PROPERTY RIGHTS AND TAKINGS BURDENS

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ABSTRACT

The Fifth Amendment Takings Clause was interpreted through the nineteenth century as referring only to physical takings or ousters of possession. Justice Holmes's enigmatic 1922 opinion in *Pennsylvania Coal Co. v. Mahon* was the genesis of the contemporary "regulatory takings" doctrine, which reached full expression in 1978 in *Penn Central Transportation Co. v. City of New York*. The ad hoc, three-factor test of *Penn Central*, generally deemed incoherent and chaotic, focused on regulatory burdens placed upon landowners, not with respect to specific rights but rather with regard to a specified relevant parcel ("parcel as a whole"). In 2017, in *Murr v. Wisconsin*, the Court conflated the elements of what constitutes the relevant parcel and the three factors pertaining to whether that parcel had been taken.

This Article discusses theories of "property," the merits of balancing tests versus more objective rules, and how these play out in the *Murr* majority opinion and dissents. It also treats the importance of *Murr*'s mandate to internalize those externalities that were irrelevant prior to regulation. Given the universal unhappiness with regulatory takings jurisprudence, this Article also considers arguments for reconsidering regulatory takings as due process deprivations.

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INTRODUCTION

Traditional takings doctrine, based as it is on the indicia of physical occupation of land, does not fit easily into the issues that arose with the emergence of the regulatory state.
Judge S. Jay Plager[1]

During the past forty years, the United States Supreme Court has developed a doctrinal structure for adjudicating inverse condemnation claims respecting property in land. Permanent government arrogations of possession are compensable, as are permanent deprivations of all economic value. Other deprivations of rights in land are evaluated using an ad hoc, multifactor test and are compensable if sufficiently severe. Claims are evaluated based on the Takings Clause and not other constitutional provisions such as the Due Process Clause.

However, closer inspection indicates that judicial formulations regarding claims based on other than arrogations of land—referred to as "regulatory takings"—rest on an insecure foundation. It was a statute that literally drew lines on coastal sands that led to the dueling opinions of Justices Scalia and Kennedy a quarter century ago in *Lucas v. South Carolina Coastal Council*.[2] It was a statute obliterating property lines along scenic river shores that, in 2017, gave rise to *Murr v. Wisconsin*.[3] There, Justice Kennedy maintained his earlier views, while the late Justice Scalia's quest for bright-line stability was picked up by Chief Justice Roberts.

Justice Kennedy's opinion for the Court in *Murr* held fast to *Penn Central Transportation Co. v. City of New York*,[4] where the Court developed the outlines of its ad hoc, multifactor approach to regulatory takings. Indeed, Kennedy took the Court's muddled, ad hoc approach and conflated it with antecedent considerations of property ownership. Chief Justice Roberts, however, decried that the Court now was drawing into its *Penn Central* multifactor web the very definition of property itself.

For some, *Murr* reflects changing notions of property and environmental awareness, and vindicates Heraclitus's admonition: "No man

1. Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991).
2. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
3. Murr v. Wisconsin, 137 S. Ct.1933 (2017).
4. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

ever steps in the same river twice, for it's not the same river and he's not the same man."[5] For others, redefining property rights in light of social pressures is reminiscent of Senator Daniel Patrick Moynihan's famous admonition that American society eliminates dissonance by diminishing norms.[6]

In a broader sense, *Penn Central*, *Lucas*, and now *Murr* reflect the tension between two fundamental goals. On the one hand, "property" is an undifferentiated attribute of the *individuals* who enter into society.[7] The protection of property rights in things counters overreaching by government[8] and is essential to individual liberty.[9] On the other hand, the Constitution's framers and their generation primarily have conceived of a society imbued not by individualism but with the need for, and promise of, civic virtue.[10]

Deprivations of ownership in things seem a natural fit with the Takings Clause,[11] whereas placing unfair burdens on individuals largely invokes substantive due process.[12] Assertions of republicanism

5. HERACLITUS, FRAGMENTS, at xii, 27 (Brooks Haxton trans., Viking Adult 2001).

6. Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17 (1993), http://www.jstor.org/stable/41212064. Moynihan discussed Kai T. Erickson's *Wayward Puritans* (1965), which attempted to test the theory of Émile Durkheim's *The Rules of the Sociological Method* (W.D. Halls trans., The Free Press 1982) (1895). The theory, in Erickson's words, hypothesized that "the number of deviant offenders a community can afford to recognize is likely to remain stable over time." *Id.* at 19.

7. *See, e.g.*, John Locke, The Second Treatise of Government, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., New York: Mentor 1965) (1690). "Lives, Liberties and Estates, which I call by the general Name, *Property*." *Id.* § 123; FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985).

> [W]hen the Framers of the Constitution said that the protection of property was a (or the) fundamental purpose for submitting to the authority of government, they understood that the word property had more meanings than one. In its older and more general sense it was related to the word proper, derived from the Latin *proprius*, meaning particular to, or appropriate to, an individual person.

MCDONALD, *supra* at 10.

8. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 281 (1985) ("[T]he Takings Clause is designed to control rent seeking and political faction. It is those practices, and only those practices, that it reaches.").

9. *See, e.g.*, 6 JOHN ADAMS, THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., Boston: Little Brown 1850) ("Property must be secured or liberty cannot exist.").

10. *See, e.g.*, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U.L. REV. 1099, 1107–31 (2000); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1593 (1988) (outlining the role of republicanism in the founding period and exploring modern implications).

11. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). The Clause is applicable to the states through the Fourteenth Amendment and Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

12. *See infra* Section II.E.1 for discussion.

and civic virtue engender a reaction of distrust of government, largely manifested in what Justice Alito described in *Koontz v. St. Johns River Water Management District*[13] as "extortionate demands" that "impermissibly burden the right not to have property taken without just compensation."[14]

Another challenge is finding an appropriate baseline for legal inquiry.[15] Among the inflection points in American takings law are the following: the expansion beyond explicit condemnation in *Pumpelly v. Green Bay Co.*,[16] the inclusion of takings by regulation in *Pennsylvania Coal Co. v. Mahon*,[17] the rise of loosely constrained judicial review based largely on perceived owners' "expectations" in *Penn Central*,[18] and the articulation of a bright-line test in *Lucas*.[19] Now *Murr* promises to further blur the distinction between property and its regulation.[20]

This Article asserts that the concept of property as a tool for societal governance remains ascendant; that the traditional view of property rights as protecting owners' autonomy is an impediment to this progression; and that, to paraphrase Senator Moynihan, this results in a government inclination to define property down. This occurs in *Murr* through the Court's recognition of a four-factor *Penn Central* regulatory takings test,[21] which interacts in indeterminate ways with a new "relevant parcel" test, loosely tethered to ownership of a specific parcel.

I. *PENN CENTRAL*'S INCOHERENCE IS EXACERBATED BY *MURR*

In *Murr v. Wisconsin*,[22] the petitioners maintained that the boundaries of an individually deeded parcel that they owned were definitive. Under the applicable Wisconsin merger regulation, that parcel was

13. Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586 (2013).

14. *Id.* at 2595–96.

15. *See generally* Adam M. Samaha, *On the Problem of Legal Change*, 103 GEO. L.J. 97, 100–01 (2014) (discussing the difficult legal tasks of discerning change from the status quo and drawing appropriate normative conclusions).

16. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

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

18. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

19. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

20. Murr v. Wisconsin, 137 S. Ct. 1933, 1948 (2017).

21. *See generally* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601 (2014) [hereinafter Eagle, *Four-Factor*].

22. *Murr*, 137 S. Ct.

consolidated with another, which petitioners asserted deprived them of all rights to develop it. The State maintained that its merger regulation was definitive.

Justice Kennedy, writing for the majority,[23] found that neither the boundaries of the deeded parcel nor the merger statute were definitive. Instead, he employed a loose formulation that at the same time subjects a "relevant parcel" to regulatory takings analysis and uses the elements of regulatory takings analysis to help determine the relevant parcel to be analyzed.[24]

As I previously asserted,[25] the judicial career of *Penn Central*'s "parcel as a whole" analysis, albeit textually separate from its treatment of the three other considerations, made it clear that the case had functionally laid out a four-factor test. *Murr* confirmed this understanding, and laid out that the "parcel as a whole" was both separate from and interrelated to the other factors. *Murr* thus both exacerbated existing problems with *Penn Central* and weakened the Court's understanding of "property."[26]

This Part summarizes the *Penn Central* litigation and analyzes the Supreme Court's ad hoc, multifactor test for adjudicating regulatory takings. It examines how the takings framework conventionally described as the "three-factor" *Penn Central* test was incoherent even before *Murr*.

Justice Brennan's *Penn Central* opinion for the Court[27] remains, after four decades, the "polestar" of the Supreme Court's regulatory takings jurisprudence.[28] *Penn Central* has been the subject of voluminous scholarly commentary.[29] Although the case has become

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23. Justice Kennedy was joined by Justices Ginsberg, Breyer, Sotomayor, and Kagan. Chief Justice Roberts wrote the principal dissent, joined by Justices Thomas (who also wrote a separate dissent) and Alito. Justice Gorsuch, who joined the Court subsequent to oral argument, did not participate.

24. *Murr*, 137 S. Ct. at 1943–50.

25. Eagle, *Four-Factor*, *supra* note 21.

26. *See infra* Part II.

27. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). Justice Rehnquist dissented, joined by Chief Justice Burger and Justice Stevens. *Id.* at 138.

28. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."). *See also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002) (quoting "polestar" language approvingly).

29. *See, e.g.*, David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999); Eric R. Claeys, *The* Penn

regarded as pre-eminent, at the time it was written there was little inkling that it would be important at all.[30]

A. The Penn Central *Litigation*

Grand Central Terminal, opened in 1913, was described by the Supreme Court as a "magnificent example of the French beaux-arts style."[31] Eventually, it was designated as a landmark by the New York City Landmarks Preservation Commission, which meant that the commission's permission was required for exterior alterations or site improvements. In 1968, Penn Central, desirous of augmenting its income, entered into a long-term lease of air rights that would involve the construction of a fifty-five-story office building above the terminal. There was no dispute that the building would meet all zoning and building requirements, but the commission denied a required "certificate of appropriateness" because it deemed the project an "aesthetic joke."[32]

The railroad sued, and the New York trial court found that the commission's denial constituted a compensable taking.[33] The intermediate appellate court reversed, finding that the railroad could earn a reasonable rate of return,[34] and its decision was affirmed in a very sweeping opinion by the New York Court of Appeals that emphasized the public's role in creating the terminal's value.[35] Justice Brennan's Supreme Court opinion did not refer to that analysis but rather

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Central *Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339 (2006); Christopher Serkin, Penn Central *Take Two*, 92 NOTRE DAME L. REV. 913 (2016).

30. Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287 (2004) [hereinafter Transcript, *Looking Back*] (noting that, in order to hold a majority, clerks in other chambers warned that "the opinion better not say very much," and, after the draft was circulated, "Justice Stewart's clerk read it and said he was pretty sure it doesn't say anything at all. [Laughter]" (comment of David Carpenter, who worked on the opinion as Justice Brennan's judicial clerk)).

31. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 115 (1978).

32. *Id.* at 117–18.

33. *See* Penn Cent. Transp. Co. v. City of New York, 377 N.Y.S.2d 20 (N.Y. App. Div. 1975) (noting the unpublished order of the New York court).

34. *Id.*

35. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). In determining the base upon which the rate of return was calculated, Chief Judge Charles Breitel subtracted "that ingredient of property value created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings." *Id.* at 272–73. *See also* Steven J. Eagle, *Public Use in the Dirigiste Tradition*, 38 FORDHAM URB. L.J. 1023, 1070 (2011) (criticizing Judge Breitel's Georgist approach).

broadly deemed that the landmark regulation "benefit[ed] all New York citizens and all structures." The opinion further declared, contrary to the gravamen of then-Justice Rehnquist's dissent, that "we cannot conclude that the owners of the Terminal have in no sense been benefitted by the Landmarks Law."[36]

The Court applied its three-factor test to the tax block on which the terminal was located[37] and determined that there had been no taking. I will summarize the Court's analysis in *Penn Central* briefly, but I have discussed it at greater length elsewhere.[38]

B. The Penn Central *Ad Hoc, Multifactor Takings Test*

In 1978, the Court developed in *Penn Central*[39] the outlines of an ad hoc, multifactor approach to regulatory takings that it subsequently expanded upon.[40] Justice Brennan enunciated the standard for the Court's inquiry:

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36. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134–35 (1978). Justice Rehnquist declared: "Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks." *Id.* at 138 (Rehnquist, J., dissenting).

37. *See infra* Section I.C.1.

38. Eagle, *Four-Factor*, *supra* note 21, at 605–26.

39. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

40. The principal cases expanding upon *Penn Central* include the following: Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) (finding that "does not substantially advance legitimate state interests" is not a valid takings test, but rather a substantive due process test); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (deciding whether a temporary moratoria on all economic use is a taking that must be evaluated on *Penn Central* factors); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (deciding that a takings claim is not barred by acquisition of title subsequent to the effective date of regulation); Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding that conditions imposed on an administrative permit not based on an individualized determination of the "rough proportionality" between the conditions and the police-power burdens resulting from development constitute a taking); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (noting that a complete deprivation of economic use constitutes a taking); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (deeming the imposition of a development-permit condition without any nexus to permissible regulatory purposes a taking); First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, 482 U.S. 304 (1987) (ordering that compensation must be paid where a regulation constituted a taking for the time during which the taking was effective, despite the government's subsequent withdrawal or invalidation of the regulation then in effect); Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (stating that takings claims against state or local governments are not "ripe" for federal court adjudication without (1) a final decision regarding the type and intensity of development permitted and (2) the exhaustion of available state procedures for compensation); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (finding that the public disclosure of trade secrets in violation of a statutory promise of confidentiality constitutes a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding that permanent physical occupations constitute per se takings).

