CHOICE OF LAW IN TAKINGS CASES

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ABSTRACT

This Article considers what law should apply in resolving subsidiary questions that arise in the course of deciding takings cases under federal constitutional law. It argues that there are three choices: federal constitutional law, state law, or a federal-patterning definition that lays down certain general parameters as a matter of federal constitutional law but otherwise follows state law if it is consistent with these parameters. The article illustrates these choices by considering a recent Supreme Court decision, *Murr v. Wisconsin*,[1] which held that the horizontal dimensions of a "parcel of land" should be determined, for takings purposes, as a matter of federal constitutional law. It argues that the wholesale federalization of the issue in this context was misguided. A better solution would be to adopt a federal-patterning definition of "parcel," which would largely resolve the issue by looking to applicable state law unless affirmative evidence shows that parcel boundaries have been manipulated to manufacture a takings claim.

INTRODUCTION

Stewart Sterk has been a relatively lonely voice in arguing that takings cases should be resolved with greater attention to the role of state law.[2] I agree with him that state law has been ignored too often. I would like to use this occasion to address one dimension of the state-versus-federal-law question in takings jurisprudence. Specifically, I will consider whether subsidiary questions that arise in adjudicating takings claims should be resolved as a matter of federal

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1. 137 S. Ct. 1933 (2017).

2. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004); *see also* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35 (2016); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251 (2006).

constitutional law, state law, or some combination of federal and state law. Because the right in question appears in the Federal Constitution, federal constitutional law cannot be ignored. At the same time, the subject of the right—private property—is generally defined and protected by state law, suggesting that state law should also play a role. The solution in many contexts, I will argue, is a federal-patterning definition: a federal constitutional articulation of how the question should broadly be resolved, leaving the specific details to be filled in as a matter of state law. I will illustrate the relevant choices and offer an example of how the federal-patterning definition might work by considering a recent Supreme Court decision, *Murr v. Wisconsin*, which held that the horizontal dimensions of a "parcel of land" should be determined, for takings purposes, as a matter of federal constitutional law.[3] I will argue that wholesale federalization of the issue in this context was misguided. A better solution would be to adopt a federal-patterning definition of "parcel," which would largely resolve the issue by looking to applicable state law unless affirmative evidence shows that parcel boundaries have been manipulated to manufacture a takings claim.

I. STATE VERSUS FEDERAL LAW: THREE OPTIONS

Let me begin by broadly framing what I regard to be the relevant inquiry. The Takings Clause, whether it applies to traditional eminent domain or to regulatory takings claims, protects "private property."[4] The Takings Clause, of course, is part of the Federal Constitution and as such, has been held to apply to both the federal government and the states. So the right in question is one established by federal constitutional law. Private property, which is the object of the right established by the Clause, is primarily governed by state law. Indeed, the Supreme Court is fond of quoting the line from *Board of Regents v. Roth* that says property interests are "not created by the Constitution" but rather "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[5] So the Takings Clause presents a situation in

3. 137 S. Ct. 1933.

4. "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

5. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). For repetitions of the

which the Federal Constitution creates a right protecting an entitlement that is primarily created and defined by state law. This means the doctrine developed under the Takings Clause must inevitably delineate, in some fashion, the respective roles of federal and state law in protecting the constitutional right.

Perhaps the most obvious problem of delineation occurs when there is some dispute about whether the interest to be protected constitutes "private property" within the meaning of the Takings Clause. Cases presenting this issue are relatively uncommon.[6] The most recent skirmishes of prominence involved cases that presented the question whether interest earned on client funds deposited with a lawyer is the private property of the client for takings purposes.[7] (The Court held that the answer is "yes."[8])

I have previously argued that cases presenting this type of question should *not* be resolved by asking what sorts of rights and privileges are classified as "private property" as a matter of state law.[9] Insofar as the quotation from *Board of Regents v. Roth* suggests that this is how courts should proceed, it is misleading. Instead, it is necessary to have some federal constitutional conception of the kinds of interests that qualify as "private property" in order to decide which entitlements are protected by the Takings Clause. I have called this a federal constitutional "patterning definition" of private property.[10] Armed with the relevant patterning definition, courts can then canvas a state's law to see if it recognizes an interest that qualifies as private property under the patterning definition. Such an approach

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quotation in the takings context, see, for example, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992), Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984), and Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980).

6. *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 58–60 (2002) (presenting a collection of cases from eminent domain and regulatory takings law that pose the question of whether an entitlement is "private property").

7. Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003); Philips v. Wash. Legal Found., 524 U.S. 156 (1998).

