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MURR V. WISCONSIN: THE SUPREME COURT REWRITES PROPERTY RULES IN MULTIPLE-PARCEL REGULATORY TAKINGS CASES

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I. Introduction

The U.S. Supreme Court's 5-3 long-anticipated ruling in *Murr v. Wisconsin*,¹ expected to resolve the “larger parcel” or “denominator” issue in regulatory takings cases, has instead created a test that neither property owners, lawyers, nor government officials can understand or rely on.

The majority opinion, authored by Justice Anthony Kennedy, addressed a long-standing question in regulatory takings law: when a claimant who owns more than a single parcel alleges a regulation works a taking of one of them, how much of the claimant's total holdings will the economic impact of the regulation measured against?² The question in *Murr* arose as a choice between which regulatory takings rule would apply in the case, the categorical “deprivation of economically beneficial use” rule from *Lucas*,³ or the *ad hoc Penn Central* balancing test.⁴ This threshold question governed the outcome because the narrower the Murrs' property interest was defined by the courts, the more likely it would be they would be able to prove the regulation was a taking. In other words, how would the “property” which was claimed to have been taken defined?

The majority answered that question by generating a non-exclusive list of factors which lower courts must consider: the “treatment of the land” under state law, the “physical characteristics” of the properties (which includes the parcels' topography and “the surrounding human and ecological environment”), and “the value of the property under the challenged regulation.”⁵ With this ruling, the Court settled the issue of what test applies, but it also left many more questions for the future. As one of the lawyers in the case predicted, this standard represents “*Penn Central* squared,”⁶ referencing the Court's difficult-to-apply three factor test for a regulatory taking.⁷ Al-

though *Penn Central* is the applicable standard in most regulatory takings cases to determine whether, “in all justice and fairness,” the regulation of property is so extensive it is the *de facto* equivalent of an exercise of eminent domain and should be compensated, it is also a test that is infamously unclear.⁸ The *Murr* majority’s multifactor test will likely be viewed similarly.

As a practical matter, as in *Murr*, property owners often may purchase additional parcels to protect privacy or otherwise add to a small landholding, and, in addition, for a variety of personal reasons such as estate planning, may choose to acquire or transfer ownership of such parcels separately or as a merged lot. As illustrated by *Murr*, these decisions could have unforeseen consequences, including potential state law implications, for small property owners for whom regulations work a hardship.

II. Facts

The four Murr siblings own two adjacent parcels along Wisconsin’s St. Croix River. One

lot (Lot “E”) was not developed, and the family had a small vacation cabin on the other (Lot “F”). The Murrs’ parents originally owned the lots, purchasing them at different times and titling them separately.⁹ They purchased Lot F in 1960, built the cabin, and the following year transferred title to the family’s plumbing company.¹⁰ Two years later, they purchased the adjacent Lot E, which they held in their own names. They never developed Lot E. In 1994 the plumbing company transferred title to Lot F to the four Murr children, and a year later the Murr parents transferred title to Lot E to the same four children. Eventually, the siblings wanted to move the cabin on Lot F to a different site; they wanted to sell Lot E to fund the move.¹¹

Although both parcels are larger than one acre, due to a steep bluff, each has less than one acre of developable land.¹² At the time of the purchases, neither was subject to restrictive development regulations, nor was there any indication that the parents could not have sold the lots to an unrelated third party.

A decade later, Congress designated the St. Croix River for federal protection under the Wild and Scenic Rivers Act.¹³ This required Wisconsin to create a management plan, and in 1976, the state environmental agency adopted rules “to ensure the continued eligibility of the Lower St. Croix River for inclusion in the national wild and scenic rivers system[.]”¹⁴ These rules would “reduce the adverse effects of overcrowding and poorly planned shoreline and bluff area development . . . maintain property values, and . . . preserve and maintain the exceptional scenic, cultural and natural characteristics of the water and related land[.]”¹⁵

The Murrs’ two parcels were classified as “rural residential,”¹⁶ which meant that they were limited to one single-family home on each,¹⁷ provided the parcel had more than “one acre of net project area.”¹⁸ Neither parcel quali-

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fied because of its topography: while they were both more than one acre, their actual buildable area was less, due to the bluff. The regulations also prohibited the transfer of substandard parcels to an unrelated buyer.¹⁹ The regulations contain a limited exception to the development ban for substandard “lots of record” which were “in the records of the deeds office” in 1976 when the regulations were adopted.²⁰ To qualify for this exception, however, the parcels could not be owned by the same owners.

