

# The Superior Solution to the “Denominator Problem” — Comparing the Majority and Dissent’s Property Benchmark Tests in *Murr v. Wisconsin* with a Focus on Property Owners’ Reasonable Expectations

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## Repository Citation

Rosemary K. McGuirk, *The Superior Solution to the “Denominator Problem” — Comparing the Majority and Dissent’s Property Benchmark Tests in Murr v. Wisconsin with a Focus on Property Owners’ Reasonable Expectations*, 27 Wm. & Mary Bill Rts. J. 539 (2018), <https://scholarship.law.wm.edu/wmborj/vol27/iss2/7>

**THE SUPERIOR SOLUTION TO THE “DENOMINATOR  
PROBLEM”—COMPARING THE MAJORITY AND  
DISSENT’S PROPERTY BENCHMARK TESTS IN *MURR  
V. WISCONSIN* WITH A FOCUS ON PROPERTY  
OWNERS’ REASONABLE EXPECTATIONS**

Rosemary K. McGuirk\*

INTRODUCTION

On June 23, 2017, the United States Supreme Court, in a 5–3 decision—*Murr v. Wisconsin*—set out a multifactor balancing test intended to resolve the “denominator problem” in regulatory takings cases involving real property. The denominator problem asks how the pertinent parcel of land should be defined when deciding whether a regulatory taking has occurred. The dissenting opinion, written by Justice Roberts and joined by Justices Thomas and Alito, protested the unnecessary complexity of the majority’s test. Fearing its potential ramifications on property rights, the dissent set out an alternative, straightforward solution. While both the majority and dissent’s tests would have arrived at the same holding—ruling against the Murr family and in favor of St. Croix County—their solutions as to how the denominator question should be answered are markedly different. This difference is especially pronounced when comparing the tests’ potential to achieve denominators in agreement with property owners’ reasonable expectations.

The *Murr* majority opinion, written by Justice Kennedy, offered three specific considerations to weigh when defining the denominator: “[1] the treatment of the land under state and local law; [(2)] the physical characteristics of the land; and [(3)] the prospective value of the regulated land.”<sup>1</sup> The Justices further elucidated:

The endeavor [(with respect to the denominator inquiry)] should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue

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<sup>1</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

derive from background customs and the whole of [the federal] legal tradition.<sup>2</sup>

The language of this additional explication closely resembles Justice Scalia's proposed solution to the denominator problem, as per his recommendation in footnote seven of *Lucas v. South Carolina Coastal Council*:

The answer to this difficult [denominator] question may lie in *how the owner's reasonable expectations have been shaped by the State's law of property*—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.<sup>3</sup>

In the final paragraph of the *Murr* opinion, Kennedy again writes: "Courts must instead define the parcel [(the denominator)] in a manner that reflects reasonable expectations about the property."<sup>4</sup> Despite such unambiguous statements, however, it is difficult to imagine how a court balancing the three enumerated factors would always yield a denominator in agreement with property owners' reasonable expectations. Instead, a simpler, bright-line solution—one consistent with state law property boundaries and immune from excessive discretion by courts—like that proposed by the *Murr* dissent—and serving as the first of three factors enumerated by the majority—would be better equipped to serve such a purpose.

Despite the majority's obvious attempt to achieve fair outcomes through the use of its multifactor balancing test, fairness may be better served through simplicity and predictability. Accordingly, the dissent's test—which defines the denominator by looking exclusively to state law—offers a superior solution with respect to attaining denominators in agreement with property owners' reasonable expectations. In consequence, the dissent's solution affords future regulatory takings plaintiffs a less malleable definition of their property, and with such increased predictability, property owners can better anticipate the likelihood of their takings claims' success.

The purpose of this Note is to compare the *Murr* majority's and *Murr* dissent's different solutions to the denominator problem with a particular emphasis on their capacities to achieve denominators in agreement with property owners' reasonable expectations.<sup>5</sup> I will apply each test to past regulatory takings cases involving varied

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<sup>2</sup> *Id.*

<sup>3</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992) (emphasis added).

<sup>4</sup> *Murr*, 137 S. Ct. at 1950.

<sup>5</sup> This said, I do not believe that property owners' reasonable expectations should be a factor in itself during the denominator inquiry. Rather, I agree with the dissent's state law-based determination and simply argue that the dissent's solution does the better job in meeting such reasonable property owner expectations.

fact patterns. I will then compare their expected denominator outcomes and their relation to reasonable property owners’ expectations.

Part I provides background information on the Takings Clause, regulatory takings jurisprudence, the denominator problem, and the denominator problem’s historical treatment by courts. Part II discusses *Murr v. Wisconsin* and the denominator tests set forth by both the Court’s majority and dissent. Part III applies the *Murr* majority and *Murr* dissent’s tests to three regulatory takings cases, with particular focus on denominator outcomes and their relation to reasonable property owners’ expectations. These cases include: (1) *Lucas v. South Carolina Coastal Council*,<sup>6</sup> (2) *Lost Tree Village Corp. v. United States*,<sup>7</sup> and (3) *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>8</sup> Finally, Part IV argues why the *Murr* dissent’s test (as opposed to the *Murr* majority’s test) provides the superior solution to the denominator problem.

## I. THE TAKINGS CLAUSE, REGULATORY TAKINGS JURISPRUDENCE, THE DENOMINATOR PROBLEM, AND THE DENOMINATOR PROBLEM’S HISTORICAL TREATMENT BY COURTS

### *A. The Takings Clause*

Immediately following the Due Process Clause of the Fifth Amendment, a provision known as the “Takings Clause” prescribes: “[N]or shall private property<sup>9</sup> be taken for public use,<sup>10</sup> without just compensation.”<sup>11</sup> The Takings Clause applies at the state level by way of the Fourteenth Amendment.<sup>12</sup> As explained by Justice

<sup>6</sup> 505 U.S. 1003 (1992).

<sup>7</sup> 707 F.3d 1286 (Fed. Cir. 2013), *aff’d* 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied* 137 S. Ct. 2325 (2017).

<sup>8</sup> 535 U.S. 302 (2002).

<sup>9</sup> *United States v. General Motors* instructs that the term “property,” as used in the Takings Clause, “denote[s] the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.” 323 U.S. 373, 378 (1945).

<sup>10</sup> *See Kelo v. City of New London*, 545 U.S. 469, 479–80 (2005) (footnotes and citations omitted) (“[The Supreme] Court long ago rejected any literal requirement that condemned property be put into use for the general public.’ Indeed, while many state courts in the mid-19th century endorsed ‘use by the public’ as the proper definition of public use, that narrow view steadily eroded over time. Not only was the ‘use by the public’ test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’”).

<sup>11</sup> U.S. CONST. amend. V. “Just compensation” is defined as the fair market value of the property at the time the land is thought to have been taken. *See, e.g., Olson v. United States*, 292 U.S. 246, 255 (1934).

<sup>12</sup> *See Dolan v. City of Tigard*, 512 U.S. 374, 383–84 (1994) (citation omitted).

Black in *Armstrong v. United States*,<sup>13</sup> the Takings Clause was “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.”<sup>14</sup> By the same token, the Takings Clause is said to “serve[] [the] dual goals of protecting both private property rights and the government’s need to regulate in the public interest.”<sup>15</sup>

### B. Regulatory Takings Jurisprudence

The Takings Clause was originally understood to apply to only physical seizures of land.<sup>16</sup> This limited interpretation, however, changed in 1922 with the watershed Land Use decision *Pennsylvania Coal Co. v. Mahon*,<sup>17</sup> in which the Supreme Court extended the use of the Takings Clause to circumstances involving overly burdensome regulations.<sup>18</sup> In the Court’s majority opinion, Justice Holmes instructed: “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”<sup>19</sup> Accordingly, “a new takings regime,”<sup>20</sup> to wit, a “regulatory takings”<sup>21</sup> regime, emerged.

“The touchstone of the regulatory takings doctrine . . . is ‘to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property.’”<sup>22</sup> In deciding whether a regulation has effected the functional equivalent of a physical seizure, courts seek “to determine how the challenged regulation affects the property’s value to the owner.”<sup>23</sup> To date, two regulatory takings tests have materialized concerning real property.<sup>24</sup> The first test—the *Lucas* test<sup>25</sup>—considers

<sup>13</sup> 364 U.S. 40 (1960).

<sup>14</sup> *Id.* at 49.

<sup>15</sup> 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/T5GW-DGQX>] [hereinafter Seifter, *Court Announces a New Test*].

<sup>16</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995).

<sup>17</sup> 260 U.S. 393 (1922).

<sup>18</sup> See Treanor, *supra* note 16, at 782 (citation omitted) (“[T]he Supreme Court’s decision in *Pennsylvania Coal v. Mahon* established a new takings regime.”).

<sup>19</sup> *Pennsylvania Coal*, 260 U.S. 393 at 415.

<sup>20</sup> Treanor, *supra* note 16, at 782.

<sup>21</sup> Some courts refer to regulatory takings as “constructive takings.” JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 391 (3d ed. 2013).

<sup>22</sup> *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 529 (2005)).

<sup>23</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017).

<sup>24</sup> Regulatory takings can also be found in instances of personal property. See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2422 (2015) (finding a regulatory taking where a program under the Department of Agriculture—intended to prevent the oversaturation of the raisin market—required the removal of some raisins from the open market).

<sup>25</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

categorical (per se) takings in instances “where a regulation deprives real property of *all economically viable use*<sup>26</sup> . . . unless the state can prove that the regulation does no more to restrict use than what the state courts could do under background principles of property law or the law of private or public nuisance.”<sup>27</sup> When a regulation does not deprive the landowner of all economically viable use, courts apply the second test—the *Penn Central* test—to decide whether a taking has occurred.<sup>28</sup> The *Penn Central* test sets out three factors to be considered: (1) the economic impact of the regulation on the landowner, (2) the extent to which the regulation interferes with distinct investment-backed expectations,<sup>29</sup> and (3) the character of the government action.<sup>30</sup>

### C. The Denominator Problem

The takings analysis is thought to be better understood with the support of fractions.<sup>31</sup> In such instances, the numerator (top number) is to be substituted with a number constituting the value of the regulated portion (i.e., the portion of the total parcel that is being impacted by the government regulation).<sup>32</sup> The question as to “the unit of property ‘whose value is to furnish the denominator of the fraction,’”<sup>33</sup> is the very question contemplated by the denominator problem. To be clear, the denominator problem asks how to define “the ‘property interest’ against which the loss of value is to be measured,”<sup>34</sup> and more specifically, “the entirety of the owner’s rights in the ‘parcel as a whole.’”<sup>35</sup>

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<sup>26</sup> See Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL. REV. 801, 822 (1999) (“In *Lucas*, the Court did not decide whether there must be a developmental use of the property to avoid a claim that a regulation does not allow an economically viable use. Some cases have held the key question is whether there is a competitive and realistic market for the land that is subject to restriction. This means there must be a market of buyers who are willing to buy the land for development, not for speculation. It does not mean the land use regulation allows a developmental use of the property.”).

