

May the Factors Be Ever in Your Favor: How *Murr v. Wisconsin* Sows Confusion in the Regulatory Takings Field

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I. INTRODUCTION

“[M]ay the odds be *ever* in your favor!”¹ That phrase from the cultural phenomenon *The Hunger Games* might soon come from the mouths of court clerks before every regulatory takings case. Historically, the law surrounding regulatory takings has been muddled.² But the Supreme Court confused the field further when it decided *Murr v. Wisconsin* on June 23, 2017.³ This Note analyzes the Supreme Court’s decision and the potential consequences it holds for private property owners. Ladies and gentlemen, welcome to the Supreme Court’s brand-new Takings Game.⁴ May the factors be ever in your favor.⁵

Regulatory takings claims are governed by the Fifth Amendment’s Taking Clause, which states that “[n]o person shall be . . . deprived of life, liberty, or *property*, without due process of law.”⁶ *Murr* presented the Court with the challenge of determining whether a regulatory taking occurred when the boundaries of the relevant parcel were still in dispute.⁷

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1. SUZANNE COLLINS, *THE HUNGER GAMES* 19 (2008) (emphasis in original).

2. Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 603 (2015) (“Scholars have long derided the regulatory takings doctrine as incoherent and unpredictable. The prevailing view seems to be that it is premised on a hodge-podge of vague factors The doctrine is also thought to rest on inherently subjective and circular norms like ‘fairness and justice’ and ‘reasonable expectations.’”).

3. *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (“Since that decision, the Supreme Court has been unable to define clearly what kind of regulations run afoul of Holmes’s vague standard.”).

4. See COLLINS, *supra* note 1, at 147.

5. See COLLINS, *supra* note 1, at 19.

6. U.S. CONST. amend. XIV (emphasis added).

7. *Murr*, 137 S. Ct. at 1943–44.

Instead of deciding the takings claim, the majority created a new test that succeeded only in muddying the waters.⁸

In *Murr*, the Supreme Court believed that defining the unit of property subject to regulation was the critical issue.⁹ Traditionally, a regulatory takings claim centers on whether the regulation was so onerous as to effectively constitute a taking of a person's property.¹⁰ The majority's test blurred the meaning of private property and harmed constitutional property rights by replacing a reliance on traditional state law definitions with a vague test to determine the property at issue. Going forward, lower courts should decline to extend *Murr*'s reach to prevent further erosion of private property protection.

This Note analyzes *Murr*'s effects if lower courts follow the test's reasoning to its logical conclusion. Part II discusses the background of regulatory takings jurisprudence. It begins by looking at the Supreme Court's establishment of the field, before discussing the seminal cases that established the field's primary tests. Finally, it provides an in-depth look at the Supreme Court's *Murr* opinion.

Part III discusses the problems that will result from applying *Murr*'s analysis. The test's malleability will allow states to manipulate their definition of property to defeat a regulatory takings claim. The test gives individual judges too much power over private property. The new test likely will cause an uneven application of justice based on the amount of property a person owns.

Finally, Part IV discusses why the courts should limit *Murr*'s reach, concluding its test contains enormous potential danger for the protection of private property rights. If courts use an incorrect process, even for a correct outcome, eventually that process will lead to an injustice.

8. See Ilya Somin, *A Loss for Property Rights in Murr v. Wisconsin*, WASH. POST (June 23, 2017) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/> [https://perma.cc/W9ZK-H3E4] ("After the oral argument in March, I worried that the Court might end up issuing a muddled decision that creates needless confusion. Sadly, that is exactly what the justices have done.").

9. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 ("Because 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, one of the most critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"*, 80 HARV. L. REV. 1165, 1192 (1967))).

10. *Murr*, 137 S. Ct. at 1942; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

II. BACKGROUND

A. *Origins of Regulatory Takings Jurisprudence*

Regulatory takings claims are relatively new.¹¹ For most of American history, the Takings Clause only protected against the government physically seizing private property.¹² Although Congressional records of sessions from the Founding Era are incomplete, there are “no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states.”¹³ The law did not consider regulations to constitute takings because, traditionally, they were viewed as “an essential and ordinarily legitimate exercise of government power.”¹⁴

Courts applying regulatory takings differentiate between physical and regulatory takings.¹⁵ Historically, courts generally understood that the “core” of the Takings Clause protected property owners from appropriation, not regulation.¹⁶ Even today, courts rarely view regulations as takings.¹⁷ Courts apply a “far different and more deferential test” for regulations affecting property than for physical possession of property.¹⁸

Many scholars argue that American legal history provides no basis for regulatory takings claims, arguing only the physical seizing of property traditionally constituted a taking because of its “particular[] vulnerab[ility] to process failure.”¹⁹ But, some find a basis for regulatory takings in the

11. See *Mahon*, 260 U.S. 393 (first regulatory taking recognized by the Supreme Court).

12. Treanor, *supra* note 3, at 782 (“The original understanding of the Takings Clause . . . was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used.”).

13. *Id.* at 791.

14. William P. Barr et al., *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 431 (2005).

15. *Murr*, 137 S. Ct. at 1942 (“As this Court has recognized, the plain language of the Takings Clause ‘requires the payment of compensation whenever the government acquires private property for a public purpose,’ but it does not address in specific terms the imposition of regulatory burdens on private property.” (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321 (2002))).

16. Barr et al., *supra* note 14, at 436.

17. *Id.* at 437.

18. *Id.*

19. Treanor, *supra* note 3, at 782; see also *Murr*, 137 S. Ct. at 1942–43 (noting that before *Mahon*, the Takings Clause was thought to apply only to “‘direct appropriation’” or “‘the functional equivalent of a practical ouster of the owner’s possession,’” and that the purpose of the Takings Clause was to prevent the government from “‘forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole’” (first quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); then quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001))).

history of English common law.²⁰ Professor Edward Ziegler draws upon William Blackstone's writings to argue for a common law basis for regulatory takings that preceded the ratification of the Fifth Amendment.²¹ James Madison wrote "[g]overnment is instituted to protect property of every sort This being the end of government . . . which *impartially* secures to every man, whatever is his own."²² By analyzing American constitutional history, some scholars find that private property preexists government, and our early courts frequently required governmental compensations for "indirect or regulatory destruction of property rights."²³ Although debate still exists over the origins of regulatory takings, regulatory takings are now a part of American takings jurisprudence.

B. *Creation and Foundation of Regulatory Takings Jurisprudence*

This section discusses the foundational regulatory takings cases leading up to *Murr*. In 1922, in *Pennsylvania Coal Co. v. Mahon*, the Supreme Court firmly established regulatory takings in American law.²⁴ Since *Mahon*, the Supreme Court has been largely silent in the field, preferring to address issues in an "ad hoc" manner, as they arise.²⁵ The Court did lay out a balancing test applicable to state regulations in *Penn Central Transportation Co. v. New York City*, discussed later in this section, that applies a variety of factors to determine if government regulations are onerous enough to reach the level of a taking.²⁶ In *Lucas v. South Carolina Coastal Council*, also discussed later in this section, Justice Scalia added his contribution to the field by establishing a bright-line test that finds a taking to have occurred if a regulation renders the affected property valueless.²⁷

20. Edward H. Ziegler, *Partial Taking Claims, Ownership Rights in Land and Urban Planning Practice: The Emerging Dichotomy Between Uncompensated Regulation and Compensable Benefit Extraction Under the Fifth Amendment Takings Clause*, 22 J. LAND RESOURCES & ENVTL. L. 1, 2 (2002).