For 20 years, the parcels presumably qualified for this exemption, because they remained separately titled. But in 1994, as part of the Murr parents’ estate plan, their plumbing company conveyed Lot F to their four children. The following year, the parents conveyed Lot E to the children.²¹ This, according to the *Murr* majority’s parenthetical mention, was the operative event which effectively “merged” Lots E and F into one, because the four Murr siblings consequently held title to both parcels, and thus were no longer exempt from the development and transfer restrictions in Wisconsin’s regulations:

(There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to the petitioners.)²²

Nothing, however, changed in the designation of the lots of record in the deeds office, and the parcels retained their separate legal identities.

A decade later, the Murr siblings wanted to move the cabin to a different spot on Lot F. They thought they could sell the undeveloped parcel, Lot E, to fund the cabin move and renovation.²³ The state’s regulations, however, prohibited the sale of the substandard parcel to an unrelated buyer.²⁴ The Murrs sought a variance from the St. Croix County agency with the power to relieve them from hardship, which would have allowed them to sell Lot E.

The agency, as well as the reviewing state courts, denied the variance.²⁵ Thus, neither Lot E nor Lot F could be separately developed or sold by the Murr siblings, except in combination with the other parcel.²⁶

The Murrs instituted a complaint in Wisconsin state court seeking the payment of compensation, asserting a regulatory taking of Lot E, the parcel which they were prohibited from selling to an unrelated buyer. They argued that after the denial of the variance, Lot E was regulated to near worthlessness, because standing alone it has little value to them. They could not build on it, except in combination with the other parcel. Not only could the Murrs not use their second parcel unless combined with the other, they could not sell to someone who could.

III. State Court

The Wisconsin trial court agreed with the government. Appraisal testimony valued Lot E in its separately-regulated state at \$40,000 (assuming it could be sold, which it could not), a nearly 90% loss of value of the parcel’s worth of \$398,000 as a separate developable lot.²⁷ There was no market for the property since it could not be sold, meaning value in its regulated state was zero. Lot F as a single improved lot was worth \$373,000, and the two parcels treated as a single lot under the regulations \$771,000.²⁸ The court concluded that the regulations had not impacted the use and value of the two parcels so severely as to be considered a taking, when the two parcels were considered as merged into one.

The Wisconsin Court of Appeals affirmed, similarly concluding that the regulations were not a taking of Lot E, because the Murrs also owned Lot F. When measured against their use of the two parcels combined, the court concluded their loss of use of the single parcel—otherwise a *Lucas* taking if standing alone—was merely a diminution in value of the

combination, and not a wipeout. The Wisconsin Supreme Court denied discretionary review.

IV. U.S. Supreme Court

Two of the parties (the Murrs and the State of Wisconsin) urged the U.S. Supreme Court to adopt clearly-defined rules because the case added to the inconsistencies among lower courts in how to determine the “denominator” in these cases.²⁹ Wisconsin advocated for a categorical rule in which state law defined property.³⁰ It argued that lot and parcel lines, and separate title, mean little in takings cases, because state law defines property, and states are, in effect, free to redefine it. Fee simple metes-and-bounds are not determinative, because Wisconsin property law (on which the Murrs relied to define their property rights) also included the regulations which require combining substandard, adjacently-owned parcels. People don’t own property parcel-by-parcel Wisconsin argued, but more like a Monopoly game in which an owner collects up different deeds, and what really matters is all of its holdings considered together; separately-titled lots need to have a “legal link” (wholly defined by the government), which is the key to defining property.³¹

The Murrs argued for a more flexible standard (but still mainly categorical), which starts with a presumption that a parcel’s metes-and-bounds lines define their property, and which places the burden on the government to show that the owner used separately-titled parcels as a single integrated economic unit.³² Contrasting the certainty that each of these parties urged, the County argued for a “factors” test to determine what constitutes property. During oral arguments, Justice Kennedy chided both the Murrs’ and Wisconsin’s counsel for advocating for a categorical rule, which he viewed as “wooden,”³³ and none of the resulting opinions advocated for a bright-line rule.

In an opinion authored by Justice Kennedy,

the five-Justice majority held that the Murrs’ “property” was both parcels, considered together. The majority first acknowledged that for over 100 years, the Court has “refrained from elaborating this principle through definitive rules.”³⁴ Building on this, Justice Kennedy identified three main factors (some of which contain subfactors, because this list is not exhaustive) for courts to examine.