<sup>27</sup> JUERGENSMEYER & ROBERTS, *supra* note 21, at 404 (emphasis added).

<sup>28</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“Where a regulation places limitations on land that fall short of eliminating all economically beneficial use [(i.e., fail to satisfy a takings under *Lucas*)], a taking nonetheless may have occurred, depending on [the] complex of factors [enumerated in *Penn Central*] . . .”).

<sup>29</sup> Courts now consider “reasonable investment-backed expectations,” which can be construed as a more objective standard. See *Lucas*, 505 U.S. at 1034.

<sup>30</sup> See *infra* accompanying notes 44–52.

<sup>31</sup> See Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1848–49 (2017).

<sup>32</sup> See *id.* at 1849.

<sup>33</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (citations omitted).

<sup>34</sup> *Lucas*, 505 U.S. at 1016 n.7.

<sup>35</sup> Brown & Merriam, *supra* note 31, at 1849.

The denominator problem surfaces in all regulatory takings cases involving real property.<sup>36</sup> Before deciding whether a regulatory taking has occurred under the categorical *Lucas* rule or the ad hoc, multifactor *Penn Central* test, the court must first define the parcel against which loss of value is to be measured.<sup>37</sup>

Professor Lynn Blais offers a simple hypothetical illustrating the importance of the denominator determination: “[A] regulation prohibiting development on one acre of wetlands in the corner of a five-acre lot can be viewed as depriving the landowner of 100 percent of that acre of land or 20 percent of the entire lot.”<sup>38</sup> Based on this example, an obvious taking would be found if the denominator contemplated only that portion of the parcel directly impacted by the government regulation (i.e., the one affected acre).<sup>39</sup> On the other hand, no taking would likely be found if the denominator instead reflected the property owner’s entire holding (i.e., the total five-acre lot).

The denominator determination is generally thought to be outcome-determinative,<sup>40</sup> particularly in the case of *Lucas* claims. As discussed in Section I.B,<sup>41</sup> the *Lucas* inquiry merely contemplates the property’s diminution in economic value. More specifically, *Lucas* asks whether the pertinent regulation has divested the landowner of all “productive or economically beneficial use of [his] land.”<sup>42</sup> “[W]hether the owner has been deprived of all economic value of his property will depend on how ‘property’ is defined. The ‘composition of the denominator in our ‘deprivation’ fraction’ is the dispositive inquiry.”<sup>43</sup> On that basis, the smaller the denominator, and the more aligned the denominator is with the numerator—the portion of the parcel thought to be impacted by the regulation—the stronger the claim for a total takings

<sup>36</sup> See *id.* (“[P]roperty owners seek to characterize their property rights narrowly . . . government regulators seek to characterize [them] . . . broadly . . .”).

<sup>37</sup> “The denominator question . . . is just a preliminary step; courts must then decide whether a taking occurred, applying . . . the tests from *Penn Central* . . . or *Lucas* . . .” Seifter, *Court Announces a New Test*, *supra* note 15.

<sup>38</sup> Lynn E. Blais, *The Total Takings Myth*, 86 *FORDHAM L. REV.* 47, 50–51 (2017) (emphasis added).

<sup>39</sup> In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, Justice Stevens speaks to this exact point: “defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [regulation] would become a total [taking] . . .” 535 U.S. 302, 331 (2002).

<sup>40</sup> See Miriam Seifter, *Argument Preview: Defining the Denominator in Regulatory Takings Law*, SCOTUSBLOG (Mar. 14, 2017, 5:11 PM), <http://www.scotusblog.com/2017/03/argument-preview-defining-denominator-regulatory-takings-law/> [<https://perma.cc/2V8Q-PMWD>] [hereinafter Seifter, *Defining the Denominator*] (“The answers [to the denominator question] matter: A regulation’s burden might look severe when measured against one segment of a property, but slight when compared to a larger property interest.”).

<sup>41</sup> See *supra* text accompanying notes 25–27.

<sup>42</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992).

<sup>43</sup> Blais, *supra* note 38, at 62–63.



under *Lucas*. For example, if the numerator was two acres of agricultural property, a denominator determination of two, three, or four acres would be conclusive under the *Lucas* analysis. In this instance, only a denominator of two acres could constitute a total deprivation of beneficial use.

When the Court fails to find a categorical *Lucas* taking,<sup>44</sup> the ad hoc, multifactor *Penn Central* test is applied.<sup>45</sup> Here, the denominator determination also plays a significant role. The first *Penn Central* factor—the economic impact of the regulation on the landowner—again considers the property’s diminution of value.<sup>46</sup> Once more, the denominator determination is integral to such an inquiry. The second *Penn Central* factor, which balances the extent to which the regulation interferes with property owners’ investment-backed expectations, is similarly influenced by the denominator determination.<sup>47</sup> Needless to say, any denominator finding at odds with a property owner’s personal definition has the potential to ignore such investment-backed expectations. Finally, the denominator determination is also relevant under the third *Penn Central* factor, which scrutinizes the character of the government action.<sup>48</sup> Although the *Penn Central* Court seemingly intended that this factor contemplate “whether the government physically invaded the claimant’s tangible property or authorized a third person to do so,”<sup>49</sup> this factor has since taken on a different, yet muddled meaning. “The ‘character or extent of the government action’ factor has been read by many courts to open up the inquiry into an assessment of the ‘purpose and importance of the public interest,’ which then must be weighed against the loss.”<sup>50</sup> For example, in *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>51</sup> when contemplating this third prong “the Court . . . ask[ed] whether the government’s actions were justified.”<sup>52</sup> Though this factor remains subject to interpretation, the size of the denominator is of particular importance when deciding whether the

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<sup>44</sup> See Brown & Merriam, *supra* note 31, at 1849–50. As of July 2017, after reviewing “more than 1,700 cases in state and federal courts,” the article’s authors discovered “only 27 cases in 25 years in which courts found a categorical taking under *Lucas*. By percentage, that works out to a *Lucas*-claim success rate of just 1.6%.” *Id.*

<sup>45</sup> See Blais, *supra* note 38, at 50.

<sup>46</sup> See Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1301, 1325 (1989) (“The Court . . . inquired whether the challenged law greatly diminishes the value of the claimant’s tangible thing . . .”).

<sup>47</sup> See *id.* at 1320.

<sup>48</sup> See *id.* at 1317–18.

<sup>49</sup> *Id.* See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding four years after *Penn Central* that “[w]hen the ‘character of the governmental action,’ . . . is a permanent physical occupation of real property, [a per se taking is established] . . . without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner”).

<sup>50</sup> JUERGENSMEYER & ROBERTS, *supra* note 21, at 408.

<sup>51</sup> 480 U.S. 470 (1987).

<sup>52</sup> Peterson, *supra* note 46, at 1319.



government's actions are justified. If a government action were to impact only 8 acres of a 100-acre parcel—notwithstanding the government objective—a court would have an easier time finding the action justifiable than it would if the regulation were to impact 80 of the 100 acres.

Because the denominator question often bears on the ultimate takings outcome, the relevant parcel's definition is frequently subject to manipulation.

[P]roperty owners seek to characterize their property rights narrowly for as small a denominator as possible. The smaller the denominator, the more likely it is to be equal to the numerator. On the other hand, government regulators seek to characterize the property owner's property rights broadly for as large a denominator as possible.<sup>53</sup>

As described above, the denominator is often subject to manipulation by both private parties as well as the government.<sup>54</sup>

#### *D. The Denominator Problem's Historical Treatment by Courts*

Before *Murr*, “the [Supreme] Court ha[d] not set forth specific guidance on how to identify the [denominator] . . . .”<sup>55</sup> Nonetheless, the *Murr* Court highlighted two limiting principles that had, up to that point, emerged from Supreme Court regulatory takings precedent. “First, the Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation.”<sup>56</sup> Referring back to Professor Blais's hypothetical, in which one acre of wetlands in a five-acre lot is prohibited from development, the Court has rejected the approach yielding a denominator of one, as such an approach—which limits the denominator to only that property interest being regulated—would always result in a taking:

‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [Instead, taking jurisprudence] focuses . . . on the nature and extent of the interference with rights in the parcel as a *whole*.<sup>57</sup>

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<sup>53</sup> Brown & Merriam, *supra* note 31, at 1849.

<sup>54</sup> *See id.* at 1850.

<sup>55</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017).

<sup>56</sup> *Id.*

<sup>57</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978) (emphasis added). John Fee provides the following example of this “nonseverability rule” in practice: “A homeowner, therefore, who is prohibited from running a magazine stand on her front lawn does not have a valid taking claim simply because her right to run a magazine stand was completely extinguished through regulation.” John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1538 (1994).

The second limiting principle provided by the *Murr* Court was “the view that property rights under the Takings Clause should be coextensive with those under state law.”<sup>58</sup> Citing the holding in *Palazzolo v. Rhode Island*,<sup>59</sup> the Court proceeded to qualify that despite the import of state law when defining the denominator, “[s]tates do not have the unfettered authority to ‘shape and define property rights and reasonable investment-backed expectations,’ leaving landowners without recourse against unreasonable regulations.”<sup>60</sup> In different words, a landowner cannot be barred from a takings claim just because the pertinent regulation was in existence at the time she gained title to the property.