21. *Id.* at 2 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 139 (1765)) ("This compensation principle can be found in the writings of William Blackstone, who noted: 'So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.'").

22. 14 PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., Univ. of Chi. Press 1983) (1792) (first emphasis added).

23. Ziegler, *supra* note 20, at 3.

24. 260 U.S. 393 (1922).

25. *Murr*, 137 S. Ct. at 1942 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)).

26. 438 U.S. 104 (1978).

27. 505 U.S. 1003 (1992).

1. *Pennsylvania Coal Co. v. Mahon*

Justice Holmes's opinion in *Mahon* was the first to recognize regulatory takings claims under the Takings Clause. By doing so, the Court "ignored the precedents in which the Court had held that regulations did not fall within the Takings Clause."²⁸

The issue in *Mahon* arose from the Pennsylvania Coal Company's reservation in a deed transfer of the subsurface rights to mine coal.²⁹ Pennsylvania passed the Kohler Act, forbidding any mining of coal in any way which "cause[s] the subsidence of, among other things, any structure used as human habitation," except for limited exceptions.³⁰ Pennsylvania Coal sued, claiming the statute infringed upon its property rights without due process.³¹

The Court first recognized that regulatory takings do not, and cannot, apply to every governmental regulation.³² But when the "regulation goes too far it will be recognized as a taking."³³ The Court's rationale was simple: "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."³⁴ The Court believed regulatory takings protection was necessary to preserve private property, but ultimately recognized that determining whether a taking occurred required answering "upon whom the loss of the changes desired should fall."³⁵

Mahon has faced criticism since its pronouncement.³⁶ As Professor William Barr notes, "the Court has struggled to articulate a coherent standard for determining when a regulation crosses the line."³⁷ Some

28. Treanor, *supra* note 3, at 801.

29. *Mahon*, 260 U.S. at 412.

30. *Id.* at 412–13.

31. *Id.* at 413.

32. *Id.* ("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."); *see also* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 565 (1984) ("Holmes first stated that exercise of the police power could diminish 'to some extent values incident to property' without implicating the takings clause, because otherwise '[g]overnment could hardly go on.'").

33. *Mahon*, 260 U.S. at 415; *see also id.* at 416 ("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.").

34. *Id.* at 415.

35. *Id.* at 416.

36. Rose, *supra* note 32, at 562 ("One case, *Pennsylvania Coal Co. v. Mahon*, seems to have generated most of the current confusion about takings.").

37. Barr et al, *supra* note 14, at 470; *see also* Treanor, *supra* note 3, at 782 ("Since that decision,

scholars criticize *Mahon* for creating an “ad hoc” test that allows judges to decide cases based on their own predilections under the guise of stare decisis.³⁸ The most basic question is perhaps the strongest: “[H]ow much diminution in value is too much?”³⁹ Since *Mahon*, the Court has attempted to better define regulatory takings jurisprudence.

2. *Penn Central Transportation Co. v. New York City*

In *Penn Central Transportation Co. v. New York City*, the Court created a test for determining whether a regulation is so onerous as to constitute a taking.⁴⁰ In *Penn Central*, the petitioner sought to build an office building above Grand Central Terminal.⁴¹ New York City passed a regulation limiting the changes an owner could make to a landmark.⁴² The petitioner’s application for the office-building project was denied, and petitioner sued, claiming the statute constituted a taking.⁴³

The Court held that whether a regulatory taking occurred “depends largely ‘upon the particular circumstances [in that] case.’”⁴⁴ The Court listed several factors to determine if a taking occurred: (1) “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;” (2) “the character of the governmental action;” (3) whether “‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land;” and (4) whether the regulation is to “permit or facilitate uniquely public functions.”⁴⁵ Ultimately, the Court found that, under this test, no taking occurred.⁴⁶

Penn Central occupies a central place in American regulatory takings jurisprudence. *Penn Central*’s importance has not shielded it from

the Supreme Court has been unable to define clearly what kind of regulations run afoul of Holmes’s vague standard.”)

38. Rose, *supra* note 32, at 566 (“[C]ourts have incanted [Holmes’s] words in . . . ‘a parody of stare decisis.’ Courts apply the ‘test’ but actually decide cases on the basis of undisclosed, ad hoc judgments The absence of principled reasoning in these judgments suggests that the test itself is deeply flawed.”) (quoting BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 235 n.2 (1977)).

39. Rose, *supra* note 32, at 566.

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

41. *Id.* at 115–16.

42. *Id.* at 108–112.

43. *Id.* at 117.

44. *Id.* at 124 (alteration in original) (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

45. *Id.* at 124–25, 128 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

46. *Id.* at 138.

criticism. Scholars across the legal and political spectrum have criticized *Penn Central*.⁴⁷ Many argue the *Penn Central* test left the field “highly muddled.”⁴⁸ Other scholars criticize *Penn Central* for sowing uncertainty among local and state governments, leaving them unsure whether their regulations will require them to compensate landowners.⁴⁹ The Court determined the diminution in value was “not only against the total value of the restricted Grand Central Terminal Building, but also against the value of the owner’s other properties in the vicinity,” a consideration that arises again in *Murr*.⁵⁰ Additionally, the vagueness of the Court’s test led several courts to applying the analysis “in a rather mechanical way” and to finding a taking only when a regulation rendered land valueless.⁵¹ After *Penn Central*, the Court believed that evaluating a particular regulation for a takings claim depended on the circumstances of each case.⁵² Consequently, the Supreme Court left the law with a confusing ad hoc test.

3. *Lucas v. South Carolina Coastal Council*

After *Penn Central*, the Court mostly applied the existing *Penn Central* factors, declining to expand upon the test. The field remained largely unchanged for fifteen years. *Lucas* carved out a narrow bright-line exception to *Penn Central* for when a regulation deprives property of all

47. See Singer, *supra* note 2, at 605–06 (“The factors . . . are too vague to be meaningful without further elaboration and too general to decide outcomes in actual cases. They also sometimes push us in opposite directions. . . . It is hard for anyone to read the Supreme Court’s regulatory takings cases without some bafflement.”); Somin, *supra* note 8 (“As scholars on both right and left have pointed out, this rule has little if any basis in the text or original meaning of the Constitution. It is a judicial invention and an ill-conceived one at that.”).

48. Brief of the CATO Institute and Owners’ Counsel of America as Amici Curiae in Support of Petitioners at 8, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1639712, at *8 [hereinafter CATO Brief] (“Numerous deficiencies in the *Penn Central* analysis lead to this ‘muddle.’ At the outset, the language the Court uses to articulate the test is notoriously vague and generally unhelpful to lower courts.”); see also Singer, *supra* note 2, at 631 (“These [*Penn Central*] factors are not elements of a claim; they represent considerations relevant to determine whether a law ‘forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))).

49. 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, 186 (2004). (“[C]ommentators have complained bitterly of the Court’s increasing muddying of the waters with new tests and new levels of scrutiny . . . and its complete unwillingness or inability to provide stable guidance to government regulators and lower courts as to how far government may go in restricting property rights.”).