First, the “treatment of land . . . under local and state law.” This looks at the actual metes-and-bounds of the legal parcel, but the purpose is to discern the owner’s reasonable expectations about whether she owns one parcel or more. To make this determination, however, a judge will not look at the owner’s actual use of one parcel together with another, but at how much she knew or should have known about “background customs and the whole of our legal tradition.”³⁵ The opinion acknowledged the rule in *Palazzolo* that acquiring property subject to restrictive regulations does not eliminate a potential takings claim,³⁶ but also noted that a “reasonable restriction that predates a landowner’s acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property.”³⁷

Second, the “physical characteristics” of the property:

These include the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulations.³⁸

Finally, judges will need to “assess the value of the property under the challenged regulation, with special attention to the effect of the burdened land on the value of other holdings.”³⁹

Applying these factors, the majority concluded the “state law” element cut against the

Murrs. Although “substantial weight” should be given to how the land “is bounded or divided, under state law,”⁴⁰ the majority paid no attention to the lot lines, and concluded that Wisconsin’s regulations, which considered the two lots as one, are what shaped the Murrs’ property rights; the Murrs voluntarily put the lots under common ownership after the regulations were adopted.⁴¹ They knew about the regulations, but in 1994 transferred the property anyway.⁴² The amalgamated two-parcel denominator meant no *Lucas* taking.⁴³

Chief Justice Roberts, joined by Justices Alito and Thomas, dissented. But they were not so much bothered by the outcome or the fact that the majority avoided bright-line rules, but the majority’s specific factors.⁴⁴ They would have adhered to the “traditional approach” of defining constitutional property by looking at state law, and state law alone.⁴⁵

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue.⁴⁶

This provides certainty, a bright-line between what is mine and what is yours,⁴⁷ and would prevent “strategic unbundling” of property sticks in order to perfect a *Lucas* takings claim.⁴⁸ The dissent also chided the majority for bootstrapping the question of whether the regulation is reasonable into the threshold question of property, arguing “these issues should be considered when deciding if a regulation constitutes a ‘taking,’ and not “crammed in” the preliminary “property” determination.⁴⁹ Property becomes a matter of regulatory bundling case-by-case, rather than applying predictable principles, and gives the government two opportunities to trip up the property owner.⁵⁰ Property owners will most often lose in the calculus of their abstract rights when weighed against a “concrete regulatory problem.”⁵¹ The dissent would have sent the case back to the Wisconsin courts for a deter-

mination of the denominator by applying “ordinary principles of Wisconsin property law.”⁵²

V. Analysis

A. REGULATORY TAKINGS: *LUCAS* OR *PENN CENTRAL*?

The regulatory takings doctrine is premised on the notion that exercises of government power other than the power of eminent domain have such a drastic effect on private property that they can be considered to be the functional equivalent of an affirmative exercise of the condemnation power.⁵³ The regulatory takings doctrine is not a limitation on government’s power to regulate for the public good, but merely forces a realistic evaluation of the actual cost of regulation. The principle driving the analysis is whether it is fair to require a property owner to shoulder the entire economic burden of publicly-worthy regulations: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁵⁴

In *Lingle v. Chevron U.S.A. Inc.*,⁵⁵ the Court reaffirmed that most regulatory takings cases are analyzed by applying a multi-factored balancing test originating in the Court’s earlier opinion in *Penn Central Transportation Co. v. City of New York*.⁵⁶ To determine whether a regulation works is taking and requires compensation, the factfinder looks at the economic impact of the regulation (the loss in property value resulting from the regulation), the property owner’s “distinct investment-backed expectations,” and the “character of the government action.”⁵⁷ The *Penn Central* factors do not stop at the label attached to the exercise of power, but focus on the impact of the regulation on the owner. The Takings Clause is designed “to bar Government from forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole,” and this applies regardless of the power the government exercises.⁵⁸

No one factor of *Penn Central* is dispositive, and courts continue to struggle with how to apply them in practice. Property owner success under *Penn Central* is very rare, and thus it is a very regulation-friendly standard.⁵⁹

Lingle, however, also affirmed the Court’s earlier ruling in *Lucas v. South Carolina Coastal Council*,⁶⁰ that certain cases where a regulation can be shown to deprive the owner of “all economically beneficial us[e]” of property are analyzed without examining any of the other *Penn Central* factors.⁶¹ In *Lucas*, the Court concluded that a near-total restriction on an owner’s economically beneficial use of property is the same thing as condemning it. Thus, it isn’t necessary to look at their expectations or the nature of the government action or the reasons for it. Property owners obviously have a much better chance of success in regulatory takings cases if they can have their claim considered under *Lucas*’ categorical rule.