A given parcel may encompass a multitude of property interests, including “the rights to possess, use, and dispose of” [ ] property.”<sup>61</sup> Accordingly, the denominator itself may embrace much more than the horizontal surface of land.<sup>62</sup> Dwight Merriam describes “[t]he world of the relevant parcel” as a “wonderland, where size seems to change in confusing ways.”<sup>63</sup> Indeed, the denominator—which “can be measured physically, functionally and temporally,”<sup>64</sup>—has received flexible treatment by courts, oftentimes permitting considerations beyond that which many property owners would reasonably anticipate. Some of these considerations include: subsurface rights, air rights, “functional dimensions” (property characteristics including “density, use, bulk, and dimensional standards”);<sup>65</sup> transfer of development rights (commonly called TDRs);<sup>66</sup> treatment of the parcel as a temporal estate (encompassing “property interests over time, such [as] a property [with] no current use but [with] speculative value”);<sup>67</sup> economic burdens (e.g., “the requirement to clean up pollution, may diminish the [denominator’s] ‘size’”);<sup>68</sup> positive externalities (when the regulation simultaneously

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<sup>58</sup> *Murr*, 137 S. Ct. at 1944.

<sup>59</sup> 533 U.S. 606, 626–27 (2001) (holding that plaintiff property owner was not barred from a takings claim just because the property was already subject to the pertinent regulation when plaintiff acquired it).

<sup>60</sup> *Murr*, 137 S. Ct. at 1944–45 (quoting *Palazzolo*, 533 U.S. at 626).

<sup>61</sup> *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427 (2015) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

<sup>62</sup> Josh Patashnik, *Less Than Meets The Eye: Murr’s Impact is Likely Limited*, Law360 (July 3, 2017, 10:29 AM), <http://www.law360.com/articles/940066/less-than-meets-the-eye-murr-s-impact-is-likely-limited> [<https://perma.cc/74EY-R8FB>] (“[B]ecause any given person or company may possess a multitude of different property interests, identifying the relevant parcel . . . the ‘denominator’ of the takings inquiry—is sometimes a complicated endeavor.”).

<sup>63</sup> Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 415 (2003).

<sup>64</sup> *Id.* at 414.

<sup>65</sup> 1 PATRICK J. ROHAN & ERIC D. KELLY, *ZONING AND LAND USE CONTROLS* § 53C.09 (2017).

<sup>66</sup> A transfer of development rights, or TDR, “is the yielding of some or all of the right to develop or use a parcel of land in exchange for a right to develop or use another parcel of land, or another portion of the same parcel of land, more intensively.” *Id.*

<sup>67</sup> Merriam, *supra* note 63, at 363.

<sup>68</sup> *Id.* at 361.

enhances the regulated property's market value because of how it restricts other neighboring properties);<sup>69</sup> the inclusion of contiguous and noncontiguous holdings when "used as part of a consolidated operation;"<sup>70</sup> and the inclusion of later-acquired properties ("parcels purchased at different times, before or after regulation").<sup>71</sup>

## II. *MURR V. WISCONSIN* AND ITS MAJORITY AND DISSENT'S DENOMINATOR TESTS

The United States Supreme Court granted certiorari in *Murr* in the hope of bringing clarity to the denominator issue.<sup>72</sup> On a narrower scale, *Murr* also provided the Court the opportunity to clarify whether commonly owned contiguous, but legally distinct, parcels could be combined for the purpose of defining the denominator.<sup>73</sup> Put differently, *Murr* would elucidate whether state and local governments could treat two adjacent parcels owned by a common owner as one single parcel, or whether each parcel ought to be treated as distinct property interests.

Before oral argument in the *Murr* case, Miriam Seifter outlined some of the questions requiring clarity when tackling the denominator issue:

[I]s the parcel the single lot whose use is most affected by the challenged regulation, the owner's contiguous holdings, or some broader set of the owner's affected interests? Is the parcel defined by state lot lines, by other state land use regulations, or by other criteria?<sup>74</sup>

The *Murr* majority's test seemingly answers all of these questions, albeit with minimal clarity.

### A. Facts

In 1972, under the Wild and Scenic Rivers Act,<sup>75</sup> Wisconsin and Minnesota were commanded "to develop 'a management and development program' for the [St. Croix River] area," as the River had been chosen for federal protection.<sup>76</sup> In compliance with the Act, and for the purpose of protecting "the wild, scenic, and recreational

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<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 358.

<sup>71</sup> *Id.* at 359.

<sup>72</sup> Patashnik, *supra* note 62.

<sup>73</sup> Gavin S. Frisch, *What is the Relevant Parcel? Clarifying the "Parcel as a Whole" Standard in Murr v. Wisconsin*, 12 DUKE J. CONST. LAW & PP SIDEBAR 253, 254 (2017).

<sup>74</sup> Seifter, *Defining the Denominator*, *supra* note 40.

<sup>75</sup> 16 U.S.C. § 1274(a)(6) (2006).

<sup>76</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1940 (2017).

qualities of the river,” Wisconsin’s State Department of Natural Resources promulgated restrictions on development.<sup>77</sup>

The plaintiffs in *Murr* were four siblings who inherited two adjacent lots alongside the St. Croix River in Troy, Wisconsin.<sup>78</sup> The lots were purchased separately by plaintiffs’ parents—Lot F in 1960, and Lot E in 1963.<sup>79</sup> Plaintiffs’ parents “built a small recreational cabin” on Lot F, but left Lot E undeveloped.<sup>80</sup> Although plaintiff’s parents continuously held title to Lot E from 1983 to 1995, in 1961, before the purchase of Lot E, plaintiffs’ parents transferred Lot F’s title to their family’s plumbing company.<sup>81</sup> For this reason, Lots E and F remained under separate ownership until they were conveyed to plaintiffs in 1994 and 1995.<sup>82</sup>

Lots E and F are described as having “the same topography.”<sup>83</sup>

A steep bluff cuts through the middle of each, with level land suitable for development above the bluff and next to the water below it . . . . Though each lot is approximately 1.25 acres in size, because of the waterline and the steep bank they each have less than one acre of land suitable for development. Even when combined, the lots’ buildable land area is only 0.98 acres due to the steep terrain.<sup>84</sup>

Under the rules promulgated by the State Department of Natural Resources, property where plaintiffs’ lots were located could not be developed if less than one acre of the property was suitable for development.<sup>85</sup> Despite the existence of a grandfather clause authorizing development on “substandard lots which were ‘in separate ownership from abutting lands’ on January 1, 1976,”<sup>86</sup> a merger provision also existed, stipulating that “adjacent lots under common ownership may not be ‘sold or developed as separate lots’ if they do not meet the size requirement [that each tract contain one acre of land suitable for development].”<sup>87</sup> This merger provision

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<sup>77</sup> *Id.* (quoting WIS. STAT. § 30.27(I) (1973)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1939–40.

<sup>81</sup> *Id.* at 1940.

<sup>82</sup> *Id.* at 1940–41.

<sup>83</sup> *Id.* at 1940.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing WIS. ADMIN. CODE §§ NR 118.04(4), 118.03(27), 118.06(1)(a)(2)(a), 118.06(1)(b) (2017)).

<sup>86</sup> *Id.* (quoting WIS. ADMIN. CODE § NR 118.08(4)(a)(1) (2017)) (January 1, 1976 was the date on which the regulation took effect).

<sup>87</sup> *Id.* (quoting WIS. ADMIN. CODE § NR 118.08(4)(a)(2) (2017)). As per the rules promulgated by the Wisconsin State Department of Natural Resources, St. Croix County’s zoning ordinance also included identical provisions. *Id.* (citing St. Croix County, Wis., Ordinance § 17.361.4.a (2005)).

was accordingly triggered when Lots E and F came under common ownership in the mid-1990s, thus “barring their separate sale or development.”<sup>88</sup> Presumably, plaintiffs were not aware of this merger until they became interested in selling Lot E in the mid-2000s.<sup>89</sup> Plaintiffs thereafter sought a variance permitting the “separate sale or use of the lots,” but the St. Croix County Board of Adjustments denied this request.<sup>90</sup> As a result, Plaintiffs asserted a regulatory takings claim, which eventually found its way to the United States Supreme Court.<sup>91</sup>

### *B. Majority vs. Dissent Tests*

The majority’s denominator test enumerates three *Penn Central*–like factors. They include: “[1] the treatment of the [property] under state and local law; [2] the physical characteristics of the [property]; and [3] the prospective value of the regulated [property].”<sup>92</sup> The first factor—treatment of the property under state and local law—is the sole consideration deemed appropriate under the dissent’s test.<sup>93</sup> According to the majority, the additional two considerations—factors two and three—“accord with other indicia of reasonable expectations about property.”<sup>94</sup> As discussed *infra*,<sup>95</sup> I strongly disagree with the majority on this point; it is my contention that any considerations beyond the property’s definition under state law are inherently in conflict with reasonable property owner expectations.

#### 1. *Murr* Majority’s Test

##### *a. Factor One*

Factor one of the majority’s test is “treatment of the land under state and local law.”<sup>96</sup> The majority writes: “[t]he reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property.”<sup>97</sup> Citing *Palazzolo*, however, the majority qualifies that “[a] valid takings claim will not evaporate just because a purchaser took title after the law was enacted.”<sup>98</sup>

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<sup>88</sup> *Id.* at 1941.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* at 1941–42.

<sup>92</sup> *Id.* at 1945.

<sup>93</sup> *Id.* at 1950 (Roberts, C.J., dissenting).

<sup>94</sup> *Id.* at 1946–47.

<sup>95</sup> *See* discussion *infra* Part IV.

<sup>96</sup> *Murr*, 137 S. Ct. at 1945.

<sup>97</sup> *Id.* (citing *Ballard v. Hunter*, 204 U.S. 241, 262 (1907)).

<sup>98</sup> *Id.* *See also* *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (“[E]nactments [that] are unreasonable [ ] do not become less [unreasonable] through passage of time or title. Were

*b. Factor Two*

Factor two of the majority’s test contemplates the “physical characteristics of the land.”<sup>99</sup> The majority states: “These [physical characteristics] include the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment.”<sup>100</sup> The majority adds that “it may be relevant if the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.”<sup>101</sup> Ultimately, this factor, like the other two factors, is supposed to be examined in such a way that defers to reasonable property owners’ expectations.<sup>102</sup> That said, why else would courts weigh the property’s potential for being subject to regulations?