50. Rose, *supra* note 32, at 568.

51. Ziegler, *supra* note 20, at 5 (“Under this view, losses resulting from regulation, short of total destruction of land value, are held to be merely ‘disappointed expectations.’”).

52. See *supra* note 39 and accompanying text; Ziegler, *supra* note 20, at 5 (noting the *Penn Central* test is multi-factored and that a diminution of land value is insufficient by itself to be a taking).

economically beneficial use.⁵³ This was the Court's first bright-line rule for analyzing regulatory takings cases.⁵⁴ The plaintiff in *Lucas* purchased two residential lots in South Carolina to build single-family homes.⁵⁵ South Carolina passed a statute that had the "direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels."⁵⁶ The statute required affected property owners to receive a permit from the South Carolina Coastal Council before using the land for a different purpose than its use at the time of the statute's passage.⁵⁷

The Court highlighted two categories of regulation that require compensation "without case-specific inquiry into the public interest advanced," the latter which Justice Scalia termed a "total taking."⁵⁸ A "total taking" occurs "where regulation denies all economically beneficial or productive use of land."⁵⁹ The Court reasoned compensation was required for complete economic deprivation or productive use of the land because these regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."⁶⁰ To determine whether a total taking occurred, the Court analyzed (1) "the degree of harm to public lands and resources . . . posed by the claimant's proposed activities;" (2) "the social value of the claimant's activities and their suitability to the locality in question;" and (3) "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government."⁶¹

In his *Lucas* concurrence, Justice Kennedy's regulatory takings analysis started taking shape. Justice Kennedy argued a court must look to the "owner's reasonable, investment-backed expectations."⁶² Additionally, Justice Kennedy wrote that reasonable expectations "must be understood in light of the whole of our legal tradition."⁶³ *Lucas*'s narrow bright-line test stands as the primary exception to application of the broader *Penn Central* factors test.⁶⁴

53. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002).

54. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

55. *Id.* at 1006–07.

56. *Id.* at 1007.

57. *Id.* at 1007–08.

58. *Id.* at 1015, 1030.

59. *Id.*

60. *Id.* at 1018.

61. *Id.* at 1030–31.

62. *Id.* at 1034 (Kennedy, J., concurring).

63. *Id.* at 1035.

64. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002).

C. *Murr v. Wisconsin*

In the 2017 term, *Murr v. Wisconsin* provided the Supreme Court with a fresh opportunity to clarify its regulatory takings analysis.⁶⁵ The case centered around two adjacent lots on the beautiful Lower St. Croix River in the small town of Troy, Wisconsin.⁶⁶ The Murr family (petitioners), two brothers and two sisters (“the Murrs”), appealed a Wisconsin State Court of Appeals ruling that the State of Wisconsin (respondent) did not effectuate a regulatory taking.⁶⁷ *Murr* focused on a threshold matter to the actual takings claim: “[w]hat is the proper unit of property against which to assess the effect of the challenged governmental action?”⁶⁸

1. Facts

Pursuant to the Wild and Scenic Rivers Act, the Wisconsin legislature authorized its Department of Natural Resources to promulgate regulations to “guarantee the protection of the wild, scenic and recreational qualities of the river.”⁶⁹ The regulation in this case forbade property owners from using “lots as separate building sites unless [a lot had] at least one acre of land suitable for development.”⁷⁰ The Murrs argued that Wisconsin took their property “by enacting burdensome regulations that [forbade Lot E’s] improvement or separate sale because it [was] classified as substandard in size.”⁷¹ Wisconsin countered that no regulatory taking occurred because the Murrs owned the adjacent lot which, under the regulations, combined with Lot E to form one parcel.⁷²

Under the regulation, if a lot did not have at least one acre of land free of land features such as rocks, steep hills, or water, i.e., at least one acre of “land suitable for development,” the owner could not build on or sell it separately.⁷³ The grandfather clause within the regulation contained a merger provision preventing “adjacent lots under common ownership [to] be ‘sold or developed as separate lots’ if they do not meet the size requirement.”⁷⁴

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

66. *Id.* at 1940.

67. *Id.* at 1941.

68. *Id.* at 1943.

69. *Id.* at 1940 (quoting Wis. Stat. § 30.27(1) (1973)).

70. *Id.*

71. *Id.* at 1939.

72. *Id.* at 1939, 1946.

73. *Id.* at 1940.

74. *Id.*

The Murrs' parents purchased Lot F in 1960, transferred Lot F's title to the family plumbing company in 1961, and purchased Lot E in 1963.⁷⁵ They built a cabin on Lot F for the family to enjoy the river, while leaving Lot E undeveloped.⁷⁶ The Murrs, who had received title in both properties by the end of 1995, hoped to move the cabin on Lot F to a different location and attempted to sell Lot E to fund the relocation.⁷⁷ The Murrs were unable to sell Lot E because the "unification of the lots under common ownership" triggered state and local rules "barring their separate sale or development."⁷⁸ Both lots possessed similar topography, triggering the Wisconsin regulation.⁷⁹ "A steep bluff cut[] through the middle of each, with level land suitable for development above the bluff and next to the water below it."⁸⁰ Each lot was approximately 1.25 acres, but because of the steep bank and the waterline, they each had "less than one acre of land suitable for development" under the regulation's definitions of "suitable land."⁸¹ The lots still had less than one acre of land suitable for development even when combined.⁸²

The Murrs filed a claim in St. Croix County Circuit Court, alleging Wisconsin's regulations constituted a taking of their property.⁸³ The Circuit Court granted summary judgment to Wisconsin because the Murrs retained "several available options for the use and enjoyment of their property."⁸⁴ The Wisconsin Court of Appeals affirmed after determining the lots merged into a single lot before applying the takings analysis.⁸⁵ The United States Supreme Court affirmed, finding the two lots are analyzed as a single parcel, and as such, a taking did not occur.⁸⁶

2. The Court's Reasoning

The Court answered a question antecedent to *Penn Central*. The Court created a new test to determine the "denominator" or the "parcel as a

75. *Id.*

76. *Id.*

77. *Id.* at 1941.

78. *Id.*

79. *Id.*

80. *Id.* at 1940.

81. *Id.*

82. *Id.*

83. *Id.* at 1941.

84. *Id.*

85. *Id.*

86. *Id.* at 1948–49.

whole.”⁸⁷ Both parties asked the Court to adopt a formulistic rule to decide the parcel inquiry.⁸⁸ Wisconsin argued the definition should be tied to state law, specifically its own regulations, while the Murrs wanted the Court to presume that “lot lines define the relevant parcel in every instance.”⁸⁹ The Court rejected both proposals because neither satisfied the need to “inform reasonable expectations about property interests.”⁹⁰

Instead, the Court created a new three-part factor test to determine “whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel.”⁹¹ The inquiry was “derive[d] from background customs and the whole of our legal tradition.”⁹² The Takings Clause is not a “static body of state property law,” and it changes as expectations change.⁹³

First, courts must give substantial weight “to the treatment of the land, in particular how it is bounded or divided, under state and local law.”⁹⁴ A restriction that predates the landowner’s title is one of the factors a landowner “would reasonably consider in forming fair expectations about their property.”⁹⁵ “Second, courts must look to the physical characteristics of the landowner’s property,” including “the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment.”⁹⁶ Finally, courts should “assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.”⁹⁷ For example, when regulation decreases the value of the property at issue, it may add value to other property by “increasing privacy, expanding recreational space, or preserving surrounding natural beauty.”⁹⁸ This factor may weigh against a taking because the “landowner’s nonadjacent holdings

87. *Id.* at 1944–46, 1949. The denominator, or the parcel as a whole, is the property at issue in a regulatory takings case used to determine if a regulation goes too far and is determined before determining whether a taking occurred. *Id.*

88. *Id.* at 1946.