8. *Philips*, 524 U.S. at 172. The later decision, *Brown*, adhered to the conclusion reached in *Philips* about whether interest earned on client funds is the private property of the client but held that no compensation was owed for taking that property because the money would not have earned any interest absent the program. *Brown*, 538 U.S. at 235, 241.

9. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 942–54 (2000).

10. Merrill, *supra* note 9, at 952–54. This approach was anticipated by my colleague Henry Monaghan. *See* Henry Paul Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 435 (1977).

is necessary, I have argued, in order to make sense of precedents that tell us, for example, that ownership of land is a type of private property covered by the Takings Clause but that government transfer payments and tax breaks are not.[11] In other words, we need some federal constitutional principle that tells us what types of state-created interests fall within the universe of "private property," as that term is used in the Constitution, before we can proceed to examine state law.

I stand by what I have said on this score with respect to resolving the threshold question of whether an asserted interest is or is not private property protected by the Takings Clause. The objective of this Article is to extend the inquiry to consider what I will call subsidiary questions that arise once we decide that an interest is covered by the Takings Clause. These are questions that concern matters such as whether the government has "taken" the property, whether the taking is for a "public use," and if the government action qualifies as a taking for public use, whether it has given the claimant "just compensation" for the taking.

To illustrate, consider the question of whether the government has given the claimant just compensation. The meaning of just compensation could be resolved exclusively as a matter of federal constitutional law, with courts specifying exactly what sorts of valuation procedures all state and federal tribunals must use in fixing compensation. Or, conceivably, courts could defer completely to state law for determining what valuation procedures yield just compensation in any given context. Or (as I have argued in deciding whether the claimant has an interest that qualifies as "private property"), courts could articulate a general patterning definition of what constitutes just compensation, which could then be used to determine whether a particular state-valuation procedure satisfies this patterning definition.

Those familiar with the Supreme Court precedent in this area will recognize that the patterning-definition option best describes

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11. With respect to land, see Lucas v. South Carolina Coastal Council, Inc., 505 U.S. 1003, 1017 n.7 (1992) (fee simple in land is clearly protected by the Takings Clause). On the lack of takings protections for transfer payments, see Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 55–56 (1986). Taxes (and hence presumably the repeal of tax breaks) have long been regarded as immune from takings challenges. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 614–15 (2013) ("It is beyond dispute . . . that '[t]axes . . . are not "takings."'").

the approach that has been taken with regard to determining whether the government has provided just compensation. The Court has held that just compensation generally means fair market value.[12] But it has not attempted to dictate, as a matter of federal constitutional law, what valuation techniques state courts or other subordinate tribunals must use in determining fair market value. The choice of valuation procedures has largely been left to state law to specify.[13]

Indeed, we can see that the Court has, in one context or another, embraced each of the three options for resolving subsidiary issues in taking cases. As an example of the purely federal constitutional approach, consider the distinction between appropriations and regulations. Appropriations are governed by a per se rule—they are categorically regarded as takings.[14] Regulations are governed by a multifactor test that rarely results in a finding of liability.[15] The distinction was launched in *Loretto v. Teleprompter Manhattan CATV*, which describes the relevant per se category as a "permanent physical occupation" of land.[16] Subsequent cases held that the category did not include schemes that prohibit landlords from terminating tenancies, even if this can be said to result in a permanent (or at least indefinite) occupation by the tenant.[17] Then the Court held, without much analysis, that the category includes public easements imposed on private land, even though these entail rights of use as opposed to permanent or indefinite occupations.[18] Most recently, the Court has extended the category to include personal property as well as land and has redescribed the category as "physical appropriations."[19] The relevant point is that each of these zigzags was announced as a proposition of federal constitutional law, with no consideration given to the content of state property law.

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12. *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 516–17 (1979); United States v. Miller, 317 U.S. 369, 374 (1943).

13. For example, states have been allowed to adopt divergent rules with respect to offsetting benefits (*see* 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 8A (3d ed. 2018)) and with respect to the undivided fee rule (4 *id.* § 12.05).

14. Horne v. Dept. of Agric., 135 S. Ct. 2419, 2426–30 (2015).

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

16. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 441 (1982).

17. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519 (1992); Fed. Commc'ns Comm'n v. Fla. Power Corp., 480 U.S. 245 (1987).

18. *See* Dolan v. City of Tigard, 512 U.S. 374, 385–86 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987).

19. *Horne*, 135 S. Ct. at 2427.