*c. Factor Three*

Factor three of the majority’s test ponders the “prospective value of the regulated land.”<sup>103</sup> In the majority’s view, courts should “[pay] special attention to the effect of [the] burdened land on the value of other holdings.”<sup>104</sup> In asking courts to consider whether “the [regulation’s] effect [is] tempered [because] the regulated land adds value to the remaining property,”<sup>105</sup> this third factor appears consistent with “reciprocity of advantage”<sup>106</sup> ideas. Moreover, the Court added that “[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel . . . .”<sup>107</sup>

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we to accept [that a purchaser or successive title holder be barred from a takings claim by virtue of their having constructive notice of the restriction] . . . no matter how extreme or unreasonable [the restriction][,] [a] State would be allowed, in effect, to put an expiration date on the Takings Clause.”)

<sup>99</sup> *Murr*, 137 S. Ct. at 1945.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1945–46 (citing *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2903 (1992) (Kennedy, J. concurring)).

<sup>102</sup> *See id.* at 1946–47 (referring to factors two and three as “other indicia of reasonable expectations about property”).

<sup>103</sup> *Id.* at 1945.

<sup>104</sup> *Id.* at 1946.

<sup>105</sup> *Id.*

<sup>106</sup> *See* Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL’Y 1, 4 (2003/2004) (“Put simply, reciprocity of advantage assumes that the benefits and burdens of any particular economic regulation are distributed unequally. But because each property owner benefits from certain regulations that are imposed on others, the overall scheme of regulation provides a net benefit for individual property owners. Accordingly, awarding compensation to an individual property owner on the basis of the detriment from an individual regulation would confer a windfall on the property owner.”).

<sup>107</sup> *Murr*, 137 S. Ct. at 1946.



## 2. Application of Majority's Test to *Murr* Facts

### *a. Factor One*

The majority concluded that under factor one—treatment of the land under state and local law—the Murrs' two parcels, Lots E and F, should be combined and “treated as one.”<sup>108</sup> The majority arrived at this conclusion due to the pertinent merger provision which took effect at the time both properties came under common ownership (i.e., after both lots were conveyed to plaintiffs in 1994 and 1995).<sup>109</sup> The Court noted: “Petitioners’ insistence that lot lines define the relevant parcel ignores the well-settled reliance on the merger provision as a common means of balancing the legitimate goals of regulation with the reasonable expectation of landowners.”<sup>110</sup> Even if the plaintiffs had no actual notice of the provision, they should have known of its existence, and thus had constructive notice of the regulation.<sup>111</sup>

### *b. Factor Two*

The majority concluded that under factor two—physical characteristics of the land—the property’s physical characteristics “support[ed] its treatment as a unified parcel.”<sup>112</sup> The Court noted that the lots were contiguous and found that “[t]heir rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited.”<sup>113</sup> Moreover, the Court found that the plaintiffs “could have anticipated public regulation might affect their enjoyment of their property” given the properties’ location along the Lower St. Croix River, an area “regulated . . . under federal, state, and local law long before petitioners possessed the land.”<sup>114</sup>

### *c. Factor Three*

The majority concluded that under factor three—prospective value of the regulated land—“the prospective value that Lot E brings to Lot F supports considering the two as one parcel . . . .”<sup>115</sup> Even though government regulation prevented the Murrs

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<sup>108</sup> *Id.* at 1948.

<sup>109</sup> *See id.* at 1940–41.

<sup>110</sup> *Id.* at 1947. *See also* Brief for National Association of Counties et al. as Amici Curiae at 32, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214) (“These merger provisions are so common, and have been in place for so long, that they are within the reasonable expectations of landowners and their lawyers.”).

<sup>111</sup> The Court noted, however, that “the harshness of a merger provision may be ameliorated by the availability of a variance from the local zoning authority . . . .” *Murr*, 137 S. Ct. at 1947.

<sup>112</sup> *Id.* at 1948.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

from selling and developing the parcels separately, the Court found that “this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space,<sup>116</sup> plus the optimal location of any improvements.”<sup>117</sup> To bolster this conclusion, the Court emphasized that the combined value of Lot E and Lot F (when treated as one parcel) greatly exceeded the estimated value of the lots when treated separately.<sup>118</sup> In sum, the Court argued that the lots were of greater market value when treated as one parcel.

*d. Majority’s Denominator Outcome*

Upon weighing each of the three factors, the majority concluded that the denominator should encompass both Lots E and F.<sup>119</sup> Like most courts conducting a takings analysis, the Court did not provide numerical information explaining its treatment of the numerator and denominator. Without such figures, it is unclear whether the denominator simply aligned with each lot’s dimensions, as dictated under state and local law, or if the denominator was modified any further to account for some of the other considerations weighed by the court.

3. *Murr* Dissent’s Test

The dissent’s denominator test proposes that the denominator only be governed by state law boundaries (i.e., the lot’s dimensions in combination with existing regulations).<sup>120</sup> Chief Justice Roberts writes: “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.”<sup>121</sup> Chief Justice Roberts explains that because “State law defines all of the interests that come along with owning a particular parcel,” “[f]ollowing state property lines is . . . entirely consistent with *Penn Central*” as “[t]h[e] risk of strategic unbundling<sup>122</sup> is not present when a legally distinct parcel is the basis of the regulatory takings claim.”<sup>123</sup>

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<sup>116</sup> *See id.* at 1948–49 (“They have an elevated level of privacy because they do not have close neighbors . . .”).

<sup>117</sup> *Id.* at 1948.

<sup>118</sup> *Id.* at 1949 (appraising the combined lots at \$698,300 and the total of the lots when sold separately at \$413,000).

<sup>119</sup> *Id.* (“The State Court of Appeals was correct in analyzing petitioners’ property as a single unit.”).

<sup>120</sup> *Id.* at 1953 (Roberts, C.J., dissenting).

<sup>121</sup> *Id.*

<sup>122</sup> *See id.* (implying that “strategic unbundling” is when property owners attempt to define the relevant parcel in a very limited way; in other words, they “strategically pluck one strand from their bundle of property rights—such as [ ] air rights . . . and claim a complete taking based on that strand alone”).

<sup>123</sup> *Id.*

Chief Justice Roberts rightly objects to the majority's solution, contending that "[i]n departing from state property principles, the majority . . . create[s] a litigation-specific definition of 'property' . . . ." <sup>124</sup> "In the dissent's view, the majority wrongly conflated the ultimate 'question of what constitutes a taking'—where the court has repeatedly stressed the need for a flexible, open-ended inquiry—with the antecedent question of how to identify the property interest at stake in the first place . . . ." <sup>125</sup>:

In deciding that Lots E and F are a single parcel, the majority focuses on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a 'taking.' *Cramming them into the definition of 'private property' undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals.* <sup>126</sup>

Here, Roberts argues that the integration of *Penn Central*-like factors into the denominator inquiry undercuts one of the very reasons the Takings Clause exists—to protect against the unfair allocation of public burdens on only some landowners. <sup>127</sup> Roberts rightly suggests that a malleable property definition is in conflict with the very protection the Takings Clause is supposed to afford. <sup>128</sup>

Roberts proceeds to protest: "The result [of the majority's approach to the denominator] is that the government's regulatory interests will come into play not once, but twice—first when identifying the relevant parcel, and again when determining whether the regulation has placed too great a public burden on that property." <sup>129</sup> Accordingly, "through 'clear double counting,'" the majority's test "stacks the deck in the government's favor . . . ." <sup>130</sup>

<sup>124</sup> *Id.* at 1954–55.

<sup>125</sup> Patashnik, *supra* note 62 (citing *Murr*, 137 S. Ct. at 1954 (Roberts, C.J., dissenting)).

<sup>126</sup> *Murr*, 137 S. Ct. at 1954 (Roberts, C.J., dissenting) (emphasis added).

<sup>127</sup> *Id.*

<sup>128</sup> For further discussion on the Chief Justice's proposition, see *infra* Section IV.A.

<sup>129</sup> *Murr*, 137 S. Ct. at 1955 (Roberts, C.J., dissenting). See also Maureen E. Brady, Essay, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 58 (2017) ("[T]he announced test gives regulators two bites at the apple . . . existing regulations are taken into account both in constructing the relevant property and in examining whether a taking has occurred, allowing the same regulations to limit the constitutional claim at two stages.").

<sup>130</sup> Seifter, *Court Announces a New Test*, *supra* note 15.

#### 4. Probable Application of Dissent’s Test to *Murr* Facts

As indicated by the dissent’s agreement with the case’s overall outcome,<sup>131</sup> the dissent would have considered the pertinent state merger provision in its denominator analysis. Such consideration would therefore treat the two commonly owned but legally distinct contiguous parcels as one tract.<sup>132</sup>

Although an argument could be made that such treatment, despite being in accord with relevant state law, is at odds with the property owners’ (the Murrs’) reasonable expectations—given their use of one of the parcels for recreational purposes and the other parcel’s treatment as more of an investment holding—a counter-argument could be made that reasonable property owners stay abreast of regulations affecting their holdings, and that the plaintiffs should have known the merger provision would take effect once the parcels came under common ownership.<sup>133</sup>

### III. APPLICATION OF THE *MURR* MAJORITY AND DISSENT’S TESTS TO REGULATORY TAKINGS CASES, WITH PARTICULAR FOCUS ON DENOMINATOR OUTCOMES AND THEIR RELATION TO REASONABLE PROPERTY OWNERS’ EXPECTATIONS

#### A. *Case 1*: *Lucas v. South Carolina Coastal Council*

*Lucas v. South Carolina Coastal Council*<sup>134</sup> is one of the foremost cases in regulatory takings jurisprudence.<sup>135</sup> As previously mentioned, *Lucas* established a per se takings in cases where a government regulation is found to deprive property owners of “all economically beneficial or productive use of land.”<sup>136</sup> The facts of *Lucas* are as follows: In 1986, plaintiff paid \$975,000 for two beachfront residential properties in Charleston County, South Carolina.<sup>137</sup> The lots “were located approximately 300 feet from the beach” on a barrier island.<sup>138</sup> Plaintiff intended to construct single-family

<sup>131</sup> *Murr*, 137 S. Ct. at 1950 (Roberts, C. J., dissenting) (“The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike.”).

<sup>132</sup> *See id.* at 1948 (“[S]tate and local regulations merged Lots E and F.”).

<sup>133</sup> *See id.* at 1940–41.

<sup>134</sup> 505 U.S. 1003 (1992).

<sup>135</sup> *Id.* at 1008. *See Brown & Merriam, supra* note 31, at 1849 (“Today, *Lucas* remains the controlling law on categorical regulatory takings.”).