Most courts approach takings cases by tracking the text of the Fifth Amendment. First, by requiring the claimant to plead and prove that she owns “private property,”⁶² after which the finder of fact determines whether the property was “taken,” either by applying *Penn Central* or *Lucas*.⁶³ If it was, the factfinder also determines what compensation is “just.”⁶⁴

The Murrs naturally wanted to employ the *Lucas* standard with its greater probability of success. The right to use to use property, and the right to sell are fundamental sticks in the bundle of rights which make up our concept of private property, and the economic impact of Wisconsin’s regulations on Lot E, viewed alone, was devastating: the Murr siblings could not sell it to an unrelated buyer at market value, and they could not develop it separately.

Standing alone, it was, from their perspective, reduced to a nominal value, and no separate use. Thus, their claim identified the “property” which they alleged was taken as the vacant parcel, and the Murrs asserted the regulations deprived them of all economically beneficial use of Lot E.

The government’s goal, by contrast, was to have the court apply the *Penn Central* test. If the factfinder were required to consider the economic impact of the regulations on *both* parcels as a whole (and not separately), the government’s chance of prevailing were much higher. The county and state argued that both of the Murr parcels constituted the “property” against which the effects of the regulation should be measured. To be sure, the Murrs could not use the vacant parcel separately, nor could they sell it, but they could use it in conjunction with the parcel on which the cabin was located, and indeed, it may have even added value to that parcel. In sum, to the government, the whole was greater than the sum of its parts.

Thus, the key battle in the case therefore wasn’t “*was* property taken,” but rather “*what* property?”⁶⁵ Was it Lot E alone, or Lots E and F considered together?⁶⁶ In short, the issue to be resolved was whether on the merits, the court would apply the *Lucas per se* test—a claim the Murrs were very likely to win—or the *Penn Central ad hoc* takings test which is heavily slanted in favor of the government. Answering that question one way or the other would, most likely, resolve the dispute on the merits.

B. REASONABLE EXPECTATIONS OR REASONABLE REGULATIONS?

The majority’s multifactor, case-specific approach will not be much help to property owners and regulators trying to predict whether expectations about property will be deemed to be reasonable enough that a regulation will

work a taking, or won't. Property owners cannot predict whether their expectations will be deemed to be reasonable by a court. Legislators and officials tasked with implementing regulations are no better off, because they cannot undertake the calculus the Takings Clause is supposed to have them ask themselves (this is a worthy regulation, but can we afford to apply it here because it impacts property too severely?).⁶⁷

Instead of focusing on the owner and her expectations and actual use of the parcels, the majority shifted the focus to the reasonableness of the regulation, by looking at factors such as the "human and ecological environment." This does not only include existing regulations, but means that owners will be charged with anticipating possible future regulations, especially if the parcels are located in areas presenting "unique concerns" or "fragile land systems."⁶⁸ The majority faulted the Murrs for not realizing that merger provisions are common in zoning laws—and therefore, in the Court's view, reasonable—in land use regulations.⁶⁹

Thus, Wisconsin's regulations were, in the Justices' view, reasonable. Underlying the majority's opinion was the majority's belief that regulation of the Murrs' property is a good thing. But the reasonableness of a regulation is not supposed to be part of the takings calculus, especially after the unanimous Court in *Lingle* rejected the "substantially advance" test as one of takings.⁷⁰ To even get to the takings question, the property owner either must concede the validity of the regulation, or a court must have concluded it was reasonable.⁷¹ Unreasonable regulations cannot be enforced, and this is a separate question of whether otherwise reasonable regulations result in a regulatory taking, a point Justice Kennedy has made in both condemnation and regulatory takings cases.⁷²

But *Murr* made this the central question in

determining Takings Clause property, because the measure of the owner's expectation is the "reasonableness" of the regulation.⁷³ This unfortunately imports the merits of the takings question (has the property been taken?) into what is supposed to be the threshold question of "property." Thus, in order to understand whether she even possesses an interest worthy of protection—and to survive the government's motion for summary judgment and get to the trier of fact—the owner will need to convince a judge that her interest was taken. Which front-loads the ultimate question on the merits (which a jury should decide), as a legal question for the judge.

It is also a view of property as merely the product of statutes and regulations, because an owner's expectations are mostly, in the majority's thinking, shaped by the "human and ecological environment." The majority also was worried that bright lines would encourage property owners to manipulate lot lines in order to avoid regulation or set up takings claims.⁷⁴ Clear rules, in the majority's view, would allow owners to game the system.⁷⁵

In that vein, a practical question. Would the case have turned out differently if the Murrs' parents had not conveyed *Lot F* to their children directly, but had transferred their plumbing company (which owned Lot F) to the children instead, thus avoiding the common ownership provision in Wisconsin's regulations?⁷⁶ If so, that only highlights the difficulties in the majority's approach. Should constitutional property turn on whether the Murr siblings acquired the lot, or their parents' plumbing company?