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[41]

At the outset, it is useful to discuss whether the *Penn Central* regulatory takings factors were intended to be talismanic, and also whether they are useful in predicting legal determinations.

Conventionally, *Penn Central* is described as a three-factor test,[42] examining (1) the economic impact on the property owner, (2) interference with the owner's distinct investment-backed expectations, and (3) the character of the regulation. It is not clear, however, why this formulation should be definitive. Logically, perhaps the test should be comprised of two factors since "investment-backed expectations" seems a subset of "economic impact," or, perhaps truer to the overall tenor of the opinion, the first factor of the multifactor test should be "the impact of the challenged regulation on the claimant, viewed in light of the claimant's investment-backed expectations."[43] That said, the Court specified, in *Kaiser Aetna v. United States*, that expectations constituted a separate factor.[44]

More broadly, the fact that the Court had "identified several factors that have particular significance" seems to suggest that there are factors either of lesser importance or not yet identified. The Supreme Court of California included the three *Penn Central* factors in its list of thirteen factors, which it described as "not a comprehensive enumeration."[45] This dispute over the proper taxonomy seems

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41. *Id.* at 124 (citations omitted).

42. *See, e.g.*, E. Enter. v. Apfel, 524 U.S. 498, 518 (1998) ("The court analyzed Eastern's claim . . . under the three factors . . . ."); Schooner Harbor Ventures, Inc. v. United States, 569 F.3d 1359, 1362 (Fed. Cir. 2009) ("*Penn Central* considered and balanced three factors . . . .").

43. Gary Lawson, Katharine Ferguson & Guillermo A. Montero, *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Matthews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 32 (2005).

44. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

45. Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860 (Cal. 1997).

reminiscent of French Prime Minister Georges Clemenceau's dismissive comment that while President Woodrow Wilson had Fourteen Points, "God Almighty has only Ten!"[46] In fact, the ad hoc nature of the *Penn Central* inquiry might preclude *any* definitive list of factors, and "it is far from obvious" that *Penn Central* "actually intended this enumeration of 'significant' factors to define a determinative, free-standing test" at all.[47]

The three conventional *Penn Central* factors are as follows.

1. Economic Impact

In *Mahon*,[48] Justice Holmes acknowledged that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[49] He added, however, that regulation "must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution [in value]."[50] The *Penn Central* economic-impact factor of the regulation test might have been designed to incorporate diminution-in-value as a rough measure of harm and therefore a coarse screening device.[51] As the Supreme Court later put it, the "common touchstone" of its regulatory takings tests are that they "aim to identify regulatory actions that are functionally equivalent to a [government] appropriation . . . or ouster."[52]

Where a regulation strips property of "all economically beneficial uses," its economic impact is conclusive under *Lucas v. South Carolina Coastal Council*[53] and constitutes a categorical taking not requiring *Penn Central* balancing.[54] In *Lost Tree Village Corp. v.*

46. Georges Clemenceau, *as quoted in* DIXON WECTER, THE HERO IN AMERICA: A CHRONICLE OF HERO-WORSHIP 402 (1941).

47. John D. Echeverria, *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG., Jan. 2000, at 4.

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

49. *Id.* at 413.

50. *Id.*

51. *See generally* Eagle, *Four-Factor*, *supra* note 21, at 616–19.

52. Lingle v. Chevron, 544 U.S. 528, 539 (2005).

53. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992).

54. "Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life.'" *Id.* at 1017–18 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124).

United States,[55] the U. S. Court of Appeals for the Federal Circuit made clear that "economic use" was the key, and that the existence of market value predicated on speculative regulatory changes or potential future uses was not relevant.[56]

On the other hand, the Court in *Lucas* noted that it had "frequently . . . held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking" if the action was necessary to protect the public health, safety, and welfare.[57] Similarly, in *Consolidated Rock Products Co. v. City of Los Angeles*,[58] the California Supreme Court upheld a zoning ordinance that required the cessation of the company's sand and gravel excavation even though the parcel had substantial value in those uses and otherwise its value was "relatively small if not minimal."[59] The U.S. Supreme Court dismissed the appeal for want of a substantial federal question.[60]

The "economic impact" factor of *Penn Central* seems to be accorded a role secondary to "investment-backed expectations."[61] In any event, impact is difficult to ascertain given that there are contesting methodological approaches to valuation.[62]

2. Investment-Backed Expectations

"Investment-backed expectations" has been the most important of the *Penn Central* factors.[63] In his seminal article *Property, Utility, and Fairness*,[64] Professor Frank Michelman referred to the importance of a "distinctly perceived, sharply crystallized, investment-backed expectation."[65] The concept was derived from Michelman's desire to

55. Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

56. *Id.* at 1117.

57. *Lucas*, 505 U.S. at 1064 (citing cases).

58. Consol. Rock Products Co. v. City of Los Angeles, 370 P.2d 342 (Cal. 1962).

59. *Id.* at 351.

60. Consol. Rock Products Co. v. City of Los Angeles, 371 U.S. 36 (1962) (dismissing appeal).

61. *See infra* note 63 and accompanying text.

62. *See generally* Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 407 (2013).

63. *See, e.g.*, Guggenheim v. City of Goleta, 638 F.3d 1111, 1120 (9th Cir. 2010) (describing it as the "primary factor"); Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437 (2000) (noting a trend towards treating investment-backed expectations as an "absolute requirement," and citing cases); Serkin, *supra* note 29, at 924 (describing it as the "most important" factor).

64. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

65. *Id.* at 1233.

protect an owner whose particular land uses were predicated on then-existing regulations, as opposed to a speculator who might be open to many possibilities for the land's use.[66] Justice Brennan's use of "investment-backed expectations" came directly from Professor Michelman's article.[67]

Without the slightest explanation, in *Kaiser Aetna v. United States* the Court changed the phrase "distinct investment-backed expectations" to "reasonable investment-backed expectations."[68] The effect was to change the inquiry from whether the landowner's expectations were sincere albeit perhaps idiosyncratic to whether they were both sincere and ostensibly objective. While "expectations" seem personal and subjective, "reasonableness" is objective only in the sense that it is rooted in the context of the broader society's expectations, which might be conflicting or indeterminate. The only thing clear is that the expectations of individuals *and* the society that regulates their conduct interact.[69]

Justice Brennan cited *Mahon* as the "leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"[70] However, it is useful to recall that *Mahon* involved the arrogation of the company's mineral estate, which was defined as a separate interest in land under Pennsylvania law.[71] Thus, it involved not "general" state policies but rather a narrow policy transferring the rights from the holders of mineral interests to surface owners.[72] Thus, Justice Holmes's emphasis on regulations that go "too far" and on "diminution in value" seems like dicta on a grand scale.[73]

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66. *Id.* at 1233–34. *See also* Eagle, *supra* note 63, at 437–42 (discussing the implementation of Michelman's vision in *Penn Central*).

67. Transcript, *Looking Back*, *supra* note 30. "The concept of 'investment backed expectations' definitely came from Michelman's article." *Id.* at 309 (comment of David Carpenter, who worked on the opinion as Justice Brennan's judicial clerk).

68. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

69. *See infra* Section II.B.2 (discussing circularity). *See also* Eagle, *supra* note 63, at 442).

70. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978).

71. Penn. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

72. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (upholding a statute designed, generally, to prevent subsidence, which, unlike the Kohler Act at issue in *Pennsylvania Coal*, "does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners.").

73. *Pa. Coal Co.*, 260 U.S. at 415, 419 (1922). *See* Richard A. Epstein, Pennsylvania Coal v. Mahon: *The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875, 892 (1998).

The takings claim in *Penn Central* resulted from the rejection by the New York City Landmarks Preservation Commission of the railroad's application to construct an office building above Grand Central Terminal.[74] Justice Brennan, writing for the Supreme Court, upheld the New York Court of Appeals' finding for the defendants.

Among the ironies surrounding *Penn Central* are that the air rights envelope, in which the building was to be constructed, already had been sold to UGP Properties, Inc., and plausibly might have been considered a separate parcel. However, Penn Central's attorney thought in 1978 that air rights were novel, and thus chose not to raise the point.[75] Also, the railroad failed to challenge the New York courts' determination that it "could earn a 'reasonable return' on its investment in the Terminal,"[76] although at that time passenger railroads faced a "fatal hardship" that soon led to the takeovers of Penn Central's rail operations by the federal government and the Terminal by New York City.[77] Finally, the assumption that Penn Central had no "investment-backed expectations" with respect to the airspace above the terminal seems belied by the Court's fleeting recognition that its foundation "includes columns, which were built into it for the express purpose" of supporting an office building.[78]

Ultimately, Professor Richard Epstein's comment that "[n]either [Justice Brennan in *Penn Central*] nor anyone else offer[] any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property'"[79] remains much on point.

3. Character of the Regulation

It is not clear if the "character of the regulation" test has any contemporary meaning. While the Court in *Penn Central* contrasted a "physical invasion by government," which was compensable, and "some public program adjusting the benefits and burdens of economic

74. *Penn Cent.*, 438 U.S. at 117–18.

75. Transcript, *Looking Back*, *supra* note 30, at 288 (remarks of Daniel Gribbon, Esq.). Mr. Gribbon later stated that he thought he made a "mistake . . . in not arguing the notion that air rights are a very important and discrete part of a property interest." *Id.*

76. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 n.26 (1978).

77. *See* William W. Wade, Penn Central*'s Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 284–85 (1999).

78. *Penn Cent.*, 438 U.S. at 115 n.15 (1978).

79. Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

life," which was not,[80] that distinction fell away after only four years. Then, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[81] the Court held that a permanent physical invasion constituted a categorical taking without need for recourse to *Penn Central* balancing. If a government action is arbitrary or capricious, *Lingle v. Chevron U.S.A. Inc.* subsequently made it clear that it will fail muster for that reason alone, with no takings inquiry required.[82] On the other hand, if an action is vital to the public welfare, that does not excuse the failure to pay just compensation, since it is exactly the situation the Takings Clause contemplates.[83]

In *Eastern Enterprises v. Apfel*,[84] a four-justice plurality of the Supreme Court found that a statute imposing severe and unexpected retroactive payment obligations triggered the need for declaratory relief.[85] Four other Justices concluded that the statute did not violate due process.[86] The swing vote, Justice Kennedy, agreed with the plurality that relief was required, but grounded his view in the Due Process Clause.[87] A few subsequent lower court opinions have indicated that if a regulation is of a character embodying severe retroactivity or if it targets a particular entity, it would suggest a taking.[88] However, no Supreme Court holding has been based on the "character" issue, and it remains to be seen whether it is relevant at all.

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80. *Penn Cent.*, 438 U.S. at 124.

81. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

82. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005) ("[I]f a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.").

83. E. Enter. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part) ("The [Takings] Clause presupposes what the government intends to do is otherwise constitutional . . . .").

84. *Id.*

85. *Id.* at 528–29.

86. *Id.* at 556–57 (Breyer, J., dissenting).

87. *Id.* at 540–46 (Kennedy, J., concurring in the judgment and dissenting in part).

88. *See* Arctic King Fisheries, Inc. v. United States, 59 Fed. Cl. 360, 381 (2004) (noting that "the Supreme Court, in *Eastern Enterprises*, suggested that in considering whether, under this factor, a regulation 'implicates [the] fundamental principles of fairness underlying the Takings Clause,' two other indicia are relevant: (i) the extent to which the action is retroactive; and (ii) whether the action targets a particular individual" (alteration in original) (citing *E. Enter.*, 524 U.S. at 537)); Am. Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 51 (2001) (holding that there is no property interest in a fishing permit and stating that "[t]he character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking"), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004).

4. Observations Regarding Balancing Tests

Dean Anthony Kronman observed that "the act of balancing remains obscure," and that balancing tests are "likely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberations too nakedly."[89] In a well-known law review article,[90] Justice Scalia adumbrated the fear of judicial discretion unfettered by a "law of rules."

Three years after *Penn Central* was handed down, Judge James Oakes of the Second Circuit stated that "[t]he takings 'jurisprudence' of the Supreme Court is still in an unsatisfactory ad hoc stage, with a lack of development of analytical principle or reconciliation of conflicting lines of precedent."[91] The *Penn Central* taxonomy, as described by Professor Gary Lawson and others, consists of "three factors in search of meaning and relevance."[92]

C. The "Relevant Parcel" Test and "Parcel as a Whole"

Justice Kennedy wrote in *Murr*, that

> [b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."[93]

Kennedy added that "the answer to this question may be outcome determinative."[94] Perhaps for that reason, determining the proper denominator in the takings fraction is a "difficult, persisting question."[95]

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89. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 349 (1993).

90. Antonin Scalia, *The Rule of Law is a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

91. James L. Oakes, "*Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 613 (1981).

92. Lawson, Ferguson & Montero, *supra* note 43, at 38–46.

93. Murr v. Wisconsin, 137 S. Ct. 1933, 1944–45 (2017) (quoting Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting, in turn, Michelman, *supra* note 64, at 1192)).

94. *Id.* at 1944 (citing Eagle, *Four-Factor*, *supra* note 21, at 631).

95. Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

1. A History of "Parcel as a Whole"

Professor Frank Michelman wrote that "to determine compensability one is expected to focus on the particular 'thing' injuriously affected and to inquire *what proportion of its* value is destroyed by the measure in question."[96] Furthermore, "[t]he difficulty is aggravated when the question is raised of how to define the 'particular thing' whose value is to furnish the denominator of the fraction."[97] As Professor Carol Rose later phrased the issue, *Mahon* not only failed to answer the most obvious question, "how much diminution in value is too much," but also failed to answer its antecedent question, "how much of what?"[98]

Justice Brennan's response in *Penn Central* was that the Court would focus on the "extent of the interference with rights in the parcel as a whole."[99] Alas, as Justice Kennedy observed in *Murr v. Wisconsin*, "the Court has not set forth specific guidance on how to identify the relevant parcel for the regulatory taking inquiry."[100] He indicated, however, that the Court had disclaimed two concepts, the first being "to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation."[101] The second approach Kennedy cautioned against was treating property rights under state law as "coextensive" with those rights under the Takings Clause, since "States do not have the unfettered authority to 'shape and define property rights *and* reasonable investment-backed expectations,' leaving landowners without recourse against unreasonable regulations."[102] He illustrated this point with a hypothetical example:

> For example, a State might enact a law that consolidates nonadjacent property owned by a single person or entity in different

96. Michelman, *supra* note 64, at 1192.

97. *Id.*

98. Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984) (discussing Pa. Coal Co., v. Mahon, 260 U.S. 393 (1922)).

99. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

100. Murr v. Wisconsin, 137 S. Ct.1933, 1944 (2017).

101. *Id.* at 1944 (providing, as examples, the Court's refusal to limit the relevant parcel to the air rights above the Grand Central Terminal in *Penn Central*, 438 U.S. at 130, and the thirty-two-month duration of the development moratoria in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 331 (2002)).

102. *Id.* at 1944–45 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001) (emphasis added)).

> parts of the State and then imposes development limits on the aggregate set. If a court defined the parcel according to the state law requiring consolidation, this improperly would fortify the state law against a takings claim, because the court would look to the retained value in the property as a whole rather than considering whether individual holdings had lost all value.[103]

A less extreme example might be the reasoning employed by the New York Court of Appeals' Chief Judge Breitel in *Penn Central*, who asserted the relevant parcel to be all of the railroad's holdings in the vicinity of Grand Central Terminal, on the grounds that private and public activity and spending in that broad area are what gave the terminal parcel its value.[104] In *Lucas v. South Carolina Coastal Council*, Justice Scalia termed that analysis "extreme" and "unsupportable."[105]

Judge Breitel's view might today claim justification in agglomeration theory, which states that clusters of productive people and innovative businesses tend to attract similar individuals and firms, making the parcels on which they work and live very valuable.[106] Perhaps one could extend that reasoning further, to include the provisions of education, roads and ports, and other infrastructure, such that the State, in Professor William Fischel's memorable words, would be "entitled to appropriate to itself all of the advantages of civilization."[107]

In *Murr,* Justice Kennedy reiterated his earlier caution in *Palazzolo v. Rhode Island*[108] that "States do not have the unfettered authority to 'shape and define property rights *and* reasonable investment-backed expectations,' leaving landowners without recourse against unreasonable regulations."[109] However, results such as those reached by Judge Breitel in *Penn Central* are not precludes

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103. *Id.* at 1945.

104. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276–1277 (1977), *aff'd*, 438 U.S. 104 (1978).

105. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

106. *See generally* David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507 (2010) (citing foundational research). *See also* Lee Anne Fennell, *Agglomerama*, 2014 BYU L. REV. 1373 (2014); Edward L. Glaeser, *Are Cities Dying?,* 12 J. ECON. PERSP. 139 (1998).

107. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 50 (1995).

108. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

109. Murr v. Wisconsin, 137 S. Ct. 1933, 1944–45 (2017) (quoting *Palazzolo*, 533 U.S. at 626) (emphasis added).

if "property rights *and* reasonable investment-backed expectations" are regarded as one unit. As I will discuss later, *Murr* does just that.[110]

2. Variations on Rules for a "Relevant Parcel"

As Dwight Merriam observed in his classic article on the subject of the "relevant parcel," "[e]ven a simplistic scheme, which collapses many categories into others, yields a dozen ways of thinking about property in the context of takings claims."[111] Among Merriam's examples are the following: Does the purported relevant parcel contain subsurface mineral rights[112] or air rights?[113] Are consolidated operations conducted on contiguous parcels[114] or noncontiguous parcels?[115] Were parcels purchased at different times, perhaps before or after regulations were imposed?[116] Are parcels held in fee or for a temporal duration?[117] Might parcel ownership entail the ability to transfer air rights or development rights?[118]

In addition to the factors noted by Merriam having to do with parcels and their uses, questions of ownership are also important. One of the questions raised in the U.S. Court of Federal Claims' first opinion in *Lost Tree Village v. United States*[119] was whether the

110. *See infra* Section II.C.

111. Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353, 357 (2003). Many of the following examples in the text are taken from Merriam; *id.* at 357–63.

112. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

113. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978).

114. *See* Forest Props. v. United States, 39 Fed. Cl. 56, 73 (1997) (treating lake bottom and uplands as a single parcel where they were a single-income-producing unit for financing, planning, and development).

115. *See* Ciampitti v. United States, 22 Cl. Ct. 310 (1991) (treating non-contiguous properties as one).

116. *See Forest Props.*, 39 Fed. Cl. at 73 (noting that the lake bottom and upland were purchased five months apart).

117. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

118. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997). *See also* Serkin, *supra* note 29 (describing how the contemporary owners of the air rights at issue in *Penn Central* claimed that the relaxation of restrictions on neighboring parcels, which gave the rights their value, constituted a taking).

119. Lost Tree Vill. v. United States, 100 Fed. Cl. 412, 427–30 (2011), *rev'd*, 707 F.3d 1286 (Fed. Cir. 2013) (holding that "relevant parcel" for purposes of takings analysis included only the plat that was the subject of the permit application, and not a neighboring plat or scattered wetlands owned by a developer in the area). The U.S. Federal Claims Court's remand opinion, 115 Fed. Cl. 219 (2014), was reviewed by the U.S. Court of Appeals for the Federal Circuit, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

government was "aggregating separate parcels owned by legally separate entities."[120]

I have analyzed elsewhere that there are times when common-law principles justify the consolidation of parcels under different ownership.[121] If *A*, *B*, and *C* are members of the *ABC* Partnership, or the sole shareholders of the *XYZ* Corporation, consolidation might be appropriate where the parties' *intent to share profits* led them to appropriate their lands to the entity.[122] There is nothing novel about this.[123]

On the other hand, where separate owners intend merely to *coordinate* the use of their parcels for their separate benefits, aggregation is inappropriate. That was the issue in the California *Sweetwater Mesa* litigation[124] where the California Coastal Commission staff asserted that such coordination (together with unsubstantiated suspicions of common ownership) sufficed for the consolidation, for development-permitting purposes, of five parcels that were separately deeded with no overlapping ownership.[125] Where coordination can obliterate the difference between "property" and "regulation," the scope of government authority is broad indeed.[126]

3. Severance—But Also Agglomeration

Justice Kennedy's statement in *Murr* about the necessity of "compar[ing] the value that has been taken from *the property* with

120. *Lost Tree Vill.*, 100 Fed. Cl. at 436 (quoting Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999)).

121. Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549 (2012).

122. *Id.* at 567–68.

123. *See, e.g.*, Chapman v. Hughes, 37 P. 1048 (Cal. 1894) (noting that the associates intended to divide the profits from use of their separate lands).

124. *See* Complaint at 2, Mulryan Props., LLP v. Cal. Coastal Comm'n, No. BS133269 (Cal. Super. Ct., Aug. 12, 2011). Owners of the other parcels filed similar complaints, and the cases were consolidated. *See* Eagle, *supra* note 121, at 595–97 (describing the cases). Eventually the Coastal Commission, after significant design changes, approved the five homes; a California court ruled its lengthy proceedings to be the equivalent of a full environmental impact study; and in April 2017, a lawsuit against the project by the Sierra Club was dismissed, thus clearing the way for development. *See* Emily Sawicki, *Sierra Club Lawsuit Fails to Halt 'Edge Project' on Sweetwater Mesa*, MALIBU TIMES, April 27, 2007, http://www.malibutimes.com/news/article_8523c5da-2b7f-11e7-bcbe-a74e6cccb1ed.html.

125. CAL. COASTAL COMM'N, Th 8a-f, STAFF REPORT: REGULAR CALENDAR 82 (Nov. 17, 2010), https://documents.coastal.ca.gov/reports/2011/2/Th8a-s-2-2011.pdf.

126. *See* Eagle, *supra* note 121 (analyzing legal and policy implications).

the value that remains in *the property*"[127] suggests, as does Justice Brennan's "parcel as a whole" formulation in *Penn Central*,[128] that a court could discern through observation and judgment a natural starting point for the "relevant parcel" inquiry. The type of landowner manipulation that allegedly is implicit here and explicit in *Tahoe-Sierra*[129] has placed the focus on what Professor Margaret Radin described as "conceptual severance."[130]

However, there are two sides to the manipulation story. The U.S. Claims Court has noted that while "a taking can appear to emerge if the property is viewed too narrowly" it is just as true that "[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined."[131] I have referred to such gamesmanship on the government side as "conceptual agglomeration."[132] A blatant example of this is the California Coastal Commission's assertion of a "unity of ownership" theory, consolidating separately deeded and owned parcels for land use regulatory purposes.[133]

D. The Murr *Litigation*

The Supreme Court granted certiorari in *Murr v. Wisconsin* upon the precise and carefully framed question presented by the petitioners: "In a regulatory taking case, does the 'parcel as a whole' concept as described in *Penn Central Transportation Company v. City of New York* establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?"[134]

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127. Murr v. Wisconsin, 137 S. Ct. 1933, 1944–45 (2017) (emphasis added).

128. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

129. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). "Petitioners seek to bring this case under the rule announced in *Lucas* by arguing that we can effectively sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria." *Id.* at 331.

130. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1667 (1988).

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

132. STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(b)(2) (5th ed. 2012).

133. *See* Eagle, *supra* note 121. For discussion, *see supra* notes 118–25 and accompanying text.

134. Petition for Writ of Certiorari at I, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978)).

The Court essentially answered that narrow question in the negative, as petitioners intended. It did so, however, only in the course of a far broader inquiry. Also, both the opinion of the Court and the principal dissent relied in part on appraisal estimates that had not been subjected to examination by lower courts hearing the case, nor briefed by the parties.[135]

In many respects, the Court treated *Murr* as an ordinary application of *Penn Central*, and even the dissenters did not object to its "bottom line" factual conclusion that treating the two parcels owned by the Murrs as one did not constitute a taking under the circumstances.[136] The Court could have analyzed each lot as a separate relevant parcel and concluded that there was a taking of neither.[137] The Court could have simply held that an inflexible statutory mandate for consolidation of contiguous parcels under common ownership was inconsistent with the ad hoc approach of *Penn Central*, and the case could have been remanded for the courts below to identify the relevant parcel.[138] Instead, the Court applied *Penn Central* in a manner conflating property and its regulation.

1. The Basic Facts

The petitioners in *Murr*[139] were two brothers and two sisters whose parents had arranged for them to acquire two lots along the scenic St. Croix River in Wisconsin. The parents had purchased Lot F in 1960, built a recreational cabin on it in that year, and the following year transferred title to their family plumbing business. In 1963, the parents acquired the adjoining Lot E, which they held in their own names. Each lot was about 1.25 acres in area and consisted of land along the river, a steep slope, and an upland area. Wisconsin law, and parallel local ordinances, limited construction to lots with one acre of buildable area. However, because of the steep slopes, Lots E

135. *See infra* note 309 and accompanying text.

136. Murr v. Wisconsin, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).

137. *Id.* at 1957 (Roberts, C.J., dissenting).

138. *Id.* at 1956, 1957 (Roberts, C.J., dissenting) ("I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.") In full disclosure, the author submitted an amicus brief suggesting this approach. Brief for Reason Foundation as Amicus Curiae Supporting Petitioners, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1593411.

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

and F, together, contained slightly less than one acre of buildable area.[140] A grandfather clause "relaxe[d] the restriction for substandard lots which were 'in separate ownership from abutting lands' on January 1, 1976, the effective date of the regulation."[141] However, a merger provision provided that "adjacent lots under common ownership may not be 'sold or developed as separate lots' if they do not meet the size requirement."[142]

Lot F was transferred from the plumbing company to the petitioners in 1994, and Lot E was transferred to them from their parents the following year. A decade later, the petitioners wanted to relocate the cabin to a different part of Lot F, and also to sell lot E to fund the project. After the Murrs learned that the lots were deemed consolidated when they came under their common ownership, they sought administrative variances to permit development on both, which were denied.[143]

The Murrs then filed an action in state court, alleging that the state and county regulations effected a regulatory taking by depriving them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot."[144] Thus, the Murrs could neither sell Lot E nor build an additional structure on it.

A Wisconsin appellate court affirmed that when the petitioners acquired both lots the applicable state statute and local ordinance "effectively merged" them, so that petitioners "could only sell or build on the single larger lot."[145] Citing *Zealy v. City of Waukesha*,[146] the Wisconsin Court of Appeals affirmed the circuit court's summary judgment for the State.[147]

Most saliently, the grandfather clause would have permitted structures to be built on both Lot E and Lot F had the lots remained under separate ownerships after the one-acre restriction was imposed in 1976. Thus, while different owners could have built on each lot, the Murrs could not.

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140. *Id.* at 1940 (summarizing facts).

141. *Id.* (quoting WIS. ADMIN. CODE NR § 118.08(4)(a)(1) (2017)).

142. *Id.* (quoting WIS. ADMIN. CODE NR § 118.08(4)(a)(2) (2017)).

143. *Id.* at 1941.

144. *Id.* (quoting Murr v. State, No. 2013AP2828, 2014 WL 7271581, at *2 (Wis. Ct. App. Dec. 23, 2014)).

145. *Id.* (quoting Murr v. St. Croix County Bd. of Adjustment, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011)).

