause."[107]

D. Problems with Murr

As Chief Justice Roberts acknowledged, the denominator analysis in *Murr* raises significant concerns for all property owners.[108] Despite some of the benefits of a multifactor test touted by the majority, their approach creates a litigation-based definition of property and weakens Fifth Amendment protection by providing deference to government interests. By conflating two

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[102] *Id.* at 1948–49.

[103] Justices Thomas and Alito joined in Chief Justice Roberts' dissent. In addition to this, Justice Thomas also wrote a separate dissenting opinion. *Murr*, 137 S. Ct. at 1951.

[104] *Id.*

[105] *Id.* at 1952.

[106] *Id.* at 1953.

[107] *Id.* at 1954–55.

[108] *Murr*, 137 S. Ct. at 1954.

separate and distinct analyses into a "*Penn Central* squared" test, the Court muddled the definition of private property as it has traditionally been understood.

Because of the creation of another multifactor test applied at the preliminary phase, there is no clear answer for property owners, legislators, or courts, as to what the relevant parcel actually is. In fact, many questions remain unanswered, and *Murr's* new test seems to create even more. What laws are relevant to determine the treatment of the property: laws at the time of purchase or laws leading to the litigation? What kind of physical characteristics are particularly relevant? What is the value of the regulated land and what if it is worth more separately? Which factors are the most important and what other factors are relevant? These are just some of the questions left unanswered upon the application of the *Murr* test that are not readily identifiable before litigation. Further, the factors listed in *Murr* lack specificity and are difficult to measure, causing confusion and uncertainty.[109] Consequently, courts will likely have to weigh these factors at the onset of litigation, before ever hearing the merits of the takings claim. This litigation-based definition of property will only serve to increase the time and costs of challenging a regulatory taking, making the issue even more complex.

In addition to the problems with clarity, particularly from the perspective of landowners, the *Murr* test tends to allow more deference to government entities at the expense of property owners. Traditionally, Fifth Amendment protections were in place to protect property owners from government interference. This protection has grown increasingly important as the regulatory state has grown, causing what some—such as Roberts—have called an inherent imbalance in the clash of interests between the common good and the interests of a few.[110] However, rather than level the playing field, the *Murr* test only serves to exacerbate the imbalance further in favor of the government:[111]

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[109] *See* Somin, *supra* note 17.
[110] *Murr*, 137 S. Ct. at 1955.
[111] *Id.*

> 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. Under the majority's test, identifying the "parcel as a whole" in such cases will turn on the reasonableness of the regulation as applied to the claimant. The result is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property.[112]

Accordingly, the *Murr* test undermines the Fifth Amendment's protection by allowing the government's goals to shape the playing field at the preliminary stage (determining the denominator) before courts ever get a chance to analyze whether a regulation goes too far.[113]

By considering government interests, reasonable investment-backed expectations, and similar factors at both the preliminary and merit stages of deciding whether a regulatory taking has occurred, the Court created a muddled "*Penn Central* squared" analysis. The outcome of *Murr* seems to incentivize landowners to keep their parcels separate from the others in order to fully protect the rights associated with each parcel:

> Put simply, [the *Murr*] decision … throws [the definition of 'private property'] into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: the majority's new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.[114]

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[112] *Id.*
[113] *Id.*
[114] *Id.* at 1956.

III. A NEW TEST

A. Alternatives to Murr

The Supreme Court's failure to articulate an answer to the denominator problem before *Murr* left a void to be filled by legal scholars and lower courts. In light of the slim majority's ambiguous decision in *Murr* and the ever-changing make-up of the Court, it is important to understand some old approaches to the denominator problem in order to find the best solution. In fact, during the years before *Murr*, there were a few dominant solutions used.[115] First, there were various multifactor tests, which ultimately influenced Justice Kennedy's test in *Murr*. [116] Second, a bright-line rule emerged based on the contiguity of parcels under common ownership.[117] Finally, the bright-line rule evolved based on state law.[118]

i. Federal circuit multifactor analysis

Justice Kennedy's creation of a multifactor analysis for the denominator problem in *Murr* was not the first time a multifactor approach has been used as a solution. Before *Murr*, several jurisdictions used various factors in their analyses of the relevant parcel. Although no cases provided an exhaustive set of factors for defining the relevant parcel, many courts implored similar approaches.

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[115] Different people have categorized the various denominator tests in a variety of ways. Here, I look to those tests that are more widely accepted. *See* Lisker, *supra* note 14.

[116] *See* Fla. Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), *abrogation recognized by* Bass Enterprises Prod. Co. v. United States 381 F.3d 1360 (Fed. Cir. 2004); *See also* Palm Beach Isles Assoc. v. United States, 208 F.3d 1374 (Fed. Cir. 2000), *abrogation recognized by* Bass Enterprises Prod. Co. v. United States 381 F.3d 1360 (Fed. Cir. 2004).