But despite muddying the waters on the main issue, *Murr* at least cleared up one question: all eight Justices who considered the case rejected Wisconsin's argument that state law alone governs the parameters of Fifth Amendment property interests. No member of the Court was willing to say that states have a

totally free hand to define and redefine property, and even the three dissenters' reliance on state property law boundaries is limited to "all but the most exceptional circumstances."⁷⁷

The Murrs, in the state's view, must take the bitter with the sweet, and property owners should know about these and similar ordinances nationwide. But state law has never been the be-all, end-all answer to the question of what constitutes "property" as Wisconsin argued, at least as far as what is a compensable property interest in takings.⁷⁸

No Justice was willing to accept the view that state and local governments can freely define these interests without compensation. The Court has always suggested that property ownership is not one of those things completely subject to state definition or redefinition, and it doesn't appear any Justice is ready to jettison those principles just yet.

VI. Later Developments

Two developments after the Court issued its opinion in *Murr*.

First, contemporaneously with *Murr*, the Court was also considering another case presenting the denominator issue. In *Lost Tree Village Corp. v. United States*,⁷⁹ the U.S. Court of Appeals for the Federal Circuit concluded the economic impact of the Corps of Engineers' denial of a Clean Water Act permit for development of a single parcel should be measured against a single parcel, and not the parcel plus "a neighboring upland plat (Plat 55), and scattered wetlands in the vicinity owned by Lost Tree at the time the permit was denied."⁸⁰ The Federal Circuit concluded the focus of the denominator question should be on whether the owner treated the multiple parcels "as part of the same economic unit."⁸¹

After the Court of Federal Claims on remand concluded the federal government was liable for the taking of the stand-alone parcel and

the Federal Circuit affirmed, the federal government sought Supreme Court review, asking the Court to hear the case together with *Murr*.⁸² Without comment, the Court denied review four days after issuing the opinion in *Murr*.⁸³

While a denial of certiorari is not usually indicative of anything, the fact that the Court did not grant the federal government's petition and hear the case together with *Murr* (in which the federal government was already arguing as amicus curiae), or vacate the Federal Circuit's judgment and remand for consideration in light of *Murr*, may indicate that that future takings litigants should take a hard look at *Lost Tree's* "same economic unit" test, because the Court may do so.

Second, in November 2017, Wisconsin's governor Scott Walker signed a bill which was introduced in the state legislature after the Supreme Court's decision.⁸⁴ The new law would allow the Murrs to transfer their undeveloped, "substandard" Lot E, which the family wanted to sell in order to fund improvements to their existing cabin on Lot F.⁸⁵ While this addressed the plight of the Murrs and other similarly-situated property owners in Wisconsin, it obviously did nothing to clarify the *Murr* majority's confusing set of factors for purposes of regulatory takings analysis, or aid owners in the other 49 states.

VII. Conclusion

Murr was a long time coming, and the Court has now addressed—however unsatisfactorily—the "denominator" and "larger parcel" issue that for so long had dogged the lower courts. Unfortunately, the majority's approach likely will not clear up any of the doctrinal and practical confusion, and the question of what "property" an owner in a regulatory takings case possesses remains as vague as ever.

* * *

ENDNOTES:

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¹*Murr v. Wisconsin*, 137 S. Ct. 1933, 198 L. Ed. 2d 497, 84 Env't. Rep. Cas. (BNA) 1713 (2017).

²The Takings Clause of the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This has been incorporated under the Fourteenth Amendment's Due Process Clause against states and their subdivisions. See *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 235, 17 S. Ct. 581, 41 L. Ed. 979 (1897).

³*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Env'tl. L. Rep. 21104 (1992).

⁴*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Env'tl. L. Rep. 20528 (1978).

⁵*Murr*, 137 S. Ct. at 1946.

⁶Tr. at 35, *Murr v. Wisconsin*, No. 15-214 (U.S. Mar. 20, 2017).

⁷*Penn Central*, 438 U.S. at 124.

⁸*Penn Central's* test has a poor reputation, even among those who advocate for a limited reading of the Takings Clause. See *John D. Echeverria, Making Sense of Penn Central*, 23 UCLA J. Env'tl. L. & Pol'y 171, 172 (2005) ("The next 'big thing'—perhaps the last big thing—in regulatory takings law will be resolving the meaning of the *Penn Central* factors.").

⁹*Murr*, 137 S. Ct. at 1941.

¹⁰*Id.*

¹¹*Id.* at 1936-37.

¹²*Id.* at 1940.