146. Zealy v. City of Waukesha, 548 N.W.2d 528, 533 (Wis. 1996).

147. Murr v. State, 859 N.W.2d 628, No. 2013AP2828, 2014 WL 7271581 (unpublished table decision) (Wis. Ct. App. Dec. 23, 2014).

2. Murr *in the Supreme Court*

Justice Kennedy wrote the Court's 5–3 majority opinion in *Murr*,[148] stressing that "[a] central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility."[149] Chief Justice Roberts wrote the principal dissent, joined by Justices Thomas and Alito.[150] He was troubled not by the majority's "bottom-line conclusion," given the facts of the case, but rather by its "new, malleable definition of 'private property.'"[151] Justice Thomas also wrote a brief, separate dissent, stressing the need to re-examine the grounding of regulatory takings in the Constitution.[152]

Justice Kennedy's opinion stated that "using [the *Zealy*] framework, the [Wisconsin] Court of Appeals concluded the merger regulations did not effect a taking"[153] and its takings analysis "'properly focused' on the regulations' effect 'on the Murrs' property as a whole'—that is, Lots E and F together."[154]

However, *Zealy* did not address the central issue of the mandatory, statutory merger of separately deeded parcels. Rather, *Zealy* was a classic case in which the landowner was attempting to sever part of an *existing* parcel for a separate regulatory takings examination. The appellate court had made it clear that "[t]he challenging landowner in this case primarily claims that when part of a parcel's zoning classification is changed to conservancy, the courts should treat that portion as though it has been constructively taken and the government should pay accordingly."[155] It held that "compensation depends upon a case-by-case analysis of the landowner's reasonably anticipated use of the property."[156]

148. Murr v. Wisconsin, 137 S. Ct. 1933 (2017). Justices Ginsburg, Breyer, Sotomayor, and Kagan joined Justice Kennedy. Justice Gorsuch took no part in the consideration or decision of the case.

149. *Id.* at 1937.

150. *Id.* at 1950 (Roberts, C.J., dissenting).

151. *Id.*

152. *Id.* at 1956 (Thomas, J., dissenting).

153. *Id.* at 1942.

154. *Id.* at 1941 (discussing Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996), and Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978)).

155. Zealy v. City of Waukesha, 534 N.W.2d 917, 919 (Wis. App. 1995), *rev'd*, 548 N.W.2d 528 (Wis. 1996).

156. *Id.*

The Supreme Court of Wisconsin agreed that "the property at issue . . . is Zealy's entire 10.4-acre parcel."[157] Thus, *Zealy* did not involve a determination of whether two separately deeded parcels merged by operation of law constituted the "parcel as a whole" but merely determined whether the landowner engaged in a conceptual severance of what legally had been one parcel.

Furthermore, it is useful to note that the phrase "parcel as a whole" was appropriate in *Penn Central* given the railroad's failure to argue that the air rights above Grand Central Terminal, which previously had been transferred, should be treated as a separate parcel.[158] The agglomeration of separate parcels simply was not a factor.[159]

Finally, the Court noted that the Murrs' ownership resulted from "voluntary conduct in bringing the lots under common ownership after the regulations were enacted."[160] However, the "voluntary conduct" was by the petitioners' parents,[161] and, in any event, persons similarly situated to the petitioners often receive such ownerships through devise or operation of law.

3. Murr *Conflates Ownership and Regulation*

While citing *Zealy* in support of his analysis, Justice Kennedy in *Murr* considered the effect of the State's merger ordinance twice over—once as a factor in determining what constitutes the relevant parcel for regulatory takings analysis and once as a factor in determining whether the imposition of burdens with respect to the relevant parcel amounted to a regulatory taking.

Justice Kennedy summarized several reasons why the Murrs' contiguous lots should be treated as one parcel. First, the lots were merged under state and local regulations, and the merger regulations were adopted "for a specific and legitimate purpose, consistent with the widespread understanding that lot lines are not dominant or controlling in every case."[162] However, as the Court noted, the fact that statutes are pre-existing does not make them determinative of

157. Zealy v. City of Waukesha, 548 N.W.2d 528, 533 (Wis. 1996).

158. *See supra* note 75 and accompanying text (explaining that this was a tactical decision regretted by counsel in retrospect).

159. See *supra* Section I.C for discussion.

160. Murr v. Wisconsin, 137 S. Ct. 1933, 1948 (2017).

161. *Id.* at 1940 (2017) (noting that the transfer was "arranged for them").

162. *Id.* at 1948.

takings clause rights.[163] Also, as Chief Justice Roberts noted, the issue was not whether parcel boundaries are controlling in *every* case but whether they should demarcate individual parcels "in all but the most exceptional circumstances."[164]

Justice Kennedy next stated that the physical characteristics of the lots "support [their] treatment as a unified parcel" and that this is enhanced by synergies of use, so that "[t]he special relationship of the lots is further shown by their combined valuation."[165] Moreover, Justice Kennedy explained,

> [N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.[166]

Kennedy then invoked the *Armstrong* principle of "fairness and justice"[167] and concluded: "*Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry*, and this supports the conclusion that no regulatory taking occurred here."[168]

Chief Justice Roberts especially attacked the last point, juxtaposing the role of the Takings Clause in securing "*established* property rights" with the majority's "new, malleable definition of 'private property'—adopted solely 'for purposes of th[e] takings inquiry'" and which "undermines that protection" the Takings Clause accords.[169]

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163. *Id.* at 1945.

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

165. *Id.* at 1949.

166. *Id.* at 1945.

167. *Id.* at 1950 (quoting Armstrong v. United States, 364 U.S. 40, 49). *See infra* notes 336–341 and accompanying text for a discussion of the materially different circumstances in *Armstrong*.

168. *Id.* (emphasis added).

169. *Id.* at 1950 (Roberts, C.J., dissenting).

4. Internalizing Those Externalities Irrelevant Prior to Regulation

Externalities are harms or benefits conferred upon neighbors for which the owner does not have to account, or for which he or she could not charge.[170] Externalities are irrelevant ("inframarginal") when internalizing them would not affect the property owner's behavior.[171]

An important aspect of Justice Kennedy's *Murr* opinion, with which the dissenters apparently concurred,[172] is its explicit recognition that the value of regulated parcels incorporates externalities that were irrelevant prior to their regulation.

> [C]ourts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty.[173]

The epilogue of the *Lucas* case illustrates this point.[174] The ultimate result of the litigation was that the South Carolina Coastal Commission paid Lucas, who had been denied development rights, $475,000 for each of his two lots. After the legislature refused to appropriate reimbursement, the commission sold each lot to a developer for $392,500. It later came out that an owner inland from of one of the coastal lots had offered the commission $315,000 for the lot, subject to a restrictive easement precluding development. The neighbor wanted ownership of the lot simply to ensure perpetuation of his existing ocean view. Prior to the Beachfront Management Act, Lucas would not have sold the lot for this purpose, since it was worth considerably more as a building site. After the Act, satisfying the neighbor's offer-backed desire for a clear vista would have been the lot's most valuable use in light of the restrictions.[175]

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170. *See generally* James M. Buchanan & Wm. Craig Stubblebine, *Externality*, 29 ECONOMICA 371 (1962). *See also* Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457 (2016).

171. *See* Fennell, *supra* note 170, at 1467.

172. *See infra* note 189 and accompanying text.

173. *Murr*, 137 S. Ct. at 1946.

174. *See* EAGLE, *supra* note 132, § 7-3(b)(2) (providing more detail and citations).

175. The story of why the Coastal Council thought it appropriate that Lucas should lose his entire investment in the lot, but that the lot *would* be appropriate for building after the Council had acquired it, is one worthy of reflection. *See id.*

The internalization of externalities that were irrelevant prior to regulation has important implications for takings law. As the saga of David Lucas's lot illustrates, value can reside in unlikely places. This affects both categorical regulatory takings under *Lucas*[176] and partial regulatory takings under *Penn Central*.[177] However, a few caveats are in order.

As noted previously,[178] the Federal Circuit has held, in *Lost Tree Village Corp. v. United States*,[179] that "economic use" does not include speculative value. It added that "[t]ypical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel."[180] Under the Supreme Court's holding in *Murr* that both lots constitute one relevant parcel, both the benefits and burdens of prohibiting development on the second lot would automatically be internalized. The owner's consequent inability to claim just compensation is consistent with the Court's existing precedent.[181]

However, if the lots were separate relevant parcels, it is possible that the benefit that the owner's unrestricted parcel would have enjoyed from the restriction would have been no different than the benefit that would have been derived by neighbors. In the instance of a government condemnation of a part of a parcel, some states permit the locality to offset against just compensation only the amount of "special benefit" that the owner would have enjoyed as a result of the project for which the severed part was condemned, on the theory that it would be unfair for the owner to subsidize, both as taxpayer and also as condemnee, for benefits equally accruing to others.[182] On the other hand, some states do permit an offset-added value resulting

176. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

177. Penn Cent. Transp. Co. v. City of New York, 438 U.S.104, 124 (1978).

178. *See supra* notes 55–56.

179. Lost Tree Vill. Corp. v. United States, 787 F.3d 1111, 1117 (Fed. Cir. 2015), *cert. denied*, United States v. Lost Tree Vill. Corp., 137 S. Ct. 2325 (2017).

180. *Id.*

181. *See, e.g.*, Bauman v. Ross, 167 U.S. 548, 574 (1897) ("When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened"). *See also* Eagle, *supra* note 62, at 418–19.

182. *See, e.g.*, City of Maryland Heights v. Heitz, 358 S.W.3d 98, 106 (Mo. 2011); United States v. 930.65 Acres of Land, 299 F. Supp. 673, 677–78 (D. Kan. 1968); Louisiana Highway Comm'n v. Hoell, 140 So. 485, 486 (La. 1932). (All example cases listed embody this reasoning.)

from "general benefits" to the entire neighborhood, most notably seen in New Jersey in *Borough of Harvey Cedars v. Karan*.[183]

More fundamentally, when the Federal Circuit in *Lost Tree Village* referred to "[t]ypical economic uses [that] enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel,"[184] it did not address condemnation, which is a forced sale. The issue then becomes: should the value of enjoyment of land that results only from the imposition of a severe government restriction be deemed an "economic use" for purposes of takings law?

While the Supreme Court denied certiorari in *Lost Tree Village*,[185] these issues are quite germane to its takings jurisprudence.

5. Envisioning a Minimalist Murr *Opinion*

The Supreme Court in *Murr v. Wisconsin*[186] did not have to reach the issue of how the relevant parcel in a regulatory takings case is to be determined. Its judgment in the case could have been premised on no more than restating that state law could not arbitrarily redefine existing parcels so as to preclude an asserted categorical taking, and that, treating *either* of the petitioners' lots as the "relevant parcel" would not have resulted in a sufficient diminution in value so as to constitute a regulatory taking.[187]

As Chief Justice Roberts noted in his dissent, the very factors that the majority used to enunciate a new relevant parcel test for regulatory takings produced the same result that adherence to the lot lines of the deeded parcels would have reached.

> If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis anew, but could still consider many of the issues the majority finds important. The majority, for instance, notes that under the ordinance

183. Borough of Harvey Cedars v. Karan, 70 A.3d 524 (N.J. 2013) (upholding offset for benefit owner would derive from increased safety from injury and property damage resulting from taking of easement along shore for construction of a high dune, but would remove owner's valuable ocean view, although neighbors would enjoy same safety advantages).

184. *Lost Tree Vill. Corp.*, 787 F.3d at 1117.

185. United States v. Lost Tree Vill. Corp., 137 S. Ct. 2325 (2017) (denying cert.).

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

187. *But see supra* notes 179–86 (discussing issues that might qualify this analysis).

> the Murrs can use Lot E as "recreational space," as the "location of any improvements," and as a valuable addition to Lot F. These facts could be relevant to whether the "regulation denies all economically beneficial or productive use" of Lot E. Similarly, the majority touts the benefits of the ordinance and observes that the Murrs had little use for Lot E independent of Lot F and could have predicted that Lot E would be regulated. These facts speak to "the economic impact of the regulation," interference with "investment-backed expectations," and the "character of the governmental action"—all things we traditionally consider in the *Penn Central* analysis.[188]

One might speculate about why the Court did not reach what apparently would have been a unanimous holding on this basis. Justice Kennedy, however, was the needed fifth vote, and his *Murr* opinion served largely to reiterate and extend his advocacy of balancing tests[189] and also to affirm his concurrence in the judgment of *Lucas*.[190]

Early scholarly reaction to Justice Kennedy's majority opinion has been unenthusiastic. Professor Nicole Garnett pronounced that "the majority opinion transforms the 'muddle' of regulatory takings law into a mudslide that threatens to undermine the very foundation of property rights. Thus, all property owners—not just the Murrs—lost in the litigation."[191] Similarly, Professor Richard Epstein concluded that Chief Justice Roberts "had by far the better of the argument in insisting that state property lines should govern," as opposed to Justice Kennedy's "complex facts-and-circumstances test."[192]

Professor Maureen Brady dubbed the new multifactor test "*Penn Central* squared," which was not intended as a compliment.[193] She argued that *Murr* exacerbates problems with private property and federalism because "the Constitution protects different interests in

188. *Murr*, 137 S. Ct. at 1957 (internal citations omitted).

189. *See infra* Section II.E.2 for elaboration.

190. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032 (Kennedy, J., concurring in the judgment).

191. Nicole Stelle Garnett, *From a Muddle to a Mudslide:* Murr v. Wisconsin, 2017 CATO SUP. CT. REV. 131, 133 (2017).

192. Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 NYU J.L. & LIBERTY 151, 152 (2017).