One must scratch a bit harder to identify an example of a pure-state law approach to a subsidiary issue. One possibility is the determination of the identity of the owner of a property. In various contexts where property has been subdivided between surface and subsurface rights or between landlord and tenant, or when there has been a transfer from corporate ownership to shareholders or from parents to children, the Court has unquestioningly accepted the characterization of ownership under state law.[20] Here we see the gravitational force of the proposition that property rights are defined and enforced as a matter of state law.

The patterning definition can be seen at work in fixing the methods for determining just compensation, as previously discussed. Another example is the nuisance exception to takings liability recognized in *Lucas v. South Carolina Coastal Council*.[21] Justice Scalia's majority opinion was clear—controversially so—in stipulating that the exception applies only to government regulation of conduct regarded as a public or private nuisance at common law.[22] This characterization of the nuisance exception constitutes a federal constitutional-patterning definition. Federal constitutional law, according to *Lucas*, limits the relevant category of laws that would satisfy the exception to those that track the common law of nuisance. Having gone this far in describing the exception, the Court then remanded the case to the South Carolina courts for a determination of whether the conduct at issue—building a home on a barrier island exposed to hurricane damage—would constitute a nuisance under South Carolina common law.[23] Thus we see the two basic elements that comprise the patterning-definition approach: federal constitutional law defines the general pattern of a particular state of affairs, and an investigation of state law determines whether that definition is satisfied in a particular case.

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20. For example in *Loretto v. Teleprompter*, the Court accepted, uncritically, the state law proposition that the landlord has exclusive control over the roof of a building, and the tenants' interest is confined to the particular unit in which the tenants hold the lease. 458 U.S. at 439. Similarly, in *Palazzolo v. Rhode Island*, the Court accepted, uncritically, the state law proposition that the dissolution of a corporation for nonpayment of taxes effected a transfer of title from the corporation to its shareholder. 533 U.S. 606, 614, 626–30 (2001).

21. 505 U.S. 1003 (1992).

22. *Id.* at 1029–31. Justice Kennedy concurred only in the judgment, objecting specifically to this limitation. *Id.* at 1035.

23. *Id.* at 1031 (majority opinion).

Before turning to the issue in *Murr*,[24] a further observation about the patterning-definition approach is warranted. In contrast to the pure-federal option or the pure-state option, there are undoubtedly different versions of the patterning-definition option. For present purposes, I will distinguish between "thick" and "thin" patterning definitions. A thick definition is one in which federal constitutional law does most of the work, leaving relatively little room for variations based on state law. A thin definition is one in which federal constitutional law imposes only a mild constraint on the range of permissible variations under state law. These, undoubtedly, describe points on a continuum with many conceivable patterning definitions falling somewhere in between.

II. *MURR V. WISCONSIN*

The Murr family owned two plots of land on the St. Croix River in Wisconsin. Everyone agreed this land was "private property" protected by the Takings Clause. What *Murr* presented was a subsidiary question under Court-made takings doctrine that has played a prominent role in regulatory takings cases: the extent or degree to which the challenged regulation diminished the value of the claimant's private property.[25] Diminution in value appeared in the Court's inaugural decision recognizing the possibility of a regulatory taking.[26] It was reaffirmed as a factor of "particular significance" under *Penn Central*'s ad hoc approach to identifying a taking.[27] It is also the critical factor under *Lucas*'s categorical rule for regulations that deprive an owner of all economic value.[28]

Diminution in value requires measuring what portion of economic value has been lost because of a challenged regulation. In order to perform this measurement, it is necessary to compare the value of the property before adoption of the regulation with the value afterwards. This, in turn, requires that we identify the unit of property that will be used in making the before-and-after comparison. This has been

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

25. *Id.* at 1940, 1941–42.

26. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("One fact for consideration . . . is the extent of the diminution.").

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

28. *Lucas*, 505 U.S. at 1016–17 & n.7.

called the "numerator/denominator" problem.[29] The "denominator" is the relevant unit of property for purposes of analysis. The "numerator" is the portion of value of that unit eliminated by the regulation.

Often there will be no issue about identifying the relevant unit of property for purposes of measuring diminution in value. Suppose the property is Blackacre, a perfectly square acre of land. The government decides the land is the critical habitat of an endangered species of toad and forbids all human activity on Blackacre in an effort to save the toad. The denominator is Blackacre, and the diminution in value caused by the endangerment order is the numerator.