¹³16 U.S.C.A. §§ 1274(a)(6), (a)(9) (2017).

¹⁴Wis. Stat. § 30.27(1) (1973) ("The purpose

of this section is to ensure the continued eligibility of the Lower St. Croix River for inclusion in the national wild and scenic rivers system and to guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations.").

¹⁵Wis. Admin. Code § NR 118.01 (2017).

¹⁶*Id.* § 118.04(4)(a).

¹⁷*Id.* § 118.06(1)(b) ("In the rural residential and conservation management zones, there may not be more than one single-family residence on each lot.").

¹⁸*Id.* § 118.06(1)(a)(2)(a) ("The minimum lot size shall have at least one acre of net project area.").

¹⁹Wis. Admin. Code § NR 118.04(4)(a)(2) (2017).

²⁰*Id.* § 118.08(4).

²¹*Murr*, 137 S. Ct. at 1941 (citing *Murr v. St. Croix County Bd. of Adjustment*, 2011 WI App 29, 332 Wis. 2d 172, 796 N.W.2d 837, 841, 844 (Ct. App. 2011)).

²²*Id.*

²³*Id.*

²⁴Wis. Admin. Code § NR 118.04(4)(a)(2) (2017).

²⁵*Murr*, 796 N.W.2d at 844.

²⁶Wis. Admin. Code § NR § 118.04(4)(a)(2) (2017) ("The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.").

²⁷*Murr*, 137 S. Ct. at 1948-49.

²⁸*Id.*

²⁹Petition for a Writ of Certiorari at 17-21, *Murr v. Wisconsin*, No. 15-214 (U.S. Aug. 14, 2015).

³⁰Justice Kagan seemed to like the background principles include "all of state law"/bitter with the sweet argument advanced by the County's brief:

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

Tr. at 17, *Murr v. Wisconsin*, No. 15-214 (U.S. Mar. 20, 2017).

³¹*Id.* at 34 (“Not at all, Your Honor. Our test is if two lots have a link, a legal link under State law, then they are one parcel. If they have no legal link under State law, then they are completely separate.”).

³²Petitioners’ Brief on the Merits at 24, *Murr v. Wisconsin*, No. 15-214 (U.S. Apr. 11, 2016).

³³“But are you—you’re talking just about State law. It seems to me that your position is as wooden and as vulnerable a criticism as—as the Petitioner’s. You say, whatever State law—basically you’re saying, whatever State law does, that defines the property. But you have to look at the reasonable investment-backed expectations of the owner.” Tr. at 34, *Murr v. Wisconsin*, No. 15-214 (U.S. Mar. 20, 2017).

³⁴*Murr*, 137 S. Ct. at 1942.

³⁵*Id.* at 1945.

³⁶*Palazzolo v. Rhode Island*, 533 U.S. 606, 627, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env’t. Rep. Cas. (BNA) 1609, 32 Env’t. L. Rep. 20516 (2001) (“Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause.”).

³⁷*Murr*, 137 S. Ct. at 1945 (the “expectations . . . an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property”).

³⁸*Id.* at 1945-46.

³⁹*Id.* at 1946.

⁴⁰*Id.* at 1945.

⁴¹*Id.* at 1949. This suggests that had the Murrs’ plumbing company not conveyed Lot F to the siblings, but instead the siblings became the owners of the plumbing company, analysis of this factor would have turned out differently.

⁴²*Id.* (“Petitioners’ land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted.”).

⁴³*Id.* And, naturally, no *Penn Central* taking because “[p]etitioners cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots.”

Id. at 1949-50.

⁴⁴*Id.* at 1950 (Roberts, C.J., dissenting) (“This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.”).

⁴⁵*Id.* (Roberts, C.J., dissenting).

⁴⁶*Id.* at 1953 (Roberts, C.J., dissenting).

⁴⁷*Id.* at (Roberts, C.J., dissenting) (“But the definition of property draws the basic line between, as P.G. Wodehouse would put it, *meum* and *tuum*. The question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue.”).

⁴⁸*Id.* (Roberts, C.J., dissenting).

⁴⁹*Id.* at 1954 (Roberts, C.J., dissenting).

⁵⁰*Id.* at 1955 (Roberts, C.J., dissenting) (“The result is that the government’s regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on the property.”). Actually, this gives government three chances, not two. Because the plaintiff property owner in most cases, even in state court, will also need to demonstrate standing. See *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 198 L. Ed. 2d 64, 97 Fed. R. Serv. 3d 1671 (2017) (intervenor in a takings case must show Article III standing in order to pursue relief that is different from that which is sought by a party with standing).