193. Maureen Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53 (2017).

different jurisdictions, depending on the content of state-specific law."[194] Brady asserted, "Constitutional property federalism has generally been perceived as desirable, encouraging beneficial competition and innovation in property forms."[195] However, *Murr* "undermines the guarantee that the Constitution will protect this panoply of interests," and "invites courts and litigants to define protected constitutional property by reference to the law and regulation of other states, undermining the security of interests that would otherwise appear stable under a single jurisdiction's rules."[196]

Also, building upon the suggestion in Justice Thomas's separate *Murr* dissent that regulatory takings jurisprudence might be grounded in the Privileges or Immunities Clause,[197] John Greil recently argued in favor of this approach based on "second-best originalism."[198]

II. DESTABILIZING PRIVATE PROPERTY

This Part expands upon the problems raised by Chief Justice Roberts in his dissent in *Murr v. Wisconsin*.[199] I suggest that the essence of his disquiet, albeit unarticulated, is that the majority's opinion reflects a movement from Lockean property towards governance property, which attenuates traditional notions of owners' rights. I believe that it is in this sense that the Chief Justice writes that the majority "goes astray," which implies more than technical fault.[200]

This Part also considers the more fundamental question, raised by Justice Thomas in his separate dissent,[201] of whether the Court's regulatory takings doctrine is properly grounded in the Fifth Amendment's Takings Clause, in the concept of substantive due process,[202]

194. *Id.* at 56.

195. *Id.*

196. *Id.*

197. Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting). *See infra* Section II.E.3 for discussion.

198. John Greil, Note, *Second-Best Originalism and Regulatory Takings*, 41 HARV. J.L. & PUB. POL'Y 373 (2018) (contending that the original public meaning of the Privileges or Immunities Clause did protect against regulatory takings). *See infra* notes 422–27 for discussion.

199. *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting).

200. *Id.*

201. *Id.* at 1957 (Thomas, J., dissenting).

202. *See infra* Section II.B.

or, as Thomas intimates, in the Privileges or Immunities Clause of the Fourteenth Amendment.[203]

A. Lockean and Governance Property

In many ways, the subtext of *Murr* was the distinction between Lockean property and governance property.

1. Lockean and Natural-Rights Perspectives

In a civil society stressing individual rights, it is imperative that individuals easily be able to distinguish what Chief Justice Roberts referred to as "meum and tuum," what is mine, and what is not.[204] He added, with some understatement, that "[t]he question of who owns what is pretty important: The rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue."[205]

An important reason to retain stable property rights is that they further individual autonomy. John Locke famously avowed, "Lives, Liberties, and Estates, which I call by the general Name, Property."[206] Similarly, Justice Thurgood Marshall observed that "[t]he constitutional terms 'life, liberty, and property' . . . have a normative dimension . . . establishing a sphere of private autonomy which government is bound to respect."[207] Indeed, Justice Kennedy, in *United States v. James Daniel Good Real Property*,[208] applied what he termed "an essential principle: Individual freedom finds tangible expression in property rights."[209] For conservative contractarians, economic efficiency is merely incidental to the role of contract and property in furthering private ordering.[210]

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203. *See infra* Section II.E.3.

204. Murr v. Wisconsin, 137 S. Ct.1933, 1953 (2017) (Roberts, C.J., dissenting).

205. *Id.*

206. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (PETER LASLETT ED., 1965) (1690).

207. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

208. United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) (holding that due process generally requires note and the opportunity for a hearing prior to civil forfeiture of property).

209. *Id.* at 61.

210. Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship,* 82 CORNELL L. REV. 856, 895 n.199 (1997).

From a utilitarian perspective, clearly defined property rights facilitate productive activity and exchange.[211] Clear understandings of rights and duties might be achieved among a few individuals through a contract, which might be as complex as the signatories desire.[212] However, property rights are in rem, meaning that everyone is bound by them and therefore should understand what belongs to others. This is why the forms of property must be simple.[213] If "property" most fundamentally is a question of what is mine and what is thine, the fact that individuals chose to use their property in ways that are not nuisances, but may seem idiosyncratic and even annoying to others, should not be crucial.

2. Governance Property

The concept of "governance property," as opposed to Lockean property, disestablishes the role of the landowner as the gatekeeper who decide which persons have access to his or her resources and for what purposes.[214] In his article *The Social-Obligation Norm in American Property Law*,[215] Professor Gregory Alexander asserted that, even under an exclusion regime, owners "owe far more responsibilities to others . . . than the conventional imagery of property rights suggests."[216]

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211. *See, e.g.*, David Millon, Communitarianism in Corporate Law: Foundations and Law Reform Strategies, in PROGRESSIVE CORPORATE LAW 1, 23 (Lawrence E. Mitchell ed., 1995) (asserting that "private ordering through contract is presumptively legitimate because it best serves [contractarians'] efficiency objective.").

212. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001). "Contract law typically permits free customization of the rights and duties of the respective parties . . . . Property law, in contrast, requires that the parties adopt one of a limited number of standard forms that define the legal dimensions of their relationship . . . ." *Id.* at 776.

213. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 4 (2000) (adopting the civil law term "numerus clausus" to the equivalent, but unnamed, common-law principle that "property rights must conform to certain standardized forms"). *See also* Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002) (asserting that restrictions on the form of property exist not to standardize rights but rather to enhance marketability by aiding verification of ownership).

214. *See generally* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454 (2002).

215. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

216. *Id.* at 747.

> Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally. In the interest of human flourishing, the community, or more colloquially, the state, affords legal recognition to asserted claims to resources. Accordingly, the state does not take away when it abstains from legally vindicating asserted claims to resources that are inconsistent with human flourishing or with community itself.[217]

Professor Alexander extended his views in *Governance Property*,[218] terming "distorted and misleading" the view that property law should be "built around the right to exclude" and should "concern[ ] itself primarily with the owner's relationship with the rest of the world."[219]

Professor Eric Rosser, in *The Ambition and Transformative Potential of Progressive Property*,[220] noted that "pushback" against an expanded understanding of the social obligation of property took forms such as the movement into private common-interest communities, with gated access, private security guards, and recreational facilities that allow residents to insulate themselves from the rest of society.[221]

Similarly, Professor Lynda Butler asserted that the "management function" of property requires more than exclusion based on owners' autonomy.[222] "[W]hat is missing" from the exclusion property model, she wrote, "is an outward-regarding perspective that encompasses a broader sense of responsibility for the impacts of property use on society and nature, and that recognizes the role of collection action in managing the exercise of property rights."[223]

All of this is quite different from what conventionally is recognized as the Lockean, natural-rights view, which envisions government as the protector of pre-political rights. George Mason's *Virginia Declaration of Rights* is exemplary.[224]

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217. *Id.* at 749.

218. Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853 (2012).

219. *Id.* at 1855.

220. Eric Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013).

221. *Id.* at 159–61.

222. Lynda L. Butler, *Property as a Management Institution*, 82 BROOK. L. REV. 1215 (2017).

223. *Id.* at 1220–21.

224. VIRGINIA DECLARATION OF RIGHTS of 1776, art. 1 (June 12, 1776), http://avalon.law.yale.edu/18th_century/virginia.asp.

3. Productive-Labor Theory

In an attempt to present an alternative to both the exclusion and governance views of property, Professor Eric Claeys suggested a productive-labor theory, predicated on natural rights.[225] Productive-labor theory "permits, justifies, and encourages exclusive rights when such rights seem practically likely to facilitate concurrent labor by different citizens for different goals."[226] Claeys noted John Locke's famous passage, "all Men are naturally in . . . a *State of perfect Freedom* to order their Actions, and dispose of their Possessions and Persons, as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man."[227] Taking Locke as an exemplar of his view, Claeys interpreted the phrase "within the bounds of the Law of Nature" as constraining individual freedom within the bounds of natural law.[228]

4. The Civic Republican Tradition

Scholars such as Dean William Treanor have stressed that during the colonial and revolutionary periods the view that the State enjoyed broad powers to regulate and reorder property relations was pervasive.[229]

According to Professor Cass Sunstein, the eminent domain provision and a number of other important provisions of the Constitution are "focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to

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> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Id.

225. Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413 (2017).

226. *Id.* at 418 (2017).

227. *Id.* at 432 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT § II.4, AT 269 (PETER LASLETT ED., 1988) (1698) (EMPHASIS ADDED).

228. *Id.*

229. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792–93 (1995).

obtain what they want."[230] He added that "[t]he prohibition of naked preferences also reflects the Constitution's roots in civil republicanism and accompanying conceptions of civic virtue."[231]

5. Property as the "Law of Things"

At its root, the fundamental insistence of Chief Justice Roberts in *Murr* is that the Court adhere to its "traditional approach" that "State law defines the boundaries of distinct parcels of land, and those boundaries should determine the 'private property' at issue in regulatory takings cases."[232] In part, this appears to be a reaction to views of law predicated upon the "disintegration of property."[233]

In *Property as the Law of Things*,[234] Professor Henry Smith argued that property is a "platform for the rest of private law," that the need for traditional baselines created by the law is important, and that "nowhere is this issue of baselines more salient than in property."[235] Property rights are rights "in rem," which originally meant "in a thing" and are now taken as rights "availing against persons generally."[236]

Professor Smith noted that legal realists and their progeny insist that property is *not* about things, but rather that "property" is a bundle of rights and other legal relationships among persons, against which things are a "mere backdrop."[237] "[T]he benefits of tinkering with property [have been] expressed in bundle terms without a corresponding theory of the costs of that tinkering."[238] In some cases, Smith added, "the traditional baselines of the law were mocked, and the idea was to dethrone them in order to remove them as barriers to enlightened social engineering."[239]

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230. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (enumerating the dormant Commerce, Privileges and Immunities, Equal Protection, Due Process, Contract, and Eminent Domain Clauses).

231. *Id.* at 1690–91.

232. Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting).

233. Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980).

234. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

235. *Id.* at 1691.

236. *Id.*

237. *Id.*

238. *Id.* at 1697.

239. *Id.* (citing, as an example, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833–49 (1935)).

From a perspective of traditional property law, as opposed to a governance-property perspective, "what is decisive is that which is taken, not that which is retained."[240]

If property is a unitary thing, so might be government. Although takings claims typically result from administrative determinations, and sometimes from legislation, acts constituting eminent domain are undertaken by the State or its political subdivision. Thus, there is a plausible claim that acts of judges that radically depart from established law might be "judicial takings."[241] A plurality opinion by Justice Scalia asserted that takings liability could arise from judicial acts in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.[242] Likewise, in his dissent from the denial of certiorari in *California Building Industry Ass'n v. City of San Jose*,[243] Justice Thomas reiterated his view in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*[244] that the "rough proportionality" and "individualized determination" tests for reviewing permit exactions, enunciated in *Dolan v. City of Tigard*,[245] should apply to a "legislative determination" by the Atlanta City Council as much as to an administrative determination made by an agency official. "A city council can take property just as well as a planning commission can."[246]

B. The Continuing Debate over Bright-Line Rules

1. Kennedy and Scalia Debate Bright-Line Rules

In his well-known article *The Rule of Law as a Law of Rules*,[247] Justice Scalia spelled out his strong preference for bright-line rules:

> Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what

240. EPSTEIN, *supra* note 8, at 58.

241. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

242. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010).

243. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928 (2016) (Thomas, J., concurring in the denial of certiorari).

244. Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

245. Dolan v. City of Tigard, 512 U.S. 374 (1994).

246. *Parking Ass'n of Ga.*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of certiorari).

247. Scalia, *supra* note 90.

> it prescribes. . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability . . . is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.[248]

Scalia added "it displays more judicial restraint to adopt [a general rule] than to announce that, 'on balance,' we think the law was violated here—leaving ourselves free to say in the next case that, 'on balance,' it was not."[249]

Beyond his general aversion to vague rules, quite possibly Justice Scalia was "irritated" by the "open-textured approach" emblematic of Penn Central, "as a matter of judicial function and aesthetics."[250]

On the other hand, balancing tests seem second nature to Justice Kennedy. An important illustration involves the Clean Water Act ("CWA"),[251] which gave the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers powers to authorize the discharge of pollutants into "navigable waters," which the CWA defined as "the waters of the United States, including the territorial seas."[252] The definition of "waters of the United States" remained unsettled, with the U.S. Court of Appeals for the Sixth Circuit ruling in *Rapanos v. United States*[253] that wetlands connected to navigable waters by only twenty miles of non-navigable tributaries were subject to the Corps of Engineers' jurisdiction.

Justice Scalia's plurality opinion took a narrow, dictionary-based approach and declared that the "only plausible interpretation" was that CWA jurisdiction extended only to "relatively permanent, standing or continuously flowing bodies of water."[254] The dissents of

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248. *Id.* at 1179.

249. *Id.* at 1179–80.

250. J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 743 (2017).

251. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

252. Rapanos v. United States, 547 U.S. 715, 722 (plurality opinion) (quoting 33 U.S.C. § 1362(7)).

253. United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004), *vacated and remanded sub. nom*. Rapanos v. United States, 547 U.S. 715 (2006).

254. *Rapanos*, 547 U.S. at 739 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

Justices Stevens[255] and Breyer,[256] on the other hand, expressed a much broader view of the importance of environmental protection and of deference to the expertise of the EPA and the Corps of Engineers. Justice Kennedy, the swing vote, concurred only in the judgment.[257] Although he gave the Corps considerable deference, he also strived to give "the term 'navigable' some meaning." Thus, he adopted a heavily fact-based standard that determined that the existence of the required nexus depends on whether the wetlands at issue, perhaps in connection with others, significantly affects the integrity of waters "more readily understood as 'navigable.'"[258]

In a more germane case, Justice Kennedy declined to endorse Justice Scalia's bright-line rule in *Lucas v. South Carolina Council*[259] and instead concurred only in the judgment.[260] Kennedy declared, "The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations."[261]

In *Lucas*, Justice Scalia "stress[ed] that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."[262] For Justice Kennedy, on the other hand, the resolution of the case involved the need for a determination as to "whether petitioner had the intent and capacity to develop the property and failed to do so."[263] Justice Blackmun agreed, and his dissent asserted that the provenance of the Court's per se rule was "unpersuasive."[264]

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255. *Id.* at 788 (Stevens, J., dissenting) (focusing on the "quality of our Nation's waters").