[117] *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602 (1993).

[118] *See* Murr, 137 S. Ct. at 1950 (Roberts, C.J. dissenting); Richard A. Epstein, Pennsylvania Coal v. Mahon*: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875 (1998).

Calling for "a flexible approach, designed to account for factual nuances,"[119] the Federal Circuit Court of Appeals' acceptance of multifactor analyses encouraged other jurisdictions to do the same.[120] In *Ciampitti v. United States*, the Federal Circuit looked at four specific factors to determine the relevant parcel in a takings challenge, while also leaving open the possibility for other factors to be considered.[121] These four relevant factors include consideration of: "(1) the degree of contiguity, (2) the dates of acquisition, (3) the extent to which the parcels have been treated as a single unit, and (4) the extent to which the protected lands enhance the value of the remaining lands."[122] While no single factor was determinative, the Federal Circuit's holding in *Ciampitti* put particular weight on the third prong by ruling that two noncontiguous lots may be treated as a single parcel for takings purposes when they are part of a single transaction.[123]

Other jurisdictions have either accepted the Federal Circuit's approach or created their own multifactor tests in response to the lack of guidance by the Supreme Court.[124] Some courts included several factual questions in their multifactor analysis, such as asking when structures were built on a property, the timing, and purpose for acquiring certain property, and so forth.[125] Similar to the approach used in *Murr*, several jurisdictions also applied *Penn Central* factors such as the economic viability of the property and the investment-backed expectations.[126]

Admittedly, these multifactor tests allow a certain degree of flexibility for the courts to give weight to many relevant considerations. Unlike in *Murr*, where the Court's goal was to establish an objective test for the denominator, many lower

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[119] *Loveladies Harbor*, 28 F.3d at 1181.

[120] Allee, *supra* note 65, at 1988.

[121] Ciampitti v. United States, 22 Cl. Ct. 310, 318–19 (1991).

[122] *Id.* at 318; *see also* Allee, *supra* note 65, at 1988.

[123] Fee, *supra* note 12, at 1547.

[124] *See* Dist. Intown Props. v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999); K & K Constr., Inc. v. Dep't of Nat. Res., 575 N.W.2d 531 (Mich. 1998).

[125] *See* E. Cape May Assocs. v. Dep't of Envtl. Prot., 777 A.2d 1015, 1025 (N.J. Super. Ct. App. Div. 2001); *see also* Fee, *supra* note 12, at 1547.

[126] *See* Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

courts considered subjective criteria in their analyses. This inclusion of subjective factors may lead to a broad or narrow definition of the relevant property, depending on the facts specific to the situation.[127] This benefits courts seeking flexibility to consider the facts of each case fully.

However, as noted in the critique of *Murr*'s test above, multifactor tests are extremely unpredictable and lead to increased litigation. As Roberts indicated in his dissent, consideration of other factors concerned with government interests completely redefines the historical definition of property.[128] Questions of the investment-backed expectations, or even the landowner's subjective purpose for owning the land, ought to be questions asked later in the regulatory takings analysis, not at the preliminary stage of defining the denominator.[129] By accepting an undefinable list of factors and applying them at each stage, these two separate inquiries are conflated and make the ultimate outcome depend on the denominator alone.

ii. Contiguous-common ownership approach

The second major proposal looks at whether the parcels in question are under common ownership and the extent to which they lie contiguously. Applying the unity-of-ownership concept to questions of regulatory takings creates a straight-forward analysis. This approach uses one of the most common boundaries of a landowner's property—the entire contiguous property line—as the denominator for a regulatory takings analysis. By avoiding an additional multifactor analysis, or some ambiguous test, a unity-of-ownership approach to property allows a court to look at the deed to determine the denominator.[130]

Because of its simplicity, many lower courts before *Murr* used this simple definition without any lengthy discussion of other rules.[131] Some courts, however, explicitly indicated a preference toward the common ownership approach in an attempt

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[127] Fee, *supra* note 12, at 1547.
[128] *Murr*, 137 S. Ct. at 1955.
[129] *Id.*
[130] Allee, *supra* note 65, at 1982.
[131] Fee, *supra* note 12, at 1546.

to limit landowner manipulation. For example, in *Bevan v. Brandon Township*, a Michigan court rejected the plaintiff's attempt to sever property into distinct parcels to obtain compensation for a taking.[132] To the court, the division of property into separate parcels, or a horizontal severance, ought to be an irrelevant fact in determining the denominator because it could incentivize property manipulation:

> If it were held to be so, the result would be that it would be competent for landowners to perpetually defeat future zoning restrictions by crisscrossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others. The test of reasonableness may not be distorted or thwarted by any such artificial device.[133]

This "gamesmanship," as Justice Kennedy called it, was also a particular concern during the development of the *Murr* test. "The ease of modifying lot lines" Kennedy explained, "also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property."[134]

Instead of recognizing the inherent value of each separate parcel, the Michigan court defined the relevant parcel as the plaintiff's entire commonly owned and contiguous property:

> According to the [U.S. Supreme Court], the "taking" analysis does not turn on the state's recognition of a separate estate within the owner's property, or whether state law allows the separate sale of a segment of the property. "It is clear," wrote Justice Stevens, "that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." [The Michigan Supreme Court] has recognized that

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[132] Bevan v. Brandon Township, 438 Mich. 385 (1991).
[133] *Id.* at 396 (quoting Korby v. Redford Township, 348 Mich. 193, 198 (1957)).
[134] *Murr*, 137 S. Ct. at 1948.

> contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances, despite the owner's division of the property into separate, identifiable lots.[135]

In coming to this conclusion, the court relied on Justice John Paul Stevens' analysis of *Penn Central* in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, in which he conflated questions of vertical severance (air rights in *Penn Central*) with horizontal severance (contiguous parcels of land).[136]

One major concern of defining the relevant parcel as contiguous land under common ownership is the adverse impact it would have on larger property owners.[137] Large parcels are less likely to suffer total economic losses because of the size of the combined area, forcing larger landowners to either lose their chance of showing a regulatory taking or severely limiting it.[138] This has led some critics to suggest that the *Penn Central* diminution-in-value prong would be nearly impossible to prove for large landowners, absent a greater loss in their property rights.[139]

Consider a similar situation to the facts in *Murr*. There are ten neighboring families along the river with similar size parcel dimensions, except the tenth family has two contiguous parcels behind their riverfront plot. When the riverfront parcels of all ten families are limited by regulations, the nine families with only riverfront property would likely be compensated for a regulatory taking. Applying this common ownership test, the tenth family with the additional parcels behind the riverfront parcel would not be compensated because their denominator would encompass their entire property. This effectively punishes a landowner for owning contiguous parcels and bars them from compensation—despite having an equally-impacted parcel of land

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[135] *Bevan*, 438 Mich. at 395.

[136] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

[137] *See* Allee, *supra* note 65.

[138] *Id.*

[139] Fee, *supra* note 12, at 1552.

like their neighbors.[140] Thus, the common ownership approach, while easy to use, proves problematic upon application by failing to account for each parcel's separate value fully, and by discriminating against landowners with multiple parcels of contiguous land.

iii. Why state property laws work best

Property rights are creatures of the state. That is, for most of American history, state law has determined the boundaries of individual parcels of land. Therefore, the best solution to the denominator problem is to look at the distinct property lines of the affected parcels. Rather than weighing an undefinable list of factors, allowing a court to look at each parcel as a separate and distinct piece of property is a clear and predictable way of determining the value of the denominator. Unlike the common ownership concept, this approach offers a consistent and equitable way of identifying the relevant parcel—without limiting the protections of larger landowners. Notably, this is the same approach sought by the plaintiffs in *Murr* and was largely supported by Roberts' dissent.[141] Despite Kennedy's rejection of this approach in *Murr*, the Supreme Court should reconsider it to differentiate between the denominator and merit stages of a regulatory takings analysis.

While no court has regularly applied this distinct property line approach, its clarity and consistency with commonly understood principles of property law make it superior to the dominant alternatives.[142] Scalia once wrote that a fee simple interest "is an estate with a rich tradition of protection at common law."[143] Similarly, Justice Potter Stewart also acknowledged the common law benefits attached to property interests and their creation:

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[140] *See id.*; *see also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192–93 (1967); Allee, *supra* note 65, at 1984–85.

[141] *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (Roberts, C.J., dissenting); *see also* Brief for Petitioners at 9, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214).

[142] *See Murr*, 137 S. Ct. at 1956 (Roberts, C.J., dissenting).

[143] *See Lucas*, 505 U.S. at 1045, n.7 (Scalia, J., dictum).

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined … Property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[144]

These are the underlying principles behind the Fifth Amendment: state laws create and define private property rights, and the Constitution ensures their protection.[145] This approach offers a clear, predictable, and consistent way of determining the denominator. By using state-created parcel lines, courts would show a greater level of respect for the state-law realm of property rights, while affording property owners due protections.