⁵¹*Id.* (Roberts, C.J., dissenting) (labeling the *Penn Central* test a “roll of the dice,” and noting that “surely in most” cases the owner will lose).

⁵²*Id.* at 1956 [dis. op. 13] (Roberts, C.J., dissenting). Justice Thomas filed a separate dissenting opinion arguing the Court’s approach to takings is on the wrong analytical footing. Instead of being grounded in the Takings Clause, the Court should examine whether the Fourteenth Amendment’s Privileges or Immunities Clause “it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be

grounded in the original meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.” *Id.* at 1957 (Thomas, J., dissenting) (citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 San Diego L. Rev. 729 (2008)).

⁵³See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Env'tl. L. Rep. 20106 (2005) (The Court “recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.”); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 316, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 26 Env't. Rep. Cas. (BNA) 1001, 17 Env'tl. L. Rep. 20787 (1987) (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”); *Andrus v. Allard*, 444 U.S. 51, 64 n.21, 100 S. Ct. 318, 62 L. Ed. 2d 210, 13 Env't. Rep. Cas. (BNA) 2057, 9 Env'tl. L. Rep. 20791 (1979) (federal power to protect endangered species measured against Takings Clause; “[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate”); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922) (Kohler Act enacted pursuant to state’s police power went “too far”).

⁵⁴*Pa. Coal*, 260 U.S. at 416.

⁵⁵*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Env'tl. L. Rep. 20106 (2005).

⁵⁶*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Env'tl. L. Rep. 20528 (1978). *Lingle* labeled the *Penn Central* test the “default” test. See *Lingle*, 544 U.S. at 538-39; see also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 n.23, 122 S. Ct. 1465, 152 L. Ed. 2d 517, 54 Env't. Rep. Cas. (BNA) 1129, 32 Env'tl. L. Rep. 20627, 10 A.L.R. Fed. 2d 681 (2002) (quoting *Palazzolo v. Rhode*

Island, 533 U.S. 606, 633, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env't. Rep. Cas. (BNA) 1609, 32 Env'tl. L. Rep. 20516 (2001) (O'Connor J., concurring) (“[O]ur polestar . . . remains the principles set forth in *Penn Central* itself,” which require a “careful examination and weighing of all the relevant circumstances.”)).

⁵⁷*Penn Central*, 438 U.S. at 124-25 (citing *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962)).

⁵⁸*Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554, 1961 A.M.C. 17 (1960).

⁵⁹See, e.g., *Reoforce, Inc. v. United States*, 853 F.3d 1249, 1269-71 (Fed. Cir. 2017), cert. denied, 138 S. Ct. 517 (2017); *Cass Cnty. Joint Water Res. Dist. v. Brakke (In re 2015 Application for Permit to Enter Land for Surveys and Examination)*, 883 N.W.2d 844, 849 (N.D. 2016); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 272-76 (Tex. App. Fort Worth 2016); *Lockaway Storage v. County of Alameda*, 216 Cal. App. 4th 161, 156 Cal. Rptr. 3d 607 (1st Dist. 2013).

⁶⁰*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Env'tl. L. Rep. 21104 (1992).

⁶¹*Lingle*, 438 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019 (emphasis omitted)).

⁶²See, e.g., *Boise Cascade Corp. v. U.S.*, 296 F.3d 1339, 1343, 54 Env't. Rep. Cas. (BNA) 1801, 32 Env'tl. L. Rep. 20797 (Fed. Cir. 2002), (stating that there is a two-step approach to takings claims, where the first step is for a court to determine “whether the plaintiff possesses a valid interest in the property affected by the governmental action, i.e., whether the plaintiff possessed a ‘stick in the bundle of property rights’” (quoting *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1374, 30 Env'tl. L. Rep. 20565, 147 O.G.R. 421 (Fed. Cir. 2000))); *Resource Invs., Inc. v. United States*, 85 Fed. Cl. 447, 478 (2009) (“Before assessing plaintiffs’ categorical takings claim, this court must, as a threshold matter, determine whether plaintiffs possessed a property interest protected by the Fifth Amendment.”).

⁶³See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-21, 119 S. Ct. 1624, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Env'tl. L. Rep. 21133 (1999) (“[W]e hold that the issue whether a landowner

has been deprived of all economically viable use of his property is a predominantly factual question . . . [and that] question is for the jury.”).

⁶⁴“The critical terms [in takings cases] are ‘property,’ ‘taken’ and ‘just compensation,’ ” *U.S. v. General Motors Corporation*, 323 U.S. 373, 377, 65 S. Ct. 357, 89 L. Ed. 311, 156 A.L.R. 390 (1945).