256. *Id.* at 811 (Breyer, J., dissenting) (expressing "no difficulty [in] finding that the wetlands at issue in these cases are within the Corps' jurisdiction").

257. *Id.* at 779 (Kennedy, J., concurring in the judgment).

258. *Id.* at 779–80.

259. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

260. *Id.* at 1032 (Kennedy, J., concurring in the judgment).

261. *Id.* at 1034 (citing Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979), and Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

262. *Id.* at 1032 n.18.

263. *Id.* at 1032 (Kennedy, J., concurring in the judgment).

264. *Id.* at 1049 (Blackmun, J., dissenting).

> The Court's suggestion that Agins v. City of Tiburon, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), a unanimous opinion, created a new *per se* rule, only now discovered, is unpersuasive. In *Agins*, the Court stated that "no precise rule determines when property has been taken" but instead that "the question necessarily requires a weighing of public and private interest."

Id. at 1049 n.11 (quoting *Agins*, 447 U.S. at 260–62).

While the majority had accepted the trial court's finding that the Beachfront Management Act had left Lucas's lots bereft of value, Kennedy noted that the trial court appeared to "presume that the property has no significant market value nor resale potential," although he accepted the finding as the law of the case.[265] He added, "Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."[266] However, similar to conflating "property" and "expectations," this conflation of "value" and "expectations" invites circularity.[267]

Justice Kennedy's assertion that the per se rule enunciated by Justice Scalia in *Lucas* is subject to the owner's investment-backed expectations has received only slender judicial support. In 1999, a Federal Circuit panel so held in *Good v. United States*.[268] One year later, however, in *Palm Beach Isles Associates, Inc. v. United States*,[269] another panel ruled that the per se rule in *Lucas* precluded consideration of owner expectations and that expressions to the contrary in *Good* were dicta, inconsistent with the law of the circuit court.[270]

Subsequent decisions of the U.S. Court of Federal Claims and the Federal Circuit "unanimously endorsed the no-role-for-expectations view, almost always without discussion. Other courts, in broad prefatory descriptions of the takings tests, appear to assume the absence of a role for expectations in the total takings context."[271] Thus, the *Penn Central* and *Lucas* tests "are mutually exclusive."[272] The Supreme Court recently declined to review this precise issue in

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265. *Id.* at 1033–34 (Kennedy, J., concurring in the judgment).

266. *Id.* at 1034 (Kennedy, J., concurring in the judgment).

267. *See infra* Section II.B.2.

268. Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

269. Palm Beach Isles Assocs. v. United States, 231 F.3d 1354 (Fed. Cir. 2000).

270. *Id.* at 1357 (discussing Florida Rock Indus. v. United States, 18 F.3d 1560 (Fed.Cir.1994)). *Florida Rock Industries* "stated in summary fashion that '[i]f a regulation categorically prohibits all economically viable use of the land—destroying its economic value for private ownership—the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.'" *Id.* (quoting *Florida Rock Indus.*, 18 F.3d at 1564).

271. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 43 ECOLOGY L.Q. 307, 332 (2007) (citing cases).

272. Calvert G. Chipchase, Comment, Lucas *Takings: Why Investment-Backed Expectations Are Irrelevant When Applying the Categorical Rule*, 24 U. Haw. L. Rev. 147, 148 n.12 (2001) (citing Barry M. Hartman, Lucas v. South Carolina Coastal Council: *The Takings Test Turns a Corner*, 35 ENVTL. L. REP. 1003 (1993) (discussing the differences between the *Lucas* and *Penn Central* tests)).

Lost Tree Village Corp. v. United States,[273] where the Federal Circuit had concluded that "*Lucas* does not require a balancing of the *Penn Central* factors."[274]

The movement towards heavy reliance on expectations received a setback in 2015 in *Horne v. Department of Agriculture*.[275] The Court's opinion, by Chief Justice Roberts, held that the rule that a physical appropriation of property is a categorical taking applies to personal property as well as real property.[276] He noted the dictum in *Lucas* stating that "while an owner of personal property 'ought to be aware of the possibility that new regulation might even render his property economically worthless,' such an 'implied limitation' was not reasonable in the case of land."[277] Roberts rejected this approach, noting that *Lucas* involved regulatory takings, and that its distinction between owner expectations regarding real and personal property would be cabined there and not applicable to physical appropriations.[278]

2. The Tendency Towards Circularity

A quarter century before *Murr*, in his concurrence in the judgment of *Lucas v. South Carolina Coastal Council*,[279] Justice Kennedy averred that whether a taking could exist would involve the interplay of government regulations and owner expectations. In such an inquiry, he recognized, elements would be mutually referential:

> There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some

273. Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

274. *Id.* at 1119. The court also held that "*Lucas* does not suggest that a land sale qualifies as an economic use." *Id.* at 1115.

275. Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2428 (2015) (holding that an appropriation of raisins in connection with a government marketing order was a categorical taking).

276. *Id.* at 2427 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

277. *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992)).

278. *Id.* at 2428 (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323, for differing treatments of government appropriations of property and regulation of property).

279. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

> circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular *in its entirety*. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.[280]

The definitional circularity employed in his *Murr* opinion might be viewed as an incremental extension of his *Lucas* takings analysis. However, there is an essential and important difference. In *Murr*, the circularity was not limited to defining the various factors regarding the *regulation* of property but rather was expanded to bring within its ambit the *definition* of property itself.

Justice Scalia's emphasis in *Lucas* was rooted in the more objective concept that, in order for regulations "prohibit[ing] all economical[] use of land" not to be "confiscatory," they must "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[281]

Justice Scalia's formulation has been subject to excoriating criticism. Professor Richard Epstein declared it "devoid of legal theory."[282] While *Lucas* involved the landowner's entire parcel, it was clear to Justice Scalia that the "relevant parcel" issue would arise soon,[283] and Professor Epstein accused Scalia simply of evading it.[284]

The essential problem with Justice Kennedy's "inherent tendency towards circularity" was succinctly stated by Judge Stephen Williams:

> Although the Takings Clause is meant to curb inefficient takings, such a notion of "reasonable investment-backed expectations"

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280. *Lucas*, 505 U.S. at 1034–35 (Kennedy, J., concurring in the judgment) (emphasis added).

281. *Id.* at 1029.

282. Epstein, *supra* note 79, at 1375.

283. *Lucas*, 505 U.S. at 1016 n.7.

> When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id.

284. Epstein, *supra* note 79, at 1375 ("Often the common law wisely proceeds incrementally, and the open-ended nature of the Eminent Domain Clause invites the Court to create a system of constitutional common law that is equally slow moving. It is one thing to issue restrained utterances when it is not clear what lies ahead; it is quite another to practice evasion in the name of cautious decisionmaking.").

> strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus *regulation begets regulation*.[285]

Justice Scalia's approach of "background principles" does have merit. I observed earlier that "[l]ike the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by squalls of legislative passion."[286] Others have raised similar points.[287]

In lauding the "flexibility" of the Court's regulatory takings jurisprudence[288] after setting out the elements of his "relevant parcel" test in *Murr*,[289] Justice Kennedy soothingly added that "[t]he inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition."[290] He also reiterated his concurrence in the judgment in *Lucas* that "a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned."[291]

However, the virtue of "flexibility" is tested by Justice Kennedy's conflation in *Murr* of "what one owns," for purposes of regulation, with how "what one owns" is regulated.[292]

C. Murr *Intensifies Concerns Regarding Government Overreach*

Prior to *Murr*, the ad hoc nature of the Court's "parcel as a whole" formulation had been criticized as a source of great confusion that

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285. Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring) (emphasis added).

286. Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 369 (1998).

287. *See, e.g.*, Merrill & Smith, *supra* note 213, at 64 ("A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule."); RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT 7–9 (7th ed. 2001) (1953) ("Custom, convention, and old prescription are checks upon both man's anarchic impulse and upon the innovator's lust for power.").

288. Murr v. Wisconsin, 137 S. Ct.1933, 1937 (2017).

289. *See supra* note 167 and accompanying text.

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

291. *Id.* at 1245 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (Kennedy, J., concurring in the judgment)).

292. *See supra* Section I.D.3 for discussion.

places the development of a coherent jurisprudence of regulatory takings at the "mercy of diverse and at times idiosyncratic approaches" from various state and federal courts, resulting in a "Tower of Babel."[293] Such a situation is rife with the possibility of government overreach.

1. The Gerrymandering of Property

The essence of Chief Justice Roberts's complaint about the *Murr* majority opinion is that it "knocks the definition of 'private property' loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis"; thus it "compromises the Takings Clause as a barrier between individuals and the press of the public interest."[294]

To be sure, the Chief Justice is not claiming that the concept of property is disintegrating.[295] Rather, he continued, the majority's ad hoc approach to property—its "focus on the particular challenged regulation"—means that "two lots might be a single 'parcel' for one takings claim, but separate 'parcels' for another."[296] Tellingly, he adds that "[t]his is just another opportunity to gerrymander the definition of 'private property' to defeat a takings claim."[297]

It might be that the word "gerrymander" was on Roberts's mind because, in the period prior to *Murr* being handed down, the Court had agreed to review claims of extreme partisan gerrymandering in *Gill v. Whitford*, a case involving Wisconsin election law.[298] "Gerrymandering" might seem an odd word to describe the general softening of property rights into a state of incoherence.

However, "gerrymandering" does bring to bring to mind the possibility of agreements among local officials and developers that slice and divvy out development opportunities, utilizing parcel- or

293. Gideon Kanner, *Hunting the Snark Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?,* 30 URB. LAW. 307, 310–11 (1998).

294. *Murr*, 137 S. Ct. at 1956 (2017) (Roberts, C.J., dissenting).

295. *Compare* Grey, *supra* note 233, *with supra* Section II.A.5.

296. *Murr*, 137 S. Ct. at 1956 (2017) (Roberts, C.J., dissenting).

297. *Id.*

298. Gill v. Whitford, 138 S. Ct. 1916 (2018).

neighborhood-specific regulatory interpretations. Pursuant to these "grand bargains" among transient coalitions, local legislatures could then approve and entrench such arrangements and acquire parcels for their fulfillment through a combination of eminent domain and compelled sales from present owners who are subjected to infeasible development conditions.[299]

2. Property Rights and Rent-Seeking

"Rent-seeking" refers to efforts to obtain economic rents—payments for things that cost nothing to produce.[300] A primary justification for eminent domain is to prevent rent-seeking behavior from landowners trying to capture large gains when their strategically located parcels are needed for public uses.[301] In a broader sense, however, the framers viewed the Constitution as a means for securing property. According to Dean William Treanor, James Madison "anticipated" the country's "enormous population growth," that landowners would "become a minority," that "landed property . . . was most threatened by majoritarian rule," and that "the greater the number of the unpropertied, the more likely would they be to pass redistributive legislation."[302]

Legislation or judicial interpretations that detract from well-defined property rights may have the effect of turning property and development into a common pool, with the allocation of rights within that pool being a negative-sum game, after taking into account the costs incurred in rent-seeking behavior.[303]

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299. *See* Roderick M. Hills & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 123–33 (2015) (outlining mechanisms for "citywide deals"). While the authors advocate the use of government "price sheets" and transparency, the potential for abuse is clear. *See also* Eagle, *supra* note 35, at 1078–81 (noting the relationship between information asymmetries, political exigencies, and cronyism in the development process).

300. *See* Anne O. Krueger, The Political Economy of the *Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (coining the term). *See generally* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 39, 48 (James M. Buchanan et al. eds., 1980).

301. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74–77 (1986). *See also* EPSTEIN, *supra* note 8.

302. Treanor, *supra* note 229, at 849 (citing Remarks of James Madison (debate of June 26, 1787), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 421, 422–23 (Max Farrand ed., 1966)).

303. EPSTEIN, *supra* note 8, at 203.

In contemporary times, fear of majoritarian impulses leading to expropriation might undergird *Armstrong*'s exhortation that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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."[304] As Chief Justice Roberts put it in *Murr*, "[b]y securing such *established* property rights [i.e., rights established under existing state property law] the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large."[305]

Similarly, Justice Alito's concerns about local officials making "extortionate demands" on landowners seeking development approvals[306] might express the fear that those with relatively deep pockets would be targets of opportunity. Land use development is marked by "zoning for dollars,"[307] and the practice whereby developers are subjected to informal demands for exactions far from effective judicial review makes Justice Alito's concerns entirely warranted.[308]

3. The Creep of Expectations

Justice Kennedy asserted in *Murr* that Lots E and F could easily be put to a common use.[309] However, U.S. Circuit Judge Stephen Williams countered that argument in a prescient opinion in *District Intown Properties Ltd. P'ship v. District of Columbia*.[310] The case

304. Armstrong v. United States, 364 U.S. 40, 49 (1960) (emphasis added).

305. Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting).

306. Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2596 (2013) ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

307. Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991) (describing and defending the trend of municipalities using incentive zoning to fund various community needs and amenities).

308. *See* Steven J. Eagle, Koontz *in the Mansion and the Gatehouse*, 46 URB. LAW. 1 (2014) (describing how informal demands for exactions in the "gatehouse" of off-the-record conversations differ from documented formal demands that might be evaluated in the "mansion" of judicial review).