In addition to its uniformity with common law principles of property, this approach is also consistent with *Penn Central*.[146] As Roberts noted, the "parcel as a whole" language used in *Penn Central* was a response to attempts to vertically sever certain rights from the bundle.[147] This conceptually-created vertical severance should not be confused with state-created horizontal lines that separate different parcels. "Th[e] risk of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim." He further explained that "the government must take those [state] rights as they find them."[148]

One alleged drawback to this approach is what critics have suggested is a dual incentive for both the landowner and the government of Kennedy's "gamesmanship."[149] If the state can create and define property rights, what stops it from gaming the

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[144] *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
[145] *See Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).
[146] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
[147] *See id.* at 1953 (Roberts, C.J., dissenting).
[148] *Id.*
[149] *Id.* at 1948.

system by enacting laws to consolidate certain types of property? After all, in *Murr*, it was the application of the state's laws that led to the holding that two lots should be considered one parcel—despite being two distinct plots.[150] Similarly, Kennedy criticized this approach for what he saw as an easy way for landowners to modify lot lines and increase the chance a total taking had occurred, or in anticipation of new land-use regulations.[151] But, as Roberts responded, "such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm."[152] Besides, states cannot simply sidestep Fifth Amendment protections by eliminating traditional property interests long recognized under state law.[153]

Unlike the common ownership approach, using state-created property lines to distinguish between separate legal and economic parcels ensures that the value of each individual parcel is recognized. This approach also treats all parcels equally by allowing landowners an equal cause of action in a regulatory takings claim, regardless of how much unaffected or contiguous land they own.[154] Consider the hypothetical presented earlier: when nine families—each owning one parcel of equal size along a river—are impacted by a new land-use restriction. By using distinct property lines, the tenth family with a second contiguous parcel has the same cause of action, with no additional burden. In this situation, the single affected parcel becomes the denominator for the regulatory takings analysis, without consideration of any contiguous property.

A bright-line test based on state-defined property lines stands in direct contrast to the multifactor test in *Murr*. Despite accusations of its inflexibility, this approach is a clear and consistent way of determining the bounds of the relevant property.[155] Rather than determining how much of someone's property should be analyzed with a list of ambiguous and inconsistent factors, a parcel-based approach would afford some

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[150] Nicole Stelle Garnett, *From A Muddle to a Mudslide:* Murr v. Wisconsin, 2017 CATO SUP. CT. REV. 131, 148 (2017).

[151] *See* Murr, 137 S. Ct. at 1948.

[152] *Id.* at 1953.

[153] *Id.* (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998)).

[154] *Cf.* Allee, *supra* note 65.

[155] Allee, *supra* note 65, at 1995.

level of predictability to the first step of the regulatory takings claim. It would reaffirm the fact that the denominator and the extent of a regulation's impact should be two separate and distinct questions.[156] Ultimately, this approach rejects a litigation-specific definition of property and restores it to its status as a bundle of state-defined property rights.[157]

CONCLUSION

The United States has a long history of protecting the private property rights of individuals against interference from the government.[158] By protecting private property rights, the Takings Clause "stands as a buffer between property owners and governments."[159] Throughout the twentieth century, as the regulatory state has expanded, this "buffer" has become even more critical. As regulations interfere more and more with private property interests, the scope of regulatory takings jurisprudence has grown increasing muddled. The Supreme Court's attempt to bring clarity to the denominator issue in *Murr* only served to confuse a complex body of law further. Consequently, this multifactor test was a blow to private property rights because it created a litigation-specific definition of property and conflated two distinct steps of the regulatory takings analysis—severely limiting the rights of farmers and other landowners with contiguous parcels.

Rather than rely on vague, inconsistent balancing tests to define what "property" is, looking to state property lines would provide a consistent definition for landowners across the country. Though lower courts articulated a variety of denominator tests before *Murr*, these multifactor tests and common ownership approaches have significant issues. If the Court were to reevaluate its analysis in future cases by accepting Roberts' state law approach to property, this would not only bring much-needed clarity to regulatory takings but reaffirm the importance of

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[156] *See Murr*, 137 S. Ct. at 1951.

[157] *See Id.* at 1954–55.

[158] *See generally* David A. Thomas, *Why the Public Plundering of Private Property Rights is Still a Very Bad Idea*, 41 REAL PROP. PROB. & TR. J. 25 (2006) (explaining the history of government involvement in private property, and the goal of preventing unnecessary governmental interference).

[159] *Murr*, 137 S. Ct. at 1951 (Roberts, C.J., dissenting).

protecting private property interests. Embracing this approach would draw a clear distinction between two main parts of a regulatory taking analysis: identifying the impacted property and determining whether a regulatory taking has occurred. By using common law principles of property to resolve the muddled denominator problem, the Court may finally show that private property rights are not for the taking.