89. *Id.* at 1946–47.

90. *Id.* at 1946 (“Neither proposal suffices to capture the central legal and factual principles that inform reasonable expectations about property interests.”).

91. *Id.* at 1945.

92. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992)).

93. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992).

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

95. *Id.*

96. *Id.*

97. *Id.* at 1946 (noting that if the regulated value of the remaining property increases, it may weigh against finding the lots separated).

98. *Id.*

elsewhere” may mitigate the loss of value.⁹⁹

Applying these factors, the Court held that Lots E and F should be evaluated as one parcel for the purposes of analyzing the takings claim.¹⁰⁰ The shared physical characteristics of the lots encouraged a finding of unification.¹⁰¹ Finally, under the Court’s calculations, the combined value of Lots E and F was greater than the total value of the lots if sold separately.¹⁰² After determining the lots were, in fact, a single parcel for the purposes of a takings inquiry, the Court quickly determined no taking occurred under *Lucas* or *Penn Central* because the value of the combined lots did not decrease substantially.¹⁰³

3. Dissents

Chief Justice Roberts and Justice Thomas each authored dissenting opinions. In addition to joining the Chief Justice, Justice Thomas wrote a brief dissent questioning the foundation of the Court’s regulatory takings jurisprudence.¹⁰⁴ Justice Thomas recommended the Court take a “fresh look” at whether the Court can ground regulatory takings in the “original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.”¹⁰⁵

Chief Justice Roberts’s dissent focused on the majority’s reasoning, not its conclusion.¹⁰⁶ The Chief Justice believed the majority diverged from settled precedent when it looked beyond state and local law to create an “elaborate test” even though the Court’s decisions have “time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.”¹⁰⁷ The Chief Justice urged the Court to follow its traditional analysis.¹⁰⁸ Under the traditional analysis, the *Murrs* still may find themselves without compensation, but with a ruling grounded in state law.¹⁰⁹

99. *Id.*

100. *Id.* at 1948–49.

101. *Id.* at 1948.

102. *Id.* at 1949.

103. *Id.* at 1949–50.

104. *Id.* at 1957–58 (Thomas, J., dissenting).

105. *Id.* at 1957.

106. *Id.* at 1950 (Roberts, C.J., dissenting) (“This bottom-line conclusion does not trouble me; the majority presents a fair case . . .”).

107. *Id.*

108. *Id.* at 1950, 1953 (“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.”).

109. *See id.* at 1950.

The dissent criticized the majority for allowing the regulatory takings analysis to leak into determining the relevant parcel.¹¹⁰ The majority “focuse[d] on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed.”¹¹¹ The Chief Justice argued “these issues should be considered when deciding if a regulation constitutes a ‘taking.’”¹¹² By analyzing these factors to determine the relevant parcel, the Chief Justice believed the majority “undermine[d] the effectiveness of the Takings Clause as a check on the government’s power.”¹¹³

Ultimately, Chief Justice Roberts believed the majority incorrectly analyzed a relatively simple case.¹¹⁴ The Murrs acquired Lots E and F from their parents.¹¹⁵ After the lots came under common ownership, “the challenged ordinance prevented them from being ‘sold or developed as separate lots.’”¹¹⁶ After determining state law merged the lots, only then would the Chief Justice determine whether a taking occurred.¹¹⁷ Instead of determining whether a taking existed, the Justices split over the underlying analysis for determining the relevant parcel.¹¹⁸ As will be discussed in Part III, the majority’s test poses a potential threat to the protection of private property.

III. ANALYSIS

Since *Mahon*, courts have struggled to decide when a regulation constitutes a taking.¹¹⁹ Unfortunately, *Murr* will not ease their burden. “Like the ultimate question whether a regulation has gone too far, the question of the proper parcel¹²⁰ in regulatory takings cases cannot be

110. *Id.* at 1954.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1956 (“Staying with a state law approach to defining ‘private property’ would make our job in this case fairly easy.”).

115. *Id.*

116. *Id.* (quoting Wis. Admin Code § NR 118.08(4)(a)(2) (2017)).

117. *Id.* at 1957.

118. *Id.* at 1950.

119. See John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ELR 11235, 11235 (2002) (“A future challenge for courts and litigants will be to create a predictable legal standard out of the famously muddy language of the *Penn Central* decision.”).

120. See generally *id.* at 11241 (“The parcel rule . . . prohibits analysis of a taking claim by focusing on the restricted portion of a larger parcel, or by examining restricted uses to the exclusion of other permitted uses.”).

solved by any simple test.”¹²¹ Following this statement, the majority delivered a complicated factors test likely to sow increased confusion in the regulatory takings field. Since America’s founding, the protection of private property has been central to our constitutional system.¹²² Justice Kennedy acknowledged the long-held principle that strong property rights are necessary to keep people free.¹²³ The security provided by private property makes the majority’s test even more concerning.

The *Murr* test is brand-new and most courts have not yet had an opportunity to apply it. However, the Court’s analysis does lead to some reasonable conclusions as to the trajectory of the law if courts apply *Murr*’s reasoning to all regulatory takings cases. First, the *Murr* test creates a path for States to redefine private property to avoid a takings claim.¹²⁴ Second, judges can assume increased power over property because parties will need judges to weigh the non-exhaustive list of factors.¹²⁵ Finally, landowners with multiple contiguous plots may be unfairly discriminated against because *Murr* makes it harder to find a taking.¹²⁶

A. States Can Now Massage the Definition of Property Specifically to Defeat a Takings Claim

The Court’s decision places state governments and agencies in control when determining the definition of property. Under *Murr*, courts consider a government’s regulatory interest when determining what the “parcel as a whole” is before considering if a taking has occurred. Under *Penn Central*, however, courts construed the “parcel as a whole” in accordance with existing definitions found in state or local law before applying the takings test. *Murr* reduces state or local property definitions to one of multiple factors to consider. Although dicta in *Penn Central* alludes to the idea that ownership of other contiguous property may lessen the harm of

121. *Murr*, 137 S. Ct. at 1950.

122. See James Madison, *Federalist No. 54*, in *THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS WRITTEN IN FAVOUR OF THE NEW CONSTITUTION* 267 (Coventry House Publ’g ed., 2015) (1788) (“Government is instituted no less for protection of the property, than of the person, of individuals.”).

123. *Murr*, 137 S. Ct. at 1943 (“Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.”).

124. See *id.* at 1955 (Roberts, C.J., dissenting).

125. See Somin, *supra* note 8.

126. See *id.* (“The bigger the unit that counts as the relevant parcel, the less likely it is that the courts will rule that a restriction on the use of any part of it is a taking requiring compensation.”).

a regulation,¹²⁷ *Murr* makes ownership of other property, even *non-contiguous* property, a factor when determining the “parcel as a whole.” This allows governments to gain an advantage over the private party by changing the property at issue before the core issue, whether the regulation is overly burdensome, is even considered. The malleability of the factors to be considered by courts provides governments the opportunity to create a special definition of private property to defeat a regulatory takings claim. *Murr* itself is evidence of this. Wisconsin treated Lot E and Lot F as separate units when assessing state property tax,¹²⁸ yet under the regulation at issue in the case, the state combined the lots into one, defeating the Murrs’ claim. State agencies could easily create regulations that, while not affecting tax collection, would only affect property when a regulatory takings claim is made, as in *Murr*.