<sup>136</sup> *Lucas*, 505 U.S. at 1015.

<sup>137</sup> *Id.* at 1006–07.

<sup>138</sup> *Id.* at 1008. *See Barrier Island*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/barrierisland> [<https://perma.cc/ZJ56-48W4>] (“A long broad sandy island

homes on each property, just as “the owners of the immediately adjacent parcels had already done.”<sup>139</sup> However, in 1988, only two years after purchasing the properties, the South Carolina Legislature passed the Beachfront Management Act,<sup>140</sup> “which had the direct effect of barring [plaintiff] from erecting any permanent habitable structures on his two parcels.”<sup>141</sup> Plaintiff thereafter filed suit, claiming that the legislation’s barring of development on his land constituted a taking of his property without just compensation.<sup>142</sup>

### 1. Analysis Under the *Murr* Majority’s Test

Analysis under factor one—treatment of the property under state and local law—would likely yield no surprises. The Beachfront Management Act, which restricted development on each of the properties, was not enacted until two years after plaintiff purchased the lots.<sup>143</sup> Although two commonly owned parcels were at issue—like that seen in *Murr*—there was no state law merger provision at play, and lots 22 and 24 were non-contiguous.<sup>144</sup> Though the *Murr* majority seems to leave the door open for two commonly owned non-contiguous parcels to be combined for the purpose of the denominator, absent an explicit state law merger provision, such a joining of lots would not occur under factor one, but could apply under factors two or three. Therefore, with regard to the first *Murr* factor, most courts would likely treat lots 22 and 24 as distinct fee simple interests.<sup>145</sup>

Analysis under factor two—physical characteristics of the land—could favor a larger denominator outcome. With respect to this second factor, Justice Kennedy wrote: “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 regulation.”<sup>146</sup> In fact, Justice Kennedy specifically cited his concurrence in *Lucas* to support this proposition.<sup>147</sup> For this reason, a court may argue that given the tracts’ discernibly vulnerable location on a barrier island, subsequent development restrictions could or should have been anticipated. On the other hand, although the likelihood for severe coastal

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lying parallel to a shore that is built up by the action of waves, currents, and winds and that protects the shore from [erosive] effects of the ocean.”) (last visited Nov. 29, 2018).

<sup>139</sup> *Lucas*, 505 U.S. at 1007–08.

<sup>140</sup> S.C. CODE ANN. § 48-39-250 (1990).

<sup>141</sup> *Lucas*, 505 U.S. at 1007.

<sup>142</sup> *Id.* at 1009.

<sup>143</sup> *Id.* at 1008–09.

<sup>144</sup> *Id.* at 1007–09.

<sup>145</sup> In footnote seven of *Lucas*, Justice Scalia describes the fee simple interest as “an estate with a rich tradition of protection at common law.” *Id.* at 1017 n.7.

<sup>146</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945–46 (2017).

<sup>147</sup> *See id.* at 1946 (quoting *Lucas*, 505 U.S. at 1035) (“Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.”).

erosion may appear obvious in 2018, it may have been less obvious when the case was decided in 1992.<sup>148</sup> Conversely, the South Carolina legislature enacted the regulation only two years after plaintiff’s purchase;<sup>149</sup> this fact suggests that the prospect for regulation was probably not a complete surprise. However, even if a court thought that the plaintiff should have anticipated such a regulation, it does not appear to have been factored into the purchase price, as \$975,000 for two vacant beachfront lots was no bargain in 1992.<sup>150</sup> A court whose primary objective during the denominator inquiry is to weigh property owners’ reasonable expectations may have difficulty overlooking this point.<sup>151</sup> Another factor worthy of consideration is that subsequent to litigation, in 1994, the *Lucas* lots remained “the only vacant lots in sight along the beach.”<sup>152</sup> Such development on all neighboring properties further supports the argument that reasonable property owners would not have anticipated such an onerous restriction.

Analysis under factor three—prospective value of the regulated land—is unlikely to change the denominator outcome. First, *Murr* advises that “[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel.”<sup>153</sup> In *Lucas*, Lots 22 and 24 were non-contiguous and bore no such “special relationship”;<sup>154</sup> this consideration therefore leans toward treatment of the lots as distinct parcels. *Murr* further recommends that, under this factor, courts “[pay] special attention to the effect of burdened land on the value of other holdings.”<sup>155</sup> Under the facts of *Lucas*, each parcel is enduring a distinct burden. Although one may try to argue that the prohibition of development on one of the parcels enhances the value of the other parcel (by virtue of there being more open, natural space in close proximity), such an argument holds little water, as all other properties alongside the beach were developed; such a value increase would be minimal at best.

## 2. Analysis Under the *Murr* Dissent’s Test

Analysis under the dissent’s test would merely replicate the denominator produced under factor one of the majority’s test. Thus, each lot would be treated as

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<sup>148</sup> *Lucas*, 505 U.S. at 1021–22 n.10.

<sup>149</sup> *Id.* at 1008.

<sup>150</sup> *Id.* at 1006–07; see also CPI INFLATION CALCULATOR, <https://data.bls.gov/cgi-bin/cpi/calc.pl?cost1=975%2C000.00&year1=199201&year2=201809> [<https://perma.cc/TYZ3-6K5Q>] (last visited Nov. 29, 2018) (showing the equivalent price today as over \$1.7 million).

<sup>151</sup> *But see* JUERGENSMEYER & ROBERTS, *supra* note 21, at 411 (“Courts have generally refrained from allowing the purchase price of land to qualify as an investment-backed expectation.”).

<sup>152</sup> William A. Fischel, *Lucas v. South Carolina Coastal Council: A Photographic Essay* (Feb. 1995), <http://www.dartmouth.edu/~wfischel/lucasessay.html> [<https://perma.cc/B85H-3GWQ>].

<sup>153</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*



distinct fee simple interests, yielding separate denominators in agreement with those boundaries prescribed under state and local law.

### 3. How the *Murr* Majority's Expected Denominator Outcome Aligns with Property Owners' Reasonable Expectations

All things considered, most courts would likely yield the same denominator in *Lucas* when applying the *Murr* majority factors. State and local law—factor one—instructs that the non-contiguous lots, absent a merger provision, be treated as separate property interests.<sup>156</sup> With respect to the prospective value of the regulated land—factor three—a court is unlikely to find a special relationship between the parcels, as neither lot ostensibly enhances the value of the other.<sup>157</sup>

Factor two—physical characteristics of the land—however, has the potential to skew the denominator outcome when applied by some courts. As discussed *supra*,<sup>158</sup> the argument can be made that plaintiff could have anticipated that his properties would be “subject to [future] environmental . . . regulation.”<sup>159</sup> Although the expensive purchase prices and the fact that all neighboring parcels had been previously developed cuts against the argument that environmental restrictions were foreseeable, a court less in tune with property owners' reasonable expectations might allow this foreseeability of regulation argument to alter their perception of the denominator. The importance of this fact and factor will inevitably vary by court, as the *Murr* majority offers no guidance as to how each factor should be weighed.<sup>160</sup> Moreover, even if *Murr* provided specific instruction as to how each factor should be calculated, the fact that this foreseeability argument (that plaintiff could have anticipated that the property would be subject to future environmental regulations) will be raised again during the second stage of the takings analysis, during the subsequent *Penn Central* balancing test, is plainly unfair and at odds with reasonable property owners' expectations. In different words, under the *Murr* factors, a court can consider—or “count”—this foreseeability argument at both the first and second stages of the takings analysis<sup>161</sup> (whereas previously, it could only be considered at the second stage).<sup>162</sup> To repeat Seifter's argument, this inevitable “double counting” of information “stacks the deck in the government's favor,”<sup>163</sup> as it can be used to weaken plaintiff's case at two stages of the takings analysis, as opposed to one. In consequence,

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<sup>156</sup> *Id.* at 1940, 1945.

<sup>157</sup> *Id.* at 1946.

<sup>158</sup> See *supra* Section III.A.1 (describing the analysis under factor two of the *Murr* majority test).

<sup>159</sup> *Murr*, 137 S. Ct. at 1946.

<sup>160</sup> See *id.* at 1945.

<sup>161</sup> See *supra* notes 129–30 and accompanying text.

<sup>162</sup> See *supra* notes 129–30 and accompanying text.

<sup>163</sup> See Seifter, *Court Announces a New Test*, *supra* note 15.

it is possible that the *Lucas* denominator outcome could change under the *Murr* majority, and in such a case, the denominator would not align with property owners’ reasonable expectations.

#### 4. How the *Murr* Dissent’s Expected Denominator Outcome Aligns with Property Owners’ Reasonable Expectations

The *Murr* dissent would yield, with consistency across courts, denominator outcomes in agreement with property owners’ reasonable expectations. In the case of *Lucas*, consideration of state and local law alone instructs that, absent a merger provision, Lots 22 and 24 should be treated as distinct parcels. Such a denominator conforms with property owners’ reasonable expectations, as most property owners would assume that courts perceive property in a way that is consistent with the property’s definition under the law.

##### B. Case 2: Lost Tree Village Corporation

The denominator problem operated as the central issue in *Lost Tree Village Corp. v. United States (Lost Tree)*,<sup>164</sup> a case involving a lengthy and complicated procedural history.<sup>165</sup> After the Army Corps of Engineers denied Lost Tree Village Corporation (Lost Tree) a wetlands fill permit<sup>166</sup> for Plat 57, Lost Tree argued a takings under *Lucas*, contending that said permit denial deprived Lost Tree of all economically viable use of the parcel.<sup>167</sup>

Plat 57—the parcel at issue—“consist[ed] of 1.41 acres of submerged lands and 3.58 acres of wetlands . . . .”<sup>168</sup> Plat 57 was part of a property transaction made by Lost Tree in 1974.<sup>169</sup> The transaction was one of a series of transactions agreed to by Lost Tree in a 1968 option agreement, in which Lost Tree consented “to purchase approximately 2,750 acres of property.”<sup>170</sup> “Beginning in 1969 and continuing through the mid-1990s, Lost Tree developed approximately 1,300 acres of the

<sup>164</sup> 707 F.3d 1286 (Fed. Cir. 2013).