⁶⁵Steven J. Eagle, *The Four Factor Penn Central Regulatory Takings Test*, 118 Pa. St. L. Rev. 601, 631 (2014).

⁶⁶Instead of considering “property” a preliminary question, it should be a part of the merits analysis of the effect of the regulation on an owner’s expectations. See Robert H. Thomas, “Property” and Investment-Backed Expectations in Ridesharing Regulatory Takings Claims, 39 U. Haw. L. Rev. 301, 302 (2017).

⁶⁷See *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171, 1175, 38 Env’t. Rep. Cas. (BNA) 1867, 24 Env’t. L. Rep. 21072 (Fed. Cir. 1994) (“The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large. In the final analysis the answer to that question is one of fundamental public policy. It calls for balancing the legitimate claims of the society to constrain individual actions that threaten the larger community, on the one side, and, on the other, the rights of the individual and our commitment to private property as a bulwark for the protection of those rights. It requires us to decide which collective rights are to be obtained at collective cost, in order better to preserve collectively the rights of the individual.”).

⁶⁸*Murr*, 137 S. Ct. at 1946 (citing *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)).

⁶⁹*Id.* at 1938.

⁷⁰*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Env’t. L. Rep. 20106 (2005) (The Court explained that the Takings Clause is not designed to prohibit government action, but to secure compensation “in the event of otherwise proper interference amounting to a taking.”).

⁷¹See *Loveladies*, 28 F.3d at 1175 (“What is not at issue is whether the Government can lawfully prevent a property owner from filling

or otherwise injuring or destroying vital wetlands. The importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas, whether privately or publicly held, through appropriate regulatory mechanisms is not here being questioned. There can be no doubt today that every effort must be made individually and collectively to protect our natural heritage, and to pass it to future generations unspoiled.”).

⁷²See *Kelo v. City of New London*, 545 U.S. 469, 491, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 60 Env’t. Rep. Cas. (BNA) 1769, 35 Env’t. L. Rep. 20134, 10 A.L.R. Fed. 2d 733 (2005); *Lingle*, 544 U.S. at 548-49 (Kennedy, J., concurring) (whether a regulation is reasonable, or whether an exercise of eminent domain is for public use is a question under Due Process, and not the Takings Clause).

⁷³*Murr*, 137 S. Ct. at 1945 (a “reasonable restriction that predates a landowner’s acquisition, however, can be one of the factors that most landowners would reasonably consider in forming fair expectations about their property”).

⁷⁴*Id.* at 1948.

⁷⁵*Id.* at 1949.

⁷⁶*Id.*

⁷⁷*Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting).

⁷⁸See *Preseault v. I.C.C.*, 494 U.S. 1, 22, 110 S. Ct. 914, 108 L. Ed. 2d 1, 20 Env’t. L. Rep. 20454 (1990) (O’Connor, J., concurring) (state law defines property but that “is an issue quite distinct from whether the Commission’s exercise of power over matters within its jurisdiction effected a taking of petitioners’ property”) (citing *Kaiser Aetna v. U. S.*, 444 U.S. 164, 174, 100 S. Ct. 383, 62 L. Ed. 2d 332, 13 Env’t. Rep. Cas. (BNA) 1929, 2000 A.M.C. 2495, 10 Env’t. L. Rep. 20042 (1979)).

⁷⁹*Lost Tree Village Corp. v. U.S.*, 707 F.3d 1286, 76 Env’t. Rep. Cas. (BNA) 1078 (Fed. Cir. 2013).

⁸⁰*Id.* at 1288.

⁸¹*Id.* at 1293.

⁸²Petition for a Writ of Certiorari at 29, *United States v. Lost Tree Vill. Corp.*, No. 15-1192 (U.S. Mar. 22, 2016).

⁸³*Lost Tree Village Corp. v. U.S.*, 787 F.3d 1111, 80 Env’t. Rep. Cas. (BNA) 1963 (Fed. Cir.

2015), *cert. denied*, 137 S. Ct. 2325, 198 L. Ed. 2d 755, 84 Env't. Rep. Cas. (BNA) 1752 (2017).

⁸⁴See *Scott Walker signs bill inspired by western Wisconsin cabin-owners' court fight*, Twin Cities Pioneer Press (Nov. 27, 2017).

⁸⁵See Wis. Legis. 2017 Assembly Bill 479 (Nov. 27, 2017) ("Under this bill, a city, village,

town, or county may generally not prohibit a property owner from . . . [c]onveying an ownership interest in a substandard lot. . . . Using a substandard lot as a building site if two conditions are met[.]").

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