By analyzing previous regulatory takings cases, such as *Penn Central*, it is possible a built-in government advantage was just an issue waiting to raise its head. From the outset, the Court’s language for the *Penn Central* analysis was “notoriously vague and generally unhelpful to the lower courts.”¹²⁹ The Supreme Court left lower courts attempting to define a legal field the Supreme Court created but for which, in many ways, it forgot to include the instructions. The ad hoc factors of *Penn Central* already provided governments with an opportunity to tip the scales in their favor through the creation of laws and regulations. Additionally, states and local governments can use preambles and statements of purpose, which are not actually operative parts of a law, to give the appearance of governmental action to promote public safety and the general welfare. Because these proffered purposes are considered by courts applying the *Murr* test, they increase state and local governments’ ability to regulate private property.

Even before *Murr*, scholars criticized federal courts for moving towards a “totality-of-the-circumstances” test that would inevitably find no taking each time it was applied.¹³⁰ *Murr* pushed the Court’s jurisprudence across that line. Its factors create a totality-of-the-circumstances test slanted in favor of state and local governments. A

127. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (“The restrictions imposed are substantially related to the promotion of the general welfare and . . . afford appellants opportunities further to enhance . . . other properties.”).

128. *See Murr*, 137 S. Ct. at 1953 (citing Wis. Stat. § 236.28 (2016)).

129. CATO Brief, *supra* 48, at 8.

130. Barr et al., *supra* note 14, at 472 (“[C]ourts seem to be moving unthinkingly in the direction of applying the ad hoc, totality-of-the-circumstances test This tendency is reflected in the suggestions of some commentators that every government action should be evaluated under the three-factor test. If that were the rule, the government would have a license to steal.”).

government's ability under *Murr* to change definitions of private property, as it benefits the government, increases weighted importance of the government's interests when analyzing the totality of the circumstances.

Chief Justice Roberts's dissent focused heavily on the issue of governments taking advantage of *Murr* to manipulate the definitions of property to their advantage. The Chief Justice warned that state and local governments will take advantage of *Murr*'s malleability if given the opportunity.¹³¹ The government will seek to apply the *Murr* test as often as possible because it counts the government's interest twice: first when using the *Murr* test to determine whether the parcels are combined, and, second, when applying the *Penn Central* test to determine if the regulation is too burdensome.¹³² This double-counting weighs the government's interest in two separate tests without extending the same courtesy to the actual property owners. *Murr* allows the government to assert its interests in the land earlier than a property owner. Governments, understandably, do not want to pay compensation if it can avoid doing so. A government's unique, coercive power provides an opportunity to change the rules before litigation even begins. Passing regulations adding special redefinitions of private property would give the government a leg up by defining the disputed property in more favorable terms to the state. The government, as any litigant would, will leap at the opportunity to "shape the playing field before the contest . . . even gets underway."¹³³

Private parties also may attempt to use the test to divide property that might otherwise be considered one parcel to more easily receive compensation. The majority believed the test was necessary because, under state law, it saw too many opportunities for "gamesmanship" by the state or landowners.¹³⁴ In some states, lot lines can be informally adjusted "by property owners, with minimal government oversight."¹³⁵ In effect, private parties could use the lack of government regulation to divide their property into smaller lots, making the effects of the regulation greater. The majority tried to solve a minor problem. Even without regulations, the state can still use common law and tax law definitions of private property.

131. *Murr*, 137 S. Ct. at 1955 (Roberts, C.J., dissenting) ("Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one 'parcel,' solely for the purposes of resisting a particular claim.").

132. Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 65 (2017) ("[T]he Court tethered the denominator factors to considerations that are already party of the Penn Central inquiry, inviting lower courts to double count these factors or to engage in merits inquiries at the denominator stage.").

133. *Murr*, 137 S. Ct. at 1955 (Roberts, C.J., dissenting).

134. *Id.* at 1953 ("The majority envisions that relying on state law will create other opportunities for 'gamesmanship' by landowners and States . . .").

135. *Id.* at 1948 (majority opinion).

But, “informal” adjustments by a private party will carry less weight in a court than a state’s formal body of property law. Private parties are more likely to be successful in manipulating their lots lines under *Murr*’s factor test than Chief Justice Roberts’s traditional state law analysis.

But defining property under state law is unlikely to lead to much manipulation. To alter the definition or status of private property within its boundaries, the government must pass a statute or regulation. If a government changes the law specifically to gain control over a parcel just before litigation, a court will see this as an obvious attempt to manipulate. The Chief Justice grounds his approach in predictability. Although a state always possesses the ability to change its property laws or regulations, property owners are reasonably on notice as to the existing laws and regulations before a taking occurs. The *Murr* test lacks the same protections. The *Murr* test has enough flexibility that the government can use different definitions to “manipulate” the test and gain a result in its favor.¹³⁶ *Murr* provides the quintessential example of a government manipulating the factors that become, in *Murr*, the new test. Wisconsin treated the Murrs’ lots as separate property when assessing state property taxes. It was not until the Murrs applied for a permit that Wisconsin’s regulation was applied to treat the two lots as one. The *Murr* test risks states passing regulations that lie dormant for years until being resurrected to defeat a regulatory takings claim.

The Court’s opinion in *Murr* broke with a long history of Supreme Court precedent of defining private property by the relevant state law.¹³⁷ Although States always had the ability to change how property is defined, procedures protected property owners from arbitrary changes in the law. By removing state law from its principle place to just one factor among many, the Court weakened traditional Constitutional protection of private property. A state law definition of private property is preferable to the *Murr* test because it limits a government’s ability to take property by regulation without compensating the owner. As discussed above, the *Murr* test provides governments the ability to manipulate the factors and win more claims. The *Murr* Court ignored Justice Holmes’s warning when first creating regulatory takings law: “When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more

136. Somin, *supra* note 8 (“The [government] . . . will have incentives to try to manipulate the various factors listed in the majority opinion, so that they come out in their favor.”).

137. *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting) (“Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.”).

until at last private property disappears.”¹³⁸

Unlike state law, the *Murr* test may provide a government the opportunity to fluidly exploit property for its own advantage, such as winning a regulatory takings lawsuit, while also using the law to achieve a different objective in a separate area, such as increasing tax revenue. Relying on the state law definition of property provides a stability to property owners and the government alike. While “the vague nature of the test . . . makes it hard to figure out exactly when that might happen,” a government, by human nature, is likely to take advantage of any opportunity it finds.¹³⁹ Ilya Somin, a George Mason law professor and author of an amicus brief in *Murr* on behalf of nine States in support of the Murr family, believes that, at least in some respects, the government can now defeat claims just by pointing out the property owners own the adjacent lot.¹⁴⁰ This danger under *Murr* leaves property owners unsure of the legal status of their property and gives States increased authority over private property.