<sup>165</sup> Six different court opinions emanate from this one dispute. *See* *Lost Tree Vill. Corp. v. United States*, 135 Fed. Cl. 92 (2017); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015); *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219 (2014); *Lost Tree Vill. Corp. v. United States (Lost Tree III)*, 707 F.3d 1286 (Fed. Cir. 2013); *Lost Tree Vill. Corp. v. United States*, 100 Fed. Cl. 412 (2011); *Lost Tree Vill. Corp. v. United States (Lost Tree I)*, 92 Fed. Cl. 711 (2010).

<sup>166</sup> *See* 33 U.S.C. § 1344 (codifying Section 404 of the Clean Water Act, and which requires the procurement of a permit “for the discharge of dredged or fill material into the navigable waters at specified disposal sites”).

<sup>167</sup> *See* *Lost Tree III*, 707 F.3d at 1291.

<sup>168</sup> *Id.* at 1290.

<sup>169</sup> *Id.* at 1288.

<sup>170</sup> *Id.*

property . . . into the upscale gated residential community of John’s Island.”<sup>171</sup> “[D]evelopment . . . proceeded in a ‘piecemeal’ manner, by ‘opportunistic progression,’ rather than strictly following any master . . . plan.”<sup>172</sup>

Plat 57 “was absent from Lost Tree’s development plans until 2002—at least seven years after the development . . . was considered complete.”<sup>173</sup> By the time Lost Tree applied for the permit in 2002, the company had sold off most of the 2,750 acres, retaining title to only Plat 57, Plat 55, and scattered wetlands within the residential community.<sup>174</sup> It was Lost Tree’s intention to build one residential home on Plat 57 and it “obtained all state and local approvals” to do so.<sup>175</sup> In denying Lost Tree’s Section 404 permit application, the Army Corps of Engineers cited the availability of “less environmentally damaging alternatives”<sup>176</sup> and stated that “the project purpose has already been realized through the development of home-sites within the subdivision.”<sup>177</sup> Ultimately, the court was charged with deciding whether the denominator was (1) the total of the tracts purchased under the 1968 option agreement, (2) Plat 57 alone, or (3) something in-between.<sup>178</sup>

### 1. Analysis Under the *Murr* Majority’s Test

Analysis under factor one—treatment of the property under state and local law—favors a single parcel denominator (i.e., Plat 57 alone). First, Plat 57 is legally distinct from Lost Tree’s other holdings.<sup>179</sup> While the tract was acquired as part of the 1968 option agreement, the site was independently platted in 2002,<sup>180</sup> long after the residential development was complete, and well after Lost Tree sold off most of its holdings in the area.<sup>181</sup> Second, no merger provision combining Plat 57 to another tract, was at play.<sup>182</sup> For these reasons, factor one of *Murr* supports a denominator comprised of Plat 57 alone.

Analysis under factor two—physical characteristics of the land—favors a denominator larger than just Plat 57. “Plat 57 is contiguous to, and physically a part

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 1289.

<sup>173</sup> *Id.* at 1294. Plat 57 went ignored even when Lost Tree developed the rest of the peninsula on which Plat 57 was located. *Id.* at 1290.

<sup>174</sup> *Id.* at 1294.

<sup>175</sup> *Id.* at 1291.

<sup>176</sup> *Id.*

<sup>177</sup> *Lost Tree Vill. Corp. v. United States (Lost Tree I)*, 92 Fed. Cl. 711, 721 (2010).

<sup>178</sup> *See Lost Tree III*, 707 F.3d at 1293–94.

<sup>179</sup> *See id.* at 1294 (explaining that there is no legal connection between the holdings sufficient to find that they constitute a single parcel).

<sup>180</sup> *Lost Tree I*, 92 Fed. Cl. at 716.

<sup>181</sup> In fact, after the mid-1990s, “Lost Tree’s business shifted to management of an investment portfolio, and Lost Tree changed its tax status to suit this new focus.” *Id.* at 720.

<sup>182</sup> *Id.* at 721.

of, the [residential] community of John’s Island. It can be reached by road only by first passing through one of the gates for entry into the community.”<sup>183</sup> Because Plat 57 cannot be accessed without traveling through some of Lost Tree’s other, former holdings, a court may consider the denominator to include such other holdings. Plat 57 is further described “as ‘a mangrove swamp and wetlands . . . disturbed by scattered upland soil mounds . . . and by manmade ditches installed for mosquito control.’”<sup>184</sup> A court may therefore argue that Lost Tree could have anticipated development restrictions on such environmentally vulnerable and valuable property. On the other hand, Lost Tree could counter that development was permitted on nearby lots comparable to Plat 57, and that reasonable property owners would not have predicted such a burdensome restriction at the time of purchase.<sup>185</sup> Ultimately, factor two supports treating Plat 57 as part of a denominator which includes Lost Tree’s remaining holdings, and potentially all parcels originally purchased under the 1968 option agreement.

Analysis under factor three—prospective value of the regulated land—also supports a larger denominator determination, making a takings claim more challenging for the landowner. “Plat 57 appears to have little value in its present state, either environmentally or aesthetically. Rather than enhance the value of the lands around it . . . Plat 57 draws value from those parcels.”<sup>186</sup> While Plat 57’s undeveloped character could add some value to the other tracts purchased under the 1968 option agreement, the value added to Plat 57 by such other parcels lends itself towards the “special relationship” described by the *Murr* court.<sup>187</sup> This information favors a denominator extending beyond Plat 57, that is, a denominator which includes Lost Tree’s remaining holdings, and possibly all parcels purchased under the 1968 option agreement.

## 2. Analysis Under the *Murr* Dissent’s Test

Again, analysis under the dissent’s test would yield the same denominator furnished under factor one of the majority’s test. Thus, Plat 57 alone, a legally distinct parcel, would constitute the denominator. Lost Tree’s remaining holdings and any other tracts purchased under the 1968 option agreement would not be included.

## 3. How the *Murr* Majority’s Expected Denominator Outcome Aligns with Property Owners’ Reasonable Expectations

Reasonable property owners, when applying for a Section 404 wetlands fill permit for a specific parcel, would believe that the regulating party—in this case the

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 716.

<sup>185</sup> *Id.* at 715–16.

<sup>186</sup> *Id.* at 721.

<sup>187</sup> *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017) (suggesting that a “special relationship” between commonly owned parcels may counsel the court to favor combining said parcels for the purpose of the denominator).

Army Corps of Engineers—would only consider that parcel referenced on the permit application. Under the *Murr* majority, however, it is possible that the *Lost Tree* denominator would not be limited to Plat 57. Instead, the denominator is likely to include at least some of Lost Tree’s remaining holdings, and or other former holdings acquired under the 1968 option agreement.<sup>188</sup>

As expected, factor one (treatment of the property under state and local law) commands that the legally distinct Plat 57 alone constitute the denominator. However, under factor two (physical characteristics of the property), a judge might increase the size of the denominator for two reasons. First, with respect to physical location, Plat 57 can only be accessed through some of Lost Tree’s other, former holdings.<sup>189</sup> Second, a court may argue that reasonable property owners could anticipate development restrictions on irreplaceable wetlands property. A judge may also increase the size of the denominator under factor three (prospective value of the regulated land), as Plat 57 arguably shares a “special relationship”<sup>190</sup> with Lost Tree’s other holdings. Even the United States Court of Federal Claims admitted that “[r]ather than enhance the value of the lands around it . . . Plat 57 draws value from those [other] parcels.”<sup>191</sup> Nonetheless, any denominator beyond the parcel explicitly mentioned on Lost Tree’s Section 404 application is obviously at odds with property owners’ reasonable expectations. The potential inclusion of Lost Tree’s former holdings, moreover, seems especially unfair. Finally, these denominator-increasing arguments will be counted against the plaintiffs at both stages of the takings inquiry, thus diminishing plaintiffs’ chances for a successful takings claim.

#### 4. How the *Murr* Dissent’s Expected Denominator Outcome Aligns with Property Owners’ Reasonable Expectations

Under the facts of *Lost Tree* Village, the *Murr* dissent’s test would again produce a denominator outcome in agreement with property owners’ reasonable expectations. Because no merger provision is at play, state and local law dictates that the denominator only include Plat 57. Such a state-based denominator definition is both intuitive and not amenable to the varying discretion of judges.

#### C. Case 3: Tahoe-Sierra Preservation Council

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>192</sup> a *Lucas* taking was asserted where two moratoria effectively halted “all development

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<sup>188</sup> See *infra* Section IV.A (discussing how a judge applying the *Murr* factors might increase the size of the denominator).

<sup>189</sup> *Lost Tree I*, 92 Fed. Ct. at 721.

<sup>190</sup> See *Murr*, 137 S. Ct. at 1946 (suggesting that if the relationship between a landowner’s properties is such that they increase each other’s value, the relationship supports including both properties in the denominator).

<sup>191</sup> *Lost Tree I*, 92 Fed. Ct. at 721.

<sup>192</sup> 535 U.S. 302 (2002).

[on plaintiffs’ properties] . . . for a period of 32 months.”<sup>193</sup> The moratoria were implemented by the Tahoe Regional Planning Agency (TRPA) to provide TRPA with time to study the impact of local development on Lake Tahoe and to devise a comprehensive environmental strategy to protect the lake upon future development.<sup>194</sup> Plaintiffs included the Tahoe Sierra Preservation Council, a nonprofit organization “representing about 2,000 owners of both improved and unimproved parcels . . . in the Lake Tahoe Basin,” and “some 400 individual owners of vacant lots” who had “purchased their properties prior to the effective date of the 1980 [Tahoe Regional Planning] Compact,”<sup>195</sup> which created TRPA and “set goals for the protection and preservation of the lake.”<sup>196</sup> As for the reasonable expectations of the vacant lot owners, most of the properties were purchased “for the purpose of constructing ‘at a time of their choosing’ a single-family home ‘to serve as a permanent, retirement or vacation residence.’”<sup>197</sup>

*Tahoe* is different from the previous two cases (*Lucas* and *Lost Tree*) in that the *Tahoe* Court did not have to decide whether a property owner’s other holdings should be included when defining the denominator.<sup>198</sup> After enumerating the three factors for use during the denominator inquiry, the *Murr* majority stated: “The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.”<sup>199</sup> Despite this statement, it is not clear whether the factors only aim to assist denominator determinations in cases where additional holdings can be considered, or if the *Murr* factors can also influence the denominator when only one holding is at issue. Nevertheless, even if the Court intended that the factors only be used when other holdings could be considered relevant, it is easy to imagine a court informally, perhaps subconsciously, adjusting the denominator by virtue of the factors where only one holding is at play. The analysis below illustrates how denominators might be manipulated even where only a single-parcel holding is involved.<sup>200</sup>

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<sup>193</sup> *Id.* at 306.