309. Murr v. Wisconsin, 137 S. Ct. 1933, 1948–49 (2017).

310. District Intown Props Ltd. P'ship v. District of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999) (Williams, J., concurring in the judgment).

involved the attempted repurposing of separately deeded lots that had served as the lawn of an old apartment building and that the court's majority deemed were incorporated, in one relevant parcel, with the apartment property. Judge Williams began with the majority's "apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis."[311] He noted that this presumption (as does the statutory consolidation of such parcels in *Murr*) "tends to reduce the likelihood that courts will order compensation." He also noted that the majority's focus on contiguity, simultaneous acquisition, on the past treatment of the lots as a single unit, and on the extent to which the restricted lots benefit the neighboring lot are "irrelevant," since "[t]he majority's focus on the property's use prior to regulation tells us nothing about the value-producing opportunities foreclosed at the time of regulation."[312]

In *Murr*, on the other hand, the majority did look at prospective values,[313] which obviously is relevant to the traditional three *Penn Central* factors.[314] As Judge Williams might have anticipated,[315] *Murr* did consider the restriction being mitigated "by the benefits of using the property as an integrated whole."[316] Unfortunately, the *Murr* opinions relied upon isolated data pertaining to values proffered by the parties. Those appraisals had not been subjected to judicial scrutiny earlier. The Court's failure to remand in *Murr* meant that it justified a new test for relevant parcel while partially depending on self-serving, ex parte evidence.[317]

4. Conflation of the Police Power and Takings

The application of the police power of the state, which is the sovereign's inherent right to protect the public's health, safety, and

311. *Id.* at 885.

312. *Id.*

313. *Murr*, 137 S. Ct. at 1948–49 (2017).

314. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *See supra* Section I.B for discussion.

315. Dist. Intown Props Ltd. Prop. v. District of Columbia, 198 F.3d 874, 888 (D.C. Cir. 1999) (Williams, J., concurring in the judgment).

316. *Murr*, 137 S. Ct. at 1949 (2017).

317. *Id.* at 1941 (noting that the trial court decided the relevant parcel issue on summary judgment).

welfare, can result in great loss to property owners for which the remedy of "just compensation" is unavailable.[318]

In *Lucas v. South Carolina Council*,[319] Justice Scalia observed that "[t]he transition from our early focus on control of 'noxious' uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."[320]

Scalia's proffered replacement for this distinction, at least where there was a prohibition of "all economically beneficial use of land," was to ascertain whether the limitation "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[321] This more objective test was not too successful. This was because the Court later emphasized, in *Lingle v. Chevron U.S.A.*, that the *Lucas* categorical rule applied only to "total regulatory takings,"[322] and also because regulators responded by ensuring that owners retained at least a modicum of beneficial use.[323] Furthermore, by bringing "background principles" to the fore, *Lucas* had the "unlikely legacy" of providing government defendants numerous defenses to takings claims.[324]

Two particularly notable conflations of police power and takings power occurred in *Berman v. Parker*[325] and in *Hawaii Housing Authority v. Midkiff*,[326] where the Court seemed to eliminate "public

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318. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887).

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Id. at 669.

319. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

320. *Id.* at 1024.

321. *Id.* at 1029.

322. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

323. *See* Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5, 11 (1996) ("If those suffering under confiscatory statutes, ordinances, or regulations can still salvage even a small amount of value, the *Lucas* test will not apply.").

324. Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005).

325. Berman v. Parker, 348 U.S. 26 (1954).

326. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

use" as an independent constitutional requirement.[327] To be sure, the Court stepped back in *Kelo v. City of New London*, but, even there, it broadly equated "public use" with "public purpose."[328] Furthermore, as in *Berman*, courts routinely treat "blight" as a justification for condemnation, although the government does not take blighted property for its own use but rather for what should more accurately be described as abatement of common-law nuisances.[329]

D. The Poor Fit Between the Takings Clause and Regulatory Takings

The Supreme Court first considered the concept of a taking by a regulatory ordinance in *San Diego Gas & Electric Co. v. City of San Diego*.[330] It explained that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."[331]

This observation suggests that the Supreme Court had the choice of either trying to fit overly burdensome regulations into the purview of the Takings Clause or to find some other constitutional basis for dealing with them.[332] It chose the former.

1. Practical Difficulties

Professor Joseph Singer, a leading proponent of progressive property, recently stated an apparent, universal truth: "Scholars have long derided the regulatory takings doctrine as incoherent and unpredictable."[333] He concurred with my earlier assertion that the

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327. *Berman*, 348 U.S. at 33 ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."); *Midkiff*, 467 U.S. at 240 ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

328. Kelo v. City of New London, 545 U.S. 469 (2005).

329. Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833, 833–56 (2007).

330. San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 623, 650 (1981) (dismissing the appeal for the lack of a final state judgment).

331. *Id.* at 650.

332. *See infra* Section II.E for discussion.

333. Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 603, 603 n.1 (2015) (citing Eagle, *Four-Factor*, *supra* note 21, at 602). *See also, e.g.*, Gideon Kanner,

Penn Central ad hoc, multifactor test "has become a compilation of moving parts that are neither individually coherent nor collectively compatible."[334] I suggest that the reason for those problems is that, as matters of constitutional law, logic, and history, the concept of regulatory takings and the Takings Clause have not been a good fit.

The Fifth Amendment Takings Clause[335] suggests three direct questions: Did the claimant have a property interest? Did the government take that interest? And did the government provide the owner with just compensation? The focus throughout this inquiry is on property: Was it owned? Was it taken? And was property of equal value provided as compensation? To be sure, determining these questions often involves subtle inquiry. However, the essential analysis is straightforward, which reflects the crucial fact that property rights are in rem, and hence susceptible to being readily understood.

On the other hand, the issues as they have been adjudicated in regulatory takings cases do not focus on property. Rather, they focus on burdens placed on i*ndividuals* who are *owners* of property. *Armstrong v. United States*[336] primarily is known for its sweeping pronouncement, quoted in *Penn Central*, that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[337]

It is instructive, however, to consider the issues and holding in *Armstrong*. Claimants, including Cecil Armstrong, furnished materials for the construction of boats that later were to be conveyed by a shipbuilder to the U.S. Navy. Under state law, the claimants possessed valid liens for materials supplied. When the shipbuilder defaulted, the Navy exercised its contract rights to terminate the agreement and demand transfer of boats that were completed or under construction. The government refused to satisfy the liens, and

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Making Laws and Sausages: A Quarter Century Retrospective on Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 653, 664–66 (2005) (enumerating scholarly criticisms of *Penn Central*).

334. Singer, *supra* note 333, at 603 n.1 (quoting Eagle, *Four-Factor*, *supra* note 21, at 602).

335. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). The Clause is applicable to the states through the Fourteenth Amendment and through *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

336. Armstrong v. United States, 364 U.S. 40 (1960).

337. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (quoting *Armstrong*, 364 U.S. at 49).

petitioners brought a takings action. In his dissent, Justice Harlan stated that the government did not "take" the liens but that their value was destroyed as an incident of the government exercising its contract rights against the shipbuilder.[338]

Justice Black, writing for the Court, declared:

> Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss *the Government was the direct, positive beneficiary*.
>
> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation 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. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here.[339]

While the government did not take Armstrong's lien, it was "the direct, positive beneficiary" of the materials that he furnished, that were incorporated into the boats, and that had given rise to his material supplier's lien under state law. In short, the liens were a statutory substitute for materials furnished. This is confirmed by the fact that, under Maine law, the petitioners had the right to attach the uncompleted work. "[T]hey were entitled to resort to the specific property for the satisfaction of their claims."[340] The Court added that "such a right is compensable by virtue of the Fifth Amendment."[341]

Penn Central, on the other hand, did not deal with arrogation of property, or even a property substitute such as a statutory lien. Rather, the Court focused, in a general sense, on the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[342]

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338. *Armstrong*, 364 U.S. at 49–50 (Harlan, J., dissenting, joined by Frankfurter, J., and Clark, J.).

339. *Id.* at 49 (emphasis added).

340. *Id.* at 44.

341. *Id.* (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)).

342. *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citations omitted).

Justice Brennan quoted *Armstrong*'s "fairness and justice" pronouncement.[343] He added that the Supreme Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that *economic injuries caused by public action* be compensated by the government, rather than remain disproportionately concentrated on a few persons."[344]

"Economic injuries," of course, is a much more varied and subjective category than property, or property substitutes. Had Armstrong attempted to reclaim materials delivered to the shipbuilder's yard but not yet incorporated within boats, his ability to do so would not depend on the extent of his wealth, on the size and scope of his business, or on his personal expectations of his rights vis-à-vis his vendees. They would depend on the property he supplied and on his rights under state law.

The *Penn Central* line of cases thus changed *Armstrong*'s focus from protecting the substance of property rights to protecting individuals from unfair and unexpected economic harm.

When government exercises its power of eminent domain, and where the focus clearly is on the thing instead of its owner, the "proceedings are in rem, and compensation is made for the value of the rights which are taken."[345] Thus, once the amount of just compensation for a parcel is established, those with various ownership claims, such as freeholders and lessees, can litigate among themselves over entitlements to that sum.[346] On the other hand, where there is a claim that an individual has been injured as a result of government regulations affecting his property, a court must focus on the extent of, and redress for, those injuries.

2. Constitutional Infirmities

The practical problems of applying the Takings Clause to regulatory takings, as discussed above, reflect constitutional issues pertaining

343. *Id.* at 123–24 (1978) (quoting *Armstrong*, 364 U.S. at 49).

344. *Id.* (emphasis added).

345. United States v. Petty Motor Co., 327 U.S. 372, 376 (1946) (internal citations omitted).

346. Direct Mail Serv., Inc. v. Best, 729 F.2d 672 (10th Cir. 1984). "[O]nce the reasonable market value of the property acquired through the exercise of the State's eminent domain authority has been established, the apportionment of that amount among persons claiming a share thereof is not the concern of the State." *Id.* at 675.

to that Clause.[347] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[348] the Court stated:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.[349]

However, the lack of a "comparable reference" in the Constitution does not mean that the Court should add one. Hesitancy on this point strongly is suggested in *Pumpelly v. Green Bay Co.*,[350] where, in 1871, the Court carefully recognized that a physical appropriation of land would require just compensation even without an arrogation of title. The Court noted that its result would override state determinations that consequential injuries to owners resulting from internal improvement would not be the subject of redress. It explained that those state courts had taken the "comparable reference" principle to its "uttermost limit of sound judicial construction" and the Supreme Court would go no further.[351]

Putting cautions expressed in cases like *Pumpelly* aside, Justice Stevens stated in *Tahoe-Sierra*[352] that the "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."[353] In essence, *Tahoe-Sierra* countenanced two separate bodies of takings law, just as Justice Kennedy

347. Other provisions will be discussed subsequently. *See infra* Section II.E.

348. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

349. *Id.* at 321–22.

350. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

351. *Id.* at 180–81.

352. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002) (footnote omitted).

353. *Id.* at 324.

in *Murr* countenanced different meanings of "property" itself, dependent upon the purpose and occasion.[354] Furthermore, that the distinction has been "longstanding" does not mean that it is valid.

There is extensive scholarly literature on whether regulatory takings can find a home in the Takings Clause. A broad reading of the Clause suggests that it does.[355] But others take a narrower view. Dean Treanor advanced a civic republican view of the values important during the founding era, one based on virtue instead of self-interest.[356] He asserted that the property interest that was the subject of the Takings Clause was "physical control of material possessions."[357]

In his well-known book *Takings*,[358] Professor Richard Epstein asserted that the framers, who had absorbed the intellectual framework of Blackstone and Locke, "meant to endorse" both the Takings Clause and broad government regulation of economic activities "without knowing the implicit tension between them."[359] Given this contradiction, Professor Epstein concludes that it is the value explicitly enumerated in the constitutional text that should be followed.[360] Professor Michael Rappaport, after reviewing these sources, disagreed with Professor Epstein because he concluded that the founders did not have a uniform Lockean framework of property rights and because the actual practice during their era was not consistent with such a broad interpretation.[361]

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354. *See supra* notes 286–89 and accompanying text.

355. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *138 (asserting that the individual's right to property "consists in the free use, enjoyment, and disposal of all of his acquisitions, without any control or diminution, save only by the laws of the land.").

356. *See generally* Treanor, *supra* note 229.

> Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest and with the belief that rights are prepolitical. . . . Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights . . . are created by the polity and subject to limitation by the polity when necessitated by the common interest.

Id. at 821.

357. William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633, 633 (2008).

358. EPSTEIN, *supra* note 8.

359. EPSTEIN, *supra* note 8, at 29 (stating that the "founders shared Locke's and Blackstone's affection for private property").

360. EPSTEIN, *supra* note 8, at 28.

361. Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 737–740 (2008).

E. Alternatives to Present Takings Doctrine

1. Substantive Due Process

Leading conservative jurists often have looked askance at the idea that due process includes a substantive component. Justice Scalia wrote:

> By its inescapable terms, [the Due Process Clause] guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require—notably, a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking.[362]

The view of Judge Frank Easterbrook was just as biting.

> Today the Court makes no pretense that its judgments have any basis other than the Justices' view of desirable policy. This is fundamentally the method of substantive due process. Giving judges this power of revision may be wise or not. The Court may design its procedures well or poorly. But there is no sound argument that this is a legitimate power or function of the Court.[363]

The debate has been neatly framed by academics. Professors Nelson Lund and John McGinnis proclaimed:

> Whatever the cause, due process has continued to provide a textual thunderbolt that Olympian judges can hurl at any law that offends them. Neither the Court nor any of its members has even once so much as attempted to explain how any of this can be derived from or even reconciled with the text of the Due Process Clauses.[364]

On the other hand, Professor Jamal Greene recently asserted: "Substantive due process is not a contradiction in terms. Indeed, it

362. Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 24–25 (Amy Gutmann ed., 1997).

363. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125 (1982).

364. Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1560 (2004).

is redundant. No inquiry into the propriety of some process—its 'due'-ness—is or can be indifferent to the substance of the associated loss."[365]

Although *Murr* purported to redefine property only for regulatory takings purposes, the opinion reflects the Court's elision of another inconvenient and troublesome distinction. If government takes private property for its own use, it must provide just compensation to the owners whose identity generally is incidental.[366] As the Court noted long ago, "just compensation is for the property, and not to the owner."[367] On the other hand, if government singles out individuals for unfair burdens in connection with their ownership of property, the owners' identities and personal circumstances are paramount. Acts of eminent domain are the subject matter of the Fifth Amendment Takings Clause whereas the applicability of that Clause to unfair burdens placed upon individuals is much more tenuous.[368]

On the other hand, negative land use determinations predicated on the identity of the applicant can be violative of the Equal Protection Clause.[369]

The question of substantive due process is especially important in takings law, given both that the concept of regulatory takings has its genesis there and also the difficulty courts have faced in fitting regulatory takings coherently into Takings Clause doctrines. Justice Stevens's explanation in *Tahoe-Sierra* that the bifurcation of physical and regulatory takings jurisprudence is a "longstanding distinction"[370] does not come to grips with the issue.

The Takings Clause provides that "nor shall private property be taken for public use without just compensation."[371] In *Dolan v. City of Tigard*,[372] the Court declared that the Takings Clause is "made

365. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 253 (2016) (internal citation omitted).

366. *See supra* notes 336–37 and accompanying text for explication.

367. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

368. *See supra* Section II.B.2 for discussion.

369. *See* Olech v. Vill. of Willowbrook, 528 U.S. 562 (2000) (explaining that the Clause can be invoked by a single applicant turned down by local officials for spite, regarding a previous lawsuit); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (finding that an ordinance precluding religious organizations while permitting cultural and membership organizations is violative of equal protection).

370. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002). *See supra* note 343 and accompanying text for explication.

371. U.S. CONST. amend. V.

372. Dolan v. City of Tigard, 512 U.S. 374 (1994).

applicable to the States through the Fourteenth Amendment,"[373] with a simple citation to *Chicago, Burlington & Quincy R.R. v. City of Chicago*.[374] However, Justice Stevens's dissent[375] noted that *Chicago, Burlington & Quincy R.R.* "contains no mention of either the Takings Clause or the Fifth Amendment" but rather held that "the substance of 'the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.'"[376]

In *Murr v. Wisconsin*, Justice Kennedy simply restated, also without discussion, that "[t]he Clause is made applicable to the States through the Fourteenth Amendment," citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*.[377] That the Court has elided the derivation of regulatory takings, and blithely treats *Chicago, Burlington & Quincy* as if it had invoked the Takings Clause, has fundamentally shaped regulatory takings jurisprudence, culminating in *Murr*.[378]

In *Pennsylvania Coal Co. v. Mahon*,[379] Justice Holmes both famously, and cryptically, declared: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[380] With this plain recognition of takings by regulation, the problematic relationship between the Takings Clause and substantive due process ostensibly became clear.[381]

In subsequent opinions, the Court considered that Holmes's use of "taking" might have been metaphorical,[382] and that due process and takings analysis might have been "fused."[383] This interpretation

373. *Id.* at 383.

374. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897).

375. Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (Stevens, J., dissenting).

376. *Id.* at 405–06. *See also* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899, 905 (2007) (asserting that the roots of regulatory takings are in substantive due process).

377. Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017) (citing *Chicago, Burlington & Quincy R.R.*, 166 U.S.).

378. *See supra* Section II.B for discussion.

379. Pa. Coal Co. v. Mahon 260 U.S. 393 (1922).

380. *Id.* at 415.

381. *See supra* Section II.E (discussing takings protections, the incorporation doctrine, and the Fourteenth Amendment Due Process Clause).

382. Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 197 (1985) (holding that the claimant's takings claim was premature).

383. Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring) (referring to Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928)).

reached its apogee in *Agins v. City of Tiburon*[384] when the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests."[385] Only twenty-five years later in *Lingle v. Chevron U.S.A. Inc.*[386] did the Court "conclude that [the *Agins*] formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence."[387]

As recently explained by Professor John Echeverria, "Understood in historical context, the transposition of due process analysis into takings doctrine was not as misguided or remarkable as it may appear 35 years later."[388] In his separate dissent in *Murr v. Wisconsin*, Justice Thomas suggested that the Court should take a "fresh look" at the grounding of regulatory takings jurisprudence.[389]

Despite being an originalist, Justice Scalia executed what Professor Peter Byrne termed an "untroubled departure from original meaning" when it came to regulatory takings.[390] In *Lucas v. South Carolina Coastal Council*,[391] Scalia acknowledged that "Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all,"[392] and that, prior to *Mahon*,[393] "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[394]

According to Professor Byrne,

> Scalia nonetheless justified applying the Clause to regulations of use, not on any revised claim about its original meaning, but on the need to adapt the clause to modern conditions of comprehensive regulation. . . . [H]e justified applying the Takings Clause to use regulations on the basis of his perception of social

384. Agins v. City of Tiburon, 447 U.S. 255 (1980).

385. *Id.* at 260 (brackets in original).

386. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

387. *Id.* at 540.

388. John D. Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 VT. L. REV. 689, 695–96 (2017).

389. Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting). *See infra* Section II.E.3 for discussion.

390. Byrne, *supra* note 250, at 734.

391. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

392. *Id.* at 1028 n.15.

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

394. *Lucas*, 505 U.S. at 1014.

> need combined with a gross and dark generalization . . . of the inevitability of political overreaching.[395]

If government takes a home, it does not matter if the occupant owns five others. It also does not matter if the owner mistakenly believes that government does not have to compensate owners whose homes are taken to widen highways. Furthermore, if the governor takes land in order to convey it to a campaign contributor, that is an impermissible use of his powers[396] and the misuse ought to be struck down as such.[397] Correspondingly, if government takes private land in order to effectuate a compelling public need, it still must compensate the owner.[398] That is what eminent domain is for.[399]

2. Justice Kennedy and the Extension of Due Process Analysis

It is possible for the Supreme Court to extend the role of due process in takings law sub rosa. Justice Kennedy often has emphasized the role of due process. In *Lawrence v. Texas*,[400] he recognized an individual's "destiny" and that "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance."[401] "Destiny" came up again in *Murr*, where he wrote

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395. Byrne, *supra* note 250, at 735–36.

396. Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

397. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.").

398. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017) (noting "the plain language of the Takings Clause 'requires the payment of compensation whenever the government acquires private property for a public purpose'" (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002)).

399. *See* E. Enter. v. Apfel, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) "The [Takings] Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional." *Id.* at 545.

400. Lawrence v. Texas, 539 U.S. 558 (2003) (holding violative of the Due Process Clause a statute that criminalized a certain sexual conduct between persons of the same sex). Justice Kennedy declared that the Due Process Clause's protection of liberty includes "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 574.

401. *Id.* at 565 (citing Roe v. Wade, 410 U.S. 113 (1973)) ("*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more

that property ownership "empowers persons to shape and to plan their own destiny."[402]

Justice Kennedy's proclivity to avoid the constraints of takings law and bright-line rules is illustrated by his swing opinion in *Eastern Enterprises v. Apfel*.[403] There, a federal statute augmented the endangered health and retirement benefits of retired coal miners and their families by imposing severe retroactive burdens on companies that employed those miners many years earlier.

The plurality opinion, by Justice O'Connor, stated that the statute violated the Takings Clause principles of fairness.[404] Writing for the four dissenters, Justice Breyer stated that the "Takings Clause does not apply"[405] and that the issue of "retroactive liability finds a natural home in the Due Process Clause."[406]

Justice Kennedy, after reviewing the "perplexing" nature of regulatory takings law, observed: "Until today, however, one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."[407] He added that "[t]he *difficulties in determining* whether there is a taking or a regulation even where a property right or interest is identified *ought to counsel against* extending the regulatory takings doctrine to cases lacking this specificity."[408] He supplied the plurality its needed fifth vote, indicating the matter fell under the Due Process Clause.[409]

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that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.").

402. Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017) ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.").

403. E. Enter. v. Apfel, 524 U.S. 498 (1998).

404. *Id.* at 537 ("When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.").

405. *Id.* at 553 (Breyer, J., dissenting) (deeming the Coal Act of 1992 constitutional under the Due Process Clause).

406. *Id.* at 554–56 (Breyer, J., dissenting) (deeming the Act constitutional under the Due Process Clause).

407. *Id.* at 541 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added).

408. *E. Enter.*, 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added).

409. *Id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part) ("When the constitutionality of the Coal Act is tested under the Due Process Clause, it must be invalidated.

While the issues in *Eastern Enterprises* were different from those in *Murr*, it is interesting to observe that Justice Kennedy's concerns in the former case stem from prudence and from the perceived difficulty in deriving an appropriate standard for review, not from a principled conclusion that takings doctrine would be inapplicable.

3. Privileges or Immunities

Justice Thomas has been fearless is raising issues regarding the constitutional limitations on property rights. In his dissent in *Kelo v. New London*,[410] he "recognized that when the Supreme Court broadly interprets the public use restriction of the Fifth Amendment's Takings Clause, and at the same time defers to political actors in this arena, it fundamentally abdicates its constitutional responsibility."[411] He similarly objected to exempting legislative decisions from the takings scrutiny accorded to administrative determinations, in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*.[412]

In his separate dissent in *Murr v. Wisconsin*,[413] Justice Thomas declared: "In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."[414] He cited the scholarly debate over those issues as summarized in an article on originalism and regulatory takings by Professor Michael Rappaport.[415]

Professor Rappaport wrote that during the founding period there was "little evidence that nonphysical takings were covered by the Clause" but that concerns regarding takings "had grown tremendously" by the enactment of the Fourteenth Amendment.[416] Thus,

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Accepted principles forbidding retroactive legislation of this type are sufficient to dispose of the case.").

410. Kelo v. New London, 545 U.S. 469 (2005).

411. Carol Necole Brown, *Justice Thomas's Kelo Dissent: The Perilous and Political Nature of Public Purpose*, 23 GEO. MASON L. REV. 273, 275–76 (2016).

412. Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari). *See supra* notes 237–39 and accompanying text for discussion.

413. Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

414. *Id.* at 1957.

415. *Id.* at 1957–58 (citing Rappaport, *supra* note 361).

416. Rappaport, *supra* note 361, at 753.

jurists had come to recognize just compensation as a "fundamental principle of justice."[417] "Even more importantly," Rappaport added, "state decisions had recognized that takings could occur not only from physical seizures, but from consequential and regulatory actions as well."[418] The case law demonstrated that "many states did not understand takings to be solely physical takings," and that takings jurisprudence "protect[ed] the right to use property, even if there was no physical interference."[419]

Professor Rappaport thus concluded that, although the original meaning of the Fifth Amendment does not cover regulatory takings,[420] there was a "very plausible case" that the Fourteenth Amendment Takings Clause "covers some regulatory takings."[421] His argument was amplified more recently by John Greil under the rubric of "second-best originalism."[422]

It is not my intention here to comment on the viability of constitutional theories—such as Rappaport's "incorporation plus"[423] approach—that would apply the regulatory takings doctrine to the states through the Fourteenth Amendment Due Process Clause. I do suggest, though, that Justice Thomas is correct that a "fresh look" at the Court's regulatory takings jurisprudence is in order, given both the difficulty in fitting regulatory takings under traditional takings doctrine and also the great expansion of both legislative and administrative land use rules and exactions.

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417. *Id.* at 754 (quoting AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 268–69).

418. *Id.* (citing cases and, *inter alia*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1549 (2003)).

419. *Id.* at 755.

420. *Id.* at 731.

421. *Id.* at 732.

422. John Greil, Note, *Second-Best Originalism and Regulatory Takings*, 41 HARV. J.L. & PUB. POL'Y 373, 376 (2018) (asserting that, "[w]hen the meaning of the text is underdetermined, but a judge is still committed to enforcing the original meaning of the text, she needs to perform a 'second-best' form of originalism.").

423. Under the currently prevailing view of "partial incorporation," specified provisions of the first eight amendments are deemed applicable to the States through the Fourteenth Amendment Due Process Clause. *See* Palko v. Connecticut, 302 U.S. 319, 323–25 (1937). Under the "total incorporation" approach, all rights set forth in the first eight amendments are applicable to the States through the Fourteenth Amendment Due Process Clause. *See* Adamson v. California, 322 U.S. 46, 89 (1947) (Black, J., dissenting). The "incorporation plus" approach incorporates all of the rights included in "total incorporation" *plus* other rights as indicated by experience. *Id.* at 124 (Murphy, F., and Rutledge, JJ., dissenting).

CONCLUSION

While the Fifth Amendment Takings Clause traditionally had been applied to government physical appropriations of land only, the Supreme Court first recognized the concept of a regulatory taking in *Mahon*,[424] and extended it in *Penn Central*[425] and *Lucas*.[426] The latter cases, however, were predicated upon the severity of burdens upon landowners. That, in turn, required a determination of the "relevant parcel" with respect to which the burden was to be measured. The relevant parcel test that would be most simple, and most respectful of the individual autonomy and productivity that the Takings Clause sought to advance, would be based on the deeded parcel. Only in the extraordinary instance where the landowner had sought to manipulate the integrity of the deeded-parcel system would another test be needed.

In *Murr v. Wisconsin*,[427] the Court had an opportunity to reinforce the concept that *the* deeded parcel was almost always the relevant parcel. Instead, it melded ad hoc tests for determining the relevant parcel with *Penn Central*'s vague tests for determining when the "parcel as a whole" was taken. The result might not comport with Fifth Amendment takings law nor Fourteenth Amendment due process, but it does substantially advance a pattern of doleful indecision.

424. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
425. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
426. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
427. Murr v. Wisconsin, 137 S. Ct. 1933 (2017).