B. *Murr’s Vague Test Will Result in More Power for Judges Over Private Property*

A strict elements test limits a judge to interpreting the facts and law to reach a predictable result. It keeps the law consistent, and a party before a court reasonably knows what to expect. When a test is vague, such as in *Murr*, there is less predictability and a judge holds more power over the law.¹⁴¹ The majority rejected the simple approaches offered by both parties in favor of a vague multifactor balancing test giving judges more power over the definition of private property than the State or the owner himself.¹⁴² The Court was on a path toward this destination for a long time.¹⁴³ The confusion of the test leaves states and private property owners

138. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

139. Somin, *supra* note 8.

140. *Id.* (“In at least some cases, [the] ruling allows the government to avoid compensating property owners for the taking of their land, merely because they also own the lot next door.”).

141. See Miriam Seifter, *Opinion Analysis: In Regulatory Takings Case, Court Announces a New Test*, SCOTUSBLOG (June 23, 2017, 9:31 PM), <http://www.scotusblog.com/2017/06/opinion-analysis-regulatory-takings-case-court-announces-new-test/> [https://perma.cc/CK5L-PC2K] (discussing how the court adopted “a multi-factor approach that would provide the least predictability, but the most flexibility to determine the interests of justice in any given case.”).

142. *Murr*, 137 S. Ct. at 1954 (Roberts, C.J., dissenting) (“The lesson that the majority draws from *Penn Central* is that defining ‘the proper parcel in regulatory takings cases cannot be solved by any simple test.’ Following through on that stand against simplicity, the majority lists a complex set of factors . . .” (quoting *id.* at 1950)).

143. See Treanor, *supra* note 3, at 810 (“[Justice] Stevens thus criticized Pennsylvania Coal as

unsure of when a regulation goes too far, instead relying on how much importance a judge decides to give each factor on a given day.

Perhaps the most worrisome part of *Murr* is the non-exhaustive nature of the majority's list. In its opinion, the majority stressed "the reasonable expectations at issue derive from background customs and the whole of our legal tradition."¹⁴⁴ That open-ended statement is in essence an uncounted, fourth factor in the majority's analysis. It allows courts to include factors as they see fit. While it can be beneficial in some occasions—for instance, Florida beachfront property probably needs to be analyzed differently than Kansas wheat fields—it also gives judges the opportunity to insert their own personal beliefs about private property. A judge that ardently supports environmentalism may be more likely to combine lots when environmental preservation is the government's goal, such as in *Murr*. On the other hand, a judge with family members in real estate may be more inclined to weigh factors supporting the division of parcels because he knows the importance of being able to develop and sell as many separate lots as possible.

Bright-line tests, like those for which the dissent argues, provide a greater stability in the law and are better suited for lower courts to apply than factor tests, like the one used in *Murr*. Per se rules are easy to apply and predict.¹⁴⁵ A common criticism against per se rules is that they can lead to harsh results. While that may be true, the benefits outweigh the costs. Property is an important right. Many people's livelihoods are dependent on their land. It is frequently bought and sold. Predictability is important in private property ownership because of its importance. An owner should not be left unsure as to what is actually owned. In takings, where the consequences can be devastating to the private party, bright-line tests protect against the dangers of state manipulation.¹⁴⁶ Balancing tests do not have origins deep in our constitutional history.¹⁴⁷ They are based on the "identification, valuation, and comparison of competing interests."¹⁴⁸ Courts reach decisions by assigning values to the different

akin to *Lochner* in vesting unconstrained power in the judiciary.").

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

145. Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 86 (2003).

146. *Id.* at 86.

147. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949 (1987) ("The great constitutional opinions of the nineteenth century and early twentieth century did not employ balancing as a method of constitutional argument or justification. Marshall did not hold for the Bank in *McCulloch v. Maryland* because the burden of the state's tax outweighed the state's interest in taxation.").

148. *Id.* at 945.

interests in the case at hand.¹⁴⁹ The major problem with balancing tests is that the factors weighed may not be “grounded in the Constitution.”¹⁵⁰ As discussed in Part II, and the preceding paragraphs, *Lucas* is an example of the benefits of applying a bright-line rule rather than a balancing test when determining whether there has been a regulatory taking.¹⁵¹ In the limited situations where courts implement bright-line rules in regulatory takings claims, they provide a clarity the balancing test of *Penn Central* lacks and the balancing test of *Murr* will not provide.

The problem of the *Murr* test is not limited to potential unknown factors weighed by judges. The factors listed by the majority are hard to measure empirically.¹⁵² This difficulty provides judges with another opportunity to influence the outcome with their own beliefs. This is not to say judges will intentionally abuse the system to determine results that favor their preferences. Often people have no idea their preconceived notions affect their judgments.¹⁵³ Providing judges with a simple application of a well-defined test limits biases from entering into judgments. The Chief Justice’s test remains subject to the vague *Penn Central* test but is a step in the right direction. It brings more stability and certainty to the process than *Murr*. A more open test allows biases to creep in and shape judgements.

Some see *Murr* as necessary to give courts the most flexibility to address unique situations as they arise. The Court had eighty years to develop a clear test to decide regulatory takings claims. It failed to do so. The Court appeared unwilling to provide litigants a stable definition of a private property.¹⁵⁴ However, this argument overlooks that it is not the

149. *Id.*

150. *Id.* at 947.

151. *See supra*, Part II.

152. *See* Somin, *supra* note 8 (“The [factors analyzed under the *Murr* test are] a recipe for confusion, uncertainty, and constant litigation. All of the factors in the test are complicated and difficult to measure.”).

153. The American Bar Association is taking steps to educate lawyers and judges about implicit bias. *Implicit Bias Initiative*, A.B.A., <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/> [<https://perma.cc/D8GG-EM9N>] (last visited Oct. 9, 2018).

154. *See* Rick Hills, *A Half-Hearted Two Cheers for the Victory of Federalism over Property Rights in Murr v. Wisconsin*, PRAWFSBLAWG (June 23, 2017), <http://prawfsblawg.blogspot.com/prawfsblawg/2017/06/a-half-hearted-two-cheers-for-the-victory-of-federalism-over-property-rights-in-murr-v-wisconsin.html> [<https://perma.cc/T8AQ-LS5C>] (“The problem with relying on the federal judiciary to define ‘property’ is that the federal courts are neither able nor willing to derive a comprehensive system of federal property rights from the dozen words of the Fifth Amendment ‘just compensation clause.’”); *see also* Blais, *supra* note 132, at 65 (“[T]he fact that this multifaceted test is to be applied before the *Lucas* inquiry effectively undermines any plausible assertion that *Lucas* created a meaningful bright-line rule.”). As Blais argues, *Murr* not only made regulatory takings claims more confusing but also undercut one of the few areas with clarity by forcing courts to consider *Murr* before it can even apply *Lucas*’s complete loss of value test. *Id.*

courts' job to define private property. As Chief Justice Roberts noted, that power historically belongs to the States.¹⁵⁵ Professor Richard Hill argues *Murr* will not have a major effect of property rights.¹⁵⁶ Professor Hill believes any attempt by the judiciary to increase its power over private property will “backfire.”¹⁵⁷ Instead, he wants people to look to state law for property rights protection.¹⁵⁸ Professor Hill disagrees with the Chief Justice because Professor Hill believes that even that approach encourages States to pass regulations hindering property owners' ability to subdivide their lots.¹⁵⁹ Instead, Professor Hill argues property owners should seek to pass regulations limiting governmental zoning power.¹⁶⁰ While Professor Hill points out the very real risks of the Chief Justice's test, he ignores the fact that States are unlikely to legislate away their own powers. But the *Murr* test decreases the influence of state law. State law is now just one of many factors for a judge to consider. The judge may place as much or as little weight on state law as he deems appropriate. The only certainty resulting from *Murr* is “that the takings analysis is now more complex. Courts and litigators will spend the coming years interpreting the Supreme Court's new, open-textured definition of the takings denominator.”¹⁶¹ That complexity will inevitably result in more power falling into the judge's lap.