<sup>194</sup> *See id.* The Court further explained: “the lake’s pristine state has deteriorated rapidly over the past 40 years; increased land development in the Lake Tahoe Basin . . . has threatened the ‘noble sheet of blue water’ beloved by Twain and countless others.” *Id.* at 307.

<sup>195</sup> *Id.* at 312.

<sup>196</sup> *Id.* at 309.

<sup>197</sup> *Id.* at 312–13.

<sup>198</sup> *See id.* at 312 (explaining the *Tahoe* Court dealt with many property owners, each of whom had only one holding).

<sup>199</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

<sup>200</sup> It is worth noting that some of the *Tahoe* plaintiffs may have possessed more than one regulated parcel; however, because of the limited issue considered by the Court—“whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause”—the opinion mainly addresses whether the denominator may be segmented in



### 1. Analysis Under the *Murr* Majority's Test

Analysis under factor one—treatment of the property under state and local law—would approach each parcel as individual fee simple interests. A significant feature of *Tahoe* was the plaintiffs' unsuccessful attempt to “conceptually sever” their parcel definition into “temporal segments.”<sup>201</sup> In different words, plaintiffs framed their denominator as a thirty-two-month slice of their fee simple estate. The Court responded by stating that “defining the property interest taken in terms of the very regulation being challenged [(the aggregate thirty-two-month moratoria)] is circular.”<sup>202</sup> In agreement with *Tahoe* and other precedent dating back to *Penn Central*, *Murr* commands treatment of the parcel as a whole, and appears to address this issue of conceptual severance under factor one.<sup>203</sup> Accordingly, the length of the moratoria will have no impact on the size of the denominator. Instead, the parcels are to be looked at through a lens of permanence, and the duration of moratoria is to be considered at the second stage of the takings analysis. As discussed *supra*,<sup>204</sup> factor one directs courts to consider whether the pertinent regulation was in place at the time the owners acquired the property. With respect to the moratoria, the Compact establishing TRPA, the organization responsible for implementing the moratoria, was not in effect at the time the vacant lot owners purchased their properties.<sup>205</sup> Such a fact bolsters the argument that the moratoria were not foreseeable or in agreement with the property owners' reasonable expectations. In theory, this might support a smaller denominator determination in favor of the plaintiffs. In practice, however, it is hard to imagine a court formulaically reducing the size of the denominator for this reason.<sup>206</sup>

Analysis under factor two—physical characteristics of the land—is likely to favor a larger denominator, thus reducing plaintiffs' chances for a successful takings claim. The *Tahoe* opinion states: “All agree that Lake Tahoe is ‘uniquely beautiful,’ . . . that President Clinton was right to call it a “national treasure that must be protected

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accordance with the length of the pertinent regulation, and not whether any of the plaintiffs' parcels should be combined when calculating their respective denominators. *Tahoe-Sierra*, 535 U.S. at 306.

<sup>201</sup> *See id.* at 318.

<sup>202</sup> *Id.* at 331. The Court elaborated: “Petitioners' ‘conceptual severance’ argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on ‘the parcel as a whole.’ We have consistently rejected such an approach to the ‘denominator’ question.” *Id.* (citations omitted).

<sup>203</sup> *Murr* instructs: “State law defines all of the interests that come along with owning a particular parcel,” and the “risk of strategic unbundling is not present when a *legally distinct* parcel is the basis of the regulatory takings claim.” *Murr*, 137 S. Ct. at 1953 (emphasis added).

<sup>204</sup> *See supra* text accompanying notes 96–98.

<sup>205</sup> *Tahoe-Sierra*, 535 U.S. at 312.

<sup>206</sup> In agreement with my proposition that the dissent's state law-based test is better suited for calculating the denominator, I believe that the regulation's foreseeability should only be considered at the second stage of the takings analysis, under the *Penn Central* balancing test. *See supra* text accompanying notes 28–30, 44–52.

and preserved,” and that Mark Twain aptly described the clarity of its waters as ‘not merely transparent, but dazzlingly, brilliantly so.’<sup>207</sup> A *Tahoe* footnote further acknowledges a senate report declaring that “[o]nly two other sizable lakes in the world are of comparable quality. . . .”<sup>208</sup> While the Compact establishing TRPA, the organization charged with regulating development in Lake Tahoe Basin,<sup>209</sup> was not in operation when the vacant lot owners purchased their properties, a court may argue that given the generally recognized importance and exceptional quality of the area’s natural resources, affected property owners could have anticipated future restrictions on development in effecting conservation efforts. On the other hand, an argument can be made that reasonable property owners would not consider how development of their land might affect local runoff, and, in turn, negatively impact the waters of a local lake.

Analysis under factor three—prospective value of the regulated land—is also likely to support a larger denominator. As discussed *supra*,<sup>210</sup> the *Murr* majority directs courts to consider whether the regulation’s impact can be mitigated by the value it adds “to the remaining [unregulated] property.”<sup>211</sup> Even if the moratoria halted development on every square inch of each plaintiff’s tract for the aggregate thirty-two-month duration, a court will argue that the moratoria still added value to the “remaining property.”<sup>212</sup> Because property should be considered over time (as a temporal estate), it can be argued that without such a moratoria, continued, uncontrolled development would have likely destroyed the quality of Lake Tahoe’s water, and in turn, local property values would have plummeted, as a great portion of the lots’ values are rooted in their proximity to the pristine lake. Accordingly, given that one of the moratoria’s objectives was, arguably, to preserve the market values of the lands being regulated, a court is likely to view the moratoria as a value-preserving or value-enhancing regulation, which will likely support a larger denominator more favorable to the regulator: the government.

## 2. Analysis Under the *Murr* Dissent’s Test

Analysis under the dissent’s test would produce the same denominator as that supplied under factor one of the majority’s test. Each parcel would be treated as a fee simple interest, as dictated by lot lines and any existing regulations. The parcel would also be viewed as a continuing estate over time, not as a thirty-two-month segment in isolation.

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<sup>207</sup> *Tahoe-Sierra*, 535 U.S. at 307 (citations omitted).

<sup>208</sup> *Id.* at 307 n.2.

<sup>209</sup> *See id.* at 309.

<sup>210</sup> *See supra* text accompanying notes 103–07.

<sup>211</sup> *Murr v. Wisconsin*, 137 S. Ct. 1933, 1946 (2017).

<sup>212</sup> *Id.*

### 3. How the *Murr* Majority's Expected Denominator Outcome Aligns with Property Owners' Reasonable Expectations

It is very possible that analysis under the *Murr* majority could yield different denominators—from those actually observed in *Tahoe*—for each of the respective plaintiffs. As discussed in Section III.C,<sup>213</sup> it is unclear if the *Murr* factors are only to be applied in cases where an owner's additional holdings can be considered. Assuming that the *Murr* factors can also influence a court's treatment of one parcel, the second and third *Murr* factors could skew denominator outcomes, cutting against property owners' reasonable expectations. Consistent with my proposition that the dissent's test—factor one under the *Murr* majority—yields denominators in better agreement with property owners' reasonable expectations, factor one, as applied to *Tahoe*, does just that. Here, factor one instructs that each parcel be treated as fee simple interests through a lens of permanence<sup>214</sup> and in accord with existing regulations. Under factor two (physical characteristics of the land), however, a judge may expand the size of the denominator, making a takings claim more difficult for the plaintiff, given the fact that reasonable property owners might anticipate future development restrictions in light of conservation concerns regarding the revered local lake. Moreover, under factor three (prospective value of the regulated land), a judge may again expand the size of the denominator in her belief that the moratoria adds future value to the pertinent estate, through its overall objective of preserving Lake Tahoe's pristine quality, and in consequence, its preserving the estate's high market value. Having said this, even if the decided denominator is never articulated by the court, the double-counting of these arguments—once when defining the denominator, and again when conducting the *Penn Central* balancing test to determine whether a taking has occurred—in favor of the government, and to the detriment of the plaintiff, is patently at odds with property owners' reasonable expectations.

### 4. How the *Murr* Dissent's Expected Denominator Outcome Aligns with Property Owners' Reasonable Expectations

The *Murr* dissent's test, as applied to *Tahoe*, produces denominator outcomes in agreement with property owners' reasonable expectations. Consideration of state

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<sup>213</sup> See discussion *supra* Section III.C (“[I]t is not clear whether the factors only aim to assist denominator determinations in cases where additional holdings can be considered, or if the *Murr* factors can also influence the denominator when only one holding is at issue.”).

<sup>214</sup> That is, without any time constraints, and more specifically, beyond the thirty-two-month duration during which the moratoria were in effect. See *Murr*, 137 S. Ct. at 1953 (Roberts, C.J. dissenting); *Tahoe-Sierra*, 535 U.S. at 331. Because factor one instructs that state law defines the boundaries of parcels, and because state law in *Tahoe* defined the owners' property as fee simple estates, the Court must treat each property as a fee simple rather than severing the properties into temporary, smaller parcels.

and local law alone instructs that, absent a merger provision, each plaintiff’s parcel be treated as “permanent” fee simple interests in accord with existing (lawful) regulations. Unlike in the majority’s test, the denominator inquiry stops, more or less, at the lot lines; it does not lend itself to the arbitrary increase of denominator size at the discretion of judges.

#### IV. WHY THE *MURR* DISSENT’S TEST IS THE SUPERIOR SOLUTION TO THE “DENOMINATOR PROBLEM”

##### *A. Theoretical Problems with the Majority’s Test*

On a basic level, a multifactor balancing test appears completely at odds with what reasonable property owners expect at the first stage of the takings inquiry—when courts are merely tasked with defining the property at issue. Instead, reasonable property owners would anticipate a bright-line solution to such a seemingly simple task,<sup>215</sup> especially if they were to appreciate how robust the Court’s discretion is under the latter part of the takings inquiry.