C. *Murr's Test May Result in Uneven Justice for Those with Multiple Contiguous Lots*

The *Murr* test provides little in the way of guidance about how to handle scenarios likely to arise in regulatory takings claims. The test provides little guidance for what to do if some factors cut in favor of the government but others in favor of the property owner.¹⁶² Additionally,

155. Historically, states, not courts, possess the power to define and decide property rights. While states do possess that power, their constitutions and laws limit arbitrary application of that power. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting).

156. Hills, *supra* note 154.

157. *Id.* (“More vigorous efforts by the federal courts are likely to backfire either legally or politically, to the detriment of lasting protection of private property.”). Although Professor Hill's point is that federal courts are unlikely to wrest more power over private property, the last clause of his statement has dangerous implications. The judiciary may fail in acquiring more power, but it is private property protection that will suffer the lasting damage.

158. *Id.* (“So where should we look for property rights protection? Mostly state law, I believe.”).

159. *Id.*

160. *Id.*

161. Seifter, *supra* note 141.

162. See Blais, *supra* note 132, at 65 (“These vague, subjective factors hardly bring clarity to the already confused denominator dilemma.”); Somin, *supra* note 8 (“[T]he Court provides little if any guidance on what to do if some of these factors cut in favor of the government, and others in support

Murr provides little guidance for courts in situations where a litigant owns more than two contiguous lots. The majority failed to consider how its test may affect various kinds of properties.¹⁶³ Those most likely to be negatively affected are wealthy property owners and farmers. Both groups are more likely to own large tracts of land that, under *Murr*, are now at risk of being combined for takings claims.

The Court's test created a fluidity where multiple lots may be considered one parcel for one takings claim but separate for another.¹⁶⁴ This fluidity fails to promote stability. Instead, it leaves individuals at the mercy of a judge's beliefs about that regulation or piece of property. Small businesses are particularly susceptible to the disadvantages of "aggregating contiguous parcels."¹⁶⁵ Small businesses often suffer a larger burden from regulations than others, so *Murr* leaves them unsure of their property and may discourage people from starting their own business.¹⁶⁶ Additionally, small business owners have less capital to risk, and often use multiple lots for different purposes.

Murr places the principal that everyone should receive the same treatment before the law at risk. Wealthier property owners are more likely to own multiple parcels of land. This is not a new issue arising out of *Murr*. The regulatory takings field is criticized for unfairly punishing the wealthy by making it harder for a taking to occur.¹⁶⁷ By removing state law as the primary definer of property, *Murr* only increases the likelihood of this happening. *Murr* encourages the aggregation of contiguous

of the property owners. Judges can hardly avoid deciding these kinds of issues at least in large part based on their personal and ideological preferences.").

163. Somin, *supra* note 8 ("Many property owners own contiguous lots that could potentially be affected by the decision, including homeowners, small businesses, charities, and others Often, which way [the *Murr* factors] cut is in the eye of the beholder.").

164. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1956 (2017) (Roberts, C.J., dissenting) ("Moreover, given [the majority's] focus on the particular challenged regulation, the majority's approach must mean that two lots might be a single 'parcel' for one takings claim, but separate 'parcels' for another.").

165. Brief for the States of Nevada, Alaska, Arizona, Arkansas, Kansas, Oklahoma, South Carolina, West Virginia, & Wyoming as Amici Curiae in Support of Petitioners at 24, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1659320, at *24 [hereinafter Brief for the States of Nevada et al.].

166. *Id.*

167. See Barr et al., *supra* note 14, at 484 ("As it turns out, the Court has usually not considered it unfair or unjust to force owners to bear fairly heavy burdens, at least if the owner is rich."); Rose, *supra* note 32, at 568 ("When a court expands the relevant property to which the 'taken' portion is compared, the diminution in value test emerges as a deep pocket rule, as holders of extensive property must suffer a greater diminution in value in order to establish a takings claim."); Wright, *supra* note 49, at 179–80 ("[S]ome commentators have criticized the parcel-as-a-whole rule because it 'discriminates against those who happen to have a larger group of property rights in a single place.'" (quoting John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1552 (1994))).

property. When a person owns more lots, he must suffer a far greater diminution in value if the lots are combined than someone who owns only one lot, or even the Murrs, who owned two.

A strict state law approach could also harm owners of substantial amounts of property, like farmers. If property is defined solely by the lot lines drawn by a state, states may be reluctant to allow owners to subdivide their property because doing so will only increase Takings Clause protections.¹⁶⁸ While this is a valid concern, it ignores one important fact: the property was one parcel when purchased. The owner may want to divide his property, but if denied by the government, the owner is left in the same position as when it was purchased. In contrast, when the government aggregates multiple lots into one parcel, the owner's property is changed. The owner goes from having multiple sellable parcels to just one. Under state law, property owners may not be able to increase the number of separate parcels owned, but also will not see their property decrease. It is important to point out again, the results from *Murr* are far from clear. Powerful interest groups, such as realtors or farmers, may step in to prevent the government from passing regulations limiting subdivision of property.¹⁶⁹

IV. LOWER COURTS SHOULD DECLINE TO EXTEND *MURR* BEYOND ITS SPECIFIC ISSUES

The majority's opinion leaves the lower courts with a great deal of discretion to interpret the factors test. The lower courts should limit the *Murr* test to the issue involved in the case. Courts should limit the test to when only two contiguous lots are at issue. This Note does not advocate for district court judges to engage in judicial activism and ignore Supreme Court precedent. Lower courts are not permitted to ignore Supreme Court precedent.¹⁷⁰ It merely recognizes the fact that lower courts are much more

168. See Hills, *supra* note 154 (“[S]uch a stance just invites states to slow-walk all efforts to subdivide parcels. If the federally protected aspect of state law is the lot line, then one can predict that counties will be loath to allow farmers to spilt their farms up, multiplying lot lines and, thus federally protected property.”).

169. See Ilya Somin, *More on Murr – A Response to Rick Hills*, WASH. POST (June 23, 2017) https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/more-on-murr-a-response-to-rick-hills/?utm_term=.10ddf1867cbe&tid=a_inl [https://perma.cc/J2FC-6JLF] (“It is far from clear that anything like this would ever happen. The imposition of such fees would annoy powerful interest groups in most communities, such as politically influential developers, who depend on subdivision to run their business.”).

170. David C. Bratz, Comment, *Stare Decisis in Lower Courts: Predicting the Demise of Supreme Court Precedent*, 60 WASH. L. REV. 87, 91 (1984) (“Yet lower courts are also constrained by their subordinate position in the judicial system. The American judicial hierarchy deprives lower

heavily involved in the practical effect on citizens.¹⁷¹ The Supreme Court created a test in *Murr*, but it is left to the lower courts to determine how it applies to the daily lives of the citizens before it.