In his dissent, Chief Justice Roberts writes: “[T]he Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority’s new, malleable definition of ‘private property’ . . . undermines that protection.”<sup>216</sup> As per Chief Justice Roberts’s suggestion, a slippery slope argument can be made. Under the Fifth Amendment’s Due Process Clause, “No person shall . . . be deprived of life, liberty, or property without due process of the law.”<sup>217</sup> By granting courts the power to manipulate the definition of property beyond that designated under state law, the protection under which the law is supposed to afford property vanishes.<sup>218</sup> In other words, how can property interests be

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<sup>215</sup> In my view, most reasonable property owners would think that a court’s definition of a given parcel would match that delineated in the property’s deed, subject to any governmental regulations that may be in place. That said, I believe that most reasonable property owners would be displeased with the amount of discretion that courts have in defining parcels for the purpose of takings challenges.

<sup>216</sup> *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting). See also JUERGENSMEYER & ROBERTS, *supra* note 21, at 387 (“The absence of consistent standards has made the constitutional protection of property susceptible to change, as different social and judicial outlooks have gained power over time.”).

<sup>217</sup> U.S. CONST. amend. V.

<sup>218</sup> Indeed, philosopher John Locke would likely be perturbed by the Court’s manipulable denominator test. See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 162 (1988) (“[Locke] argues that property-owning got under way at a time when there was no government, and that the function or ‘end’ of government is to protect property holdings that it has not itself constituted.”); see also Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 532–33 (2007) (“In Locke’s view, Civil Society was a consensual union formed by individuals who sought protection for their personal and property

protected by the law when such interests are simultaneously subject to judicial engineering and interpretation?

Given that our legal framework, at its most basic level, is meant to preserve life, liberty and *property*,<sup>219</sup> the majority's solution should raise some alarm.<sup>220</sup> In my opinion, if a group of "reasonable property owners" were surveyed, such individuals would likely find malleable definitions of property—different from those stipulated under law—to be disagreeable and susceptible to exploitation contrary to their interests. To be clear, reasonable property owners who want to maintain control of their property are unlikely to prefer the *Murr* majority's test.

On a deeper level, given property's associations with autonomy and fundamental liberties,<sup>221</sup> landowners should be able to anticipate how their property will be understood by courts. A denominator definition at odds with reasonable property owners' expectations can be injurious in itself—harmful to individuals' dignity interests. If the court defines the parcel in such a way that the landowner feels she has received unfair treatment, this designation can feel like a personal affront. Beyond its importance in the takings inquiry (as mentioned earlier, the denominator definition is generally thought to be outcome-determinative, and the prospect of just compensation is on the line) people attach great sentimental value to their land.<sup>222</sup> Land is a symbol of freedom and potential; one's land may encapsulate certain memories, may represent the labor exerted by its proprietor to attain its ownership, and may embody ideas and possibilities for the owner's vision of the future.<sup>223</sup> Further, land is supposed

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rights from the uncertainty that existed in the State of Nature. Indeed, securing those private property rights acquired through labor in the State of Nature was a chief purpose of the formation of government in Civil Society.”).

<sup>219</sup> See U.S. CONST. amend. V.

<sup>220</sup> One may ask: is our property really being protected when it is subject to such unpredictable treatment by courts?

<sup>221</sup> See David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 472 (1993) (“[Philosopher John Locke argued that] [p]roperty is a natural and pre-political institution given to man by God, and a property interest gives the owner a singular and absolute control over something which no one, including the state, could violate.”); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 256 (Phillips Bradley ed., Vintage Books 1990) (1840) (“In no country in the world is the love of property more active and more anxious than in the United States; nowhere does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property.”).

<sup>222</sup> See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 568 (2005) (“In cases of sentimental attachment, the owner finds in the asset emotional utility not accessible to other market participants and, therefore, not reflected in the market price. In other words, the price at which the owner will agree to sell the asset (the reserve price) will exceed the price that ordinary market participants will pay (the market price).”).

<sup>223</sup> See Josh Blackman, *OutFoxed: Pierson v. Post and the Natural Law*, 51 AM. J. LEGAL HIST. 417, 434 (2011) (describing John Locke's “Labor Theory”) (“The crux of Locke's theory of property is based on man acquiring property through his efforts, skills, and labor.”).

to be within its proprietor’s control.<sup>224</sup> It therefore seems especially unjust to allow courts to tell landowners that their property is not what they think it is—that their land should instead be measured at sizes different than that prescribed under state law for reasons such as unusually steep terrain,<sup>225</sup> or because of pre-existing regulatory encumbrances.<sup>226</sup> In such instances, landowners can be left feeling misunderstood and as though the government is personally out to get them.

The flexibility in the majority’s denominator analysis seems to unilaterally benefit the government during the takings inquiry. It is hard to think of an instance where the majority’s test actually reduces the parcel’s size, thus improving the plaintiff’s prospects at a successful takings claim. Instead, as compared with a denominator strictly defined by state law boundaries, as per the dissent’s recommendation, the only possible impact of the majority’s flexible denominator analysis is to increase the parcel’s size, if any change is made compared to the state-determined definition of the parcel. This makes takings claims all the more difficult for plaintiffs and all the easier for local governments.

Despite the majority’s attempt to achieve supposed fairness with use of its balancing test, it is hard to conceive of any harms resulting from the dissent’s simple state law based denominator solution. Only reasonable denominator outcomes would follow, and no surprises would ensue. The majority’s balancing test, however, seems to create more problems than it fixes: the test appears to only work in the government’s favor and always to the detriment of property owner plaintiffs.

Plaintiffs can make another slippery slope argument. At the end of the day, people do not want to buy or develop real property if they feel that the government can unpredictably manipulate their property rights and thus restrict what they can do with their property.<sup>227</sup> People also fear litigation,<sup>228</sup> which is sure to increase as a result of the majority’s proposed denominator solution.

### *B. Practical Problems with Majority’s Test*

“The flexibility the balancing test provides . . . strips governments and litigants of any certainty regarding how the court will characterize a property for the takings

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<sup>224</sup> See Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, 6 (2017) (“The bundle that any owner enjoys, whether they own in fee simple or not, typically includes the right to exclude others from the land, the right to possess it, the right to use and enjoy it, the right to sell the interest, the right to devise it, and the right to pass it by inheritance.”).

<sup>225</sup> See *Murr v. Wisconsin*, 137 S. Ct. 1946, 1948 (2017).

<sup>226</sup> See *id.* at 1945.

<sup>227</sup> In my opinion, people generally want clear rules so that they can plan for the future. A bright-line solution, like that provided in the *Murr* dissent, offers more predictability as to how a court may come out in the event that a property owner finds herself in circumstances appropriate for a takings claim.

<sup>228</sup> In my view, most reasonable individuals would prefer to avoid litigation, given the costs and headaches likely to stem from it.



analysis.”<sup>229</sup> In consequence, the only parties who appear to benefit from the majority’s overly complicated ad hoc denominator test are property attorneys. With minimal guidance, future regulatory takings plaintiffs are left with little understanding as to their prospects for success. In even the most meritorious takings cases, property owners will have to spend considerable sums of money paying for attorneys who, despite their diligent efforts, may still offer little insight into how courts will define the pertinent parcel. Such attorneys will have to engage in lengthy fact-finding investigations in their attempts to anticipate every nuance that the court may consider. Attorneys will also rack up considerable billing hours when researching courts’ treatment of the denominator question under this new, multifactor test. Granted, with such sweeping judicial discretion, denominator outcomes could vary dramatically depending on the judge and jurisdiction. At the same time, some of these research costs could prove futile, as “[t]he multi-factored balancing approach . . . makes each case a rule unto itself,”<sup>230</sup> and the court’s allocation of weight to each factor may be ignored or poorly explained in judicial opinions. Further, to those plaintiffs who cannot afford these added costs, tough luck!

The majority test’s allowance of added discretion at the parcel definition stage will be of considerable expense to courts. Because of the additional fact-finding and balancing required under the multifactor test, more litigation as well as prolonged litigation is likely to follow. Accordingly, additional time and resources will be expended to accommodate this less-than-straightforward test.

Woffinden highlights yet another weakness of the majority’s test: “The test also has the added danger of giving so much leeway to judges that the balancing test actually hides discriminatory or biased decision making.”<sup>231</sup> This susceptibility to discriminatory decision-making—which already existed in the latter part of the takings inquiry—would not exist under the dissent’s proposed denominator solution. This risk is worthy of attention and provides yet another example of how the potential harms stemming from the majority test seem to unilaterally fall on future regulatory takings plaintiffs. Again, it is hard to imagine a way in which the majority’s solution could possibly hurt the government’s standing during a takings claim.

Although it is difficult to see much benefit from the majority’s solution, Woffinden speculates about a potential silver lining: “It is possible that neither the government nor property owners will have an incentive to engage in opportunistic or wasteful behavior because neither party knows how a court will actually apply the multi-factored balancing test to a particular landowner.”<sup>232</sup>

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<sup>229</sup> Keith Woffinden, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 645–46.

<sup>230</sup> *Id.* at 653.

<sup>231</sup> *Id.* at 644.

<sup>232</sup> *Id.* at 645.



## CONCLUSION

The *Murr* dissent offers the superior solution to the denominator problem in real property regulatory takings cases. Unlike the *Murr* majority’s test, the *Murr* dissent’s test yields predictable denominator outcomes—i.e., predictable definitions of property—in agreement with property owners’ reasonable expectations. Naturally, most property owners, reasonably, expect their property to be defined by and protected by our nation’s legal framework. Under the majority’s test, however, such presumed protections are undermined, as the test allows courts the ability to judicially engineer property definitions for the purpose of takings claims.<sup>233</sup> Put differently, it is fundamentally inconsistent to believe that our laws can adequately protect our property when our courts have the discretion to define said property as they choose, in accordance with the majority’s ill-defined multifactor balancing test. Moreover, the majority’s balancing test, despite its guise of fairness, unilaterally harms property owners by permitting the government to double-count facts that were previously accounted for only during the second stage of the takings inquiry. Ultimately, a bright-line denominator test—consistent with state law principles—would be less burdensome on courts, allowing for consistent, predictable application, and increased clarity to future plaintiffs as to their prospects in takings claims. Having said this, the *Murr* dissent proposes a better denominator solution with respect to meeting reasonable property owner expectations. The simpler solution is the superior solution.

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<sup>233</sup> See *supra* Section II.B.1(a)–(c) (providing the *Murr* majority test).