District Courts should recognize that while *Murr* applies to two contiguous lots for the purposes of a regulatory takings claim, it does not answer how more than two lots, non-contiguous lots, or other property ownership questions should be answered. Courts would be better off, and property owners would benefit, from limiting the *Murr* test. Courts should not follow *Quinn v. Board of County Commissioners for Queen Anne's County*,¹⁷² an example of the Fourth Circuit using *Murr* too expansively and harming the protection of private property. Instead, the courts should only apply *Murr* when an important governmental interest is implicated, such as preservation of the environment, as was the case in *Murr*. These interests must be greater than a government's normal interest in regulation, otherwise the limitation would be effectively meaningless.

An owner's interest in her property is set by the "geographic dimensions" of her property.¹⁷³ By expanding the test, courts will blur the "geographic dimensions." Property interests will go from being determined by bright lines separating one lot from another to being determined by the subjective determination of a judge. The issue magnifies when the number of lots at issue increases. Aggregation of separate lots under *Murr* may result in a determination of no taking, even though the regulation at issue may cause a substantial diminution of property value. The greater the aggregation the greater the harm to property owners.

The first case to address *Murr* in a more than superficial way was *Quinn*.¹⁷⁴ *Quinn* challenged the "Grandfather/Merger" provision under which the county refused building permits "for [lots] smaller than the

courts of the right simply to refuse to follow binding Supreme Court precedent.").

171. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 3 (1994) ("Inferior federal courts, as a matter of empirical fact, play a far more important role in the actual lives of citizens than does the Supreme Court.").

172. *Quinn v. Bd. of Cty. Comm'rs*, 862 F.3d 433 (4th Cir. 2017).

173. See Brief for the States of Nevada et al., *supra* note 165, at 19 ("Importantly, the Court held '[a]n interest in real property is defined by the metes and bounds that describe its geographic dimensions . . .'" (quoting *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331–32 (2002))).

174. Several cases have cited *Murr* without addressing any of its principles beyond its basic holdings, not including the relevant parcel test. See generally *Heartland Biogas, LLC v. Bd. of Cty. Comm'rs*, No. 16-cv-03183-RM-NYW, 2017 U.S. Dist. LEXIS 139264 (D. Colo. Aug. 30, 2017); *Pulte Home Corp. v. Montgomery Cty.*, No. GJH-14-3955, 2017 U.S. Dist. LEXIS 138101 (D. Md. Aug. 25, 2017); *Duncan v. Becerra*, No. 3:17-cv-1017-BEN, 2017 U.S. Dist. LEXIS 101549 (S.D. Cal. June 29, 2017).

minimum size . . . unless that lot was merged with any contiguous lots under common ownership.”¹⁷⁵ Quinn owned over 200 lots of undeveloped land.¹⁷⁶ Quinn needed sewer systems running through his lot to complete his intended housing development, but the county passed an ordinance prohibiting sewer system extension to streets with only vacant lots.¹⁷⁷ The county also required new lots to meet a minimum size to receive building permits.¹⁷⁸ Quinn’s 200 lots failed to meet the minimum required size.¹⁷⁹ Analyzing the *Murr* factors, the Fourth Circuit held no taking occurred because Quinn owned twelve lots that could be merged into four lots and developed or sold.¹⁸⁰ The Fourth Circuit raised the similar physical characteristics of the land.¹⁸¹ Weighing physical characteristics of land in areas with large stretches of similar topography essentially preordains multiple lots being merged into one for a takings claim. The Fourth Circuit found no taking because “[v]iewed as a collective, the lots are still developable,” overlooking the fact that each of the twelve lots held less value under the “Grandfather/Merger” provision because each retained some value as a portion of the four lots created after the merger.¹⁸²

The Fourth Circuit’s analysis provides a limited, but beneficial example of the direction *Murr* is likely to take regulatory takings jurisprudence. It recognized each individual lot lost value under the regulation, as well as the fact Quinn lost freedom to use his property as he saw fit. Instead of the Fourth Circuit simply holding that Quinn lacked a right to sewer service, it applied parts of the *Murr* test to find the County acted properly to force Quinn to merge his lots.¹⁸³ This analysis was largely unnecessary and likely would not have occurred but for *Murr*. The Fourth Circuit believed *Murr* directed analysis over takings claims when the landowner owns multiple lots. Its inclusion of *Murr* is evidence that the *Murr* test likely will not have a limited effect, as many claim. *Murr* is likely to disrupt the definition of private property in every case where the landowner possesses multiple lots, especially if they are contiguous.

The *Murr* test is vague and highly malleable. Courts can use the vagueness to shape doctrine in their jurisdiction to favor or harm private

175. Quinn, 862 F.3d at 438.

176. *Id.* at 437.

177. *Id.*

178. *Id.* at 438.

179. *Id.*

180. *Id.* at 441–42.

181. *See id.* at 441.

182. *Id.* at 442.

183. *See id.* at 439.

property ownership as they see fit. Drawing precedential lines early forces the test to be as objective as possible. It is difficult to determine how to quantify each factor. Limiting application of these factors prevents the test from running away from the Court's original intent, creating a test that takes all factors of regulations and ownership into account.

Judicial tests evolve through judicial interpretation. While they lack the authority to overturn the Supreme Court, lower court judges possess the power to interpret what the Supreme Court's rulings mean.¹⁸⁴ By failing to limit the test to two contiguous parcels where the government has a significant interest, courts leave open the opportunity for *Murr* to seep into other takings claims. The most likely expansion occurs when an owner owns multiple lots that are not contiguous. *Murr* alluded to the idea that a loss may be lessened if the owner has other property to offset the loss in value. *Penn Central* analyzed the other property owned by the plaintiffs as well. It is a small leap from the contiguous plots in *Murr* to considering any property under common ownership. If the lots are close geographically, courts could decide they are aggregated for a takings claim. That expansion begins to affect property owners merely for owning property, regardless of whether it is contiguous. Another possibility, although less likely, is using this test when only a single lot is at issue. If courts begin to consider the government's interest and the owner's reasonable expectations of a single lot before even analyzing the effect of the regulation on the property, regulatory takings protection is essentially dead. Lower courts should find *Murr*'s place in the regulatory takings field before its ambiguity works to dominate the field and render the government the easy victor every time.

V. CONCLUSION

The purpose of the Fifth Amendment's Takings Clause is to prevent a government from taking its citizens' private property without paying just compensation. Until *Murr*, what made up the relevant parcel was a simple question primarily governed by state law. Now, that question is murky and potentially has negative consequences for property owners bringing takings claims. States may now create regulations for the purpose of defeating regulatory takings claims. The confusing factors test will put more power into the hands of the judges, as they are now allowed to determine the definition of your property. The *Murr* test will likely punish

184. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 231 (1985) ("These opening words of Article III [of the Constitution] are rich with meaning. First, they establish that the judicial power of the United States must be vested in the federal judiciary as a whole.").

landowners with multiple contiguous lots by making it harder to succeed on takings claims. Courts should set boundaries on *Murr* to prevent its expansion. Extending *Murr* risks creating even greater confusion in regulatory takings jurisprudence. Now, litigants are left hoping the factors will be ever in their favor. And while we will never see regulatory takings in the Quarter Quell¹⁸⁵ nor a revolution to end a dangerous system, under *Murr*, private property is at greater risk than before.

185. See SUZANNE COLLINS, *CATCHING FIRE* (2009).