In other circumstances, identifying the appropriate denominator can pose quite a puzzle. Suppose the property consists of ten acres of land. Suppose further that the owner would like to subdivide the parcel into ten one-acre lots and sell them for single-family homes. The government intervenes and decides that half of the tract—five of the acres—is a wetland, which cannot be developed. Is this a loss of fifty percent of the value of the ten-acre parcel, or is it a loss of one hundred percent of the value of five individual lots?

Now consider a variation on the hypothetical. Instead of starting with a ten-acre parcel, the developer acquires ten contiguous undeveloped one-acre plots with the intention of creating a subdivision and selling the lots for homes. The government intervenes as before. The same question is posed: is this a loss of fifty percent of the whole or one hundred percent of half?

Murr presented a variation on the consolidation-of-separate-lots problem. The Murr family bought two contiguous lots, Lot E and Lot F, and built a cabin on Lot F. Lot E was held for investment and future sale. After the lots were purchased by the senior Murrs but before they were transferred to the children, the local zoning authority adopted a rule imposing a minimum-lot-size restriction on future development. The new rule prohibited development on lots the size of Lot E if owned next to another contiguous lot like F. The Murrs were permitted to build a fancy new home on the combined lots, but were no longer able to sell Lot E to a third party for development into a separate home. The Murrs argued that Lot E standing alone was the relevant denominator, which would mean the minimum-lot-size rule arguably generated a large diminution in value. The government

29. *See* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting Frank Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. 1165, 1992 (1967)).

argued that Lots E and F together were the relevant denominator, making the diminution relatively small.[30]

Previous decisions had offered some guidance as to how to define denominators. The Supreme Court had seemingly settled on the notion that in cases of land the denominator is the "parcel as a whole."[31] The significance of this, in the cases previously decided, is that one cannot "conceptually sever" the parcel into subparcels, which are then used as the denominator.[32] There are ambiguities here, but I take it that what the Court had meant in these cases is that one cannot invoke a hypothetical severance of land in determining the denominator. Thus, one cannot divide a single parcel of land into surface rights and as-of-yet unsevered air rights, and treat the air rights as the denominator.[33] Nor can one divide a fee simple of indefinite duration into as-of-yet unsevered time-limited rights and residual rights, with the time-limited rights serving as the denominator.[34] One must take the *actual holding* of the claimant at the time of the regulation to be the relevant denominator.[35]

In what follows, I assume that the injunction against conceptual severance is properly regarded as part of a federal constitutional

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30. *Murr*, 137 S. Ct. at 1941–42.

31. *Penn Central*, 438 U.S. at 130–31; Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 331–32 (2002).

32. *Tahoe-Sierra*, 535 U.S. at 318 (quoting Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993)). *See generally* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1677 (1988).

33. *Penn Central*, 438 U.S. at 130–31.

34. *See Tahoe-Sierra*, 535 U.S. at 331–32.

35. Thus, I assume that if the Penn Central Corporation had previously severed the air rights above Grand Central Station and transferred them to a third party, and the Historic Preservation Commission had thereafter prohibited the third party from developing the air rights, the relevant denominator would be the air rights. Similarly, if a property owner in the Lake Tahoe region had previously entered into a three-year lease for purposes of developing property, and the Regional Planning Commission imposed a three-year moratorium on development, the relevant denominator would be the three-year lease. *Keystone Bituminous Coal* might be thought to run counter to this reading, given that the Court declined to treat a waiver of surface support, an actual holding of some of the mineral rights claimants in the case, as a denominator. But the Court was careful to explain that "the support estate is always owned by either the owner of the surface or the owner of the minerals." 480 U.S. at 500–01. Thus the denominator was properly regarded as the mineral estate plus the waiver of surface support, not the waiver of surface support standing alone. In any event, the Court did not reach the diminution-in-value question because the case was brought as a facial challenge to the statute and the record was "devoid of any evidence on what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act." *Id.* at 501.

definition of denominators. But the issue in *Murr* could not be answered by invoking the rule against conceptual severance. The question was how to define the "parcel as a whole" when a single owner actually owns two contiguous lots. In other words, the question concerned the proper definition of "parcel as a whole" along the horizontal dimension. The Supreme Court had not spoken to this question.[36]

In developing an answer, none of the briefs identified the full range of options. The Murrs and the State of Wisconsin argued that the definition of parcel in this context should be resolved as a matter of state law. They disagreed about what state law required. The Murrs maintained that each lot was a parcel.[37] The State said that under state law the two lots should be regarded as merged into one.[38]

St. Croix County, and the federal government appearing as amicus curiae, argued that the horizontal dimensions of the parcel should not be based on "legalistic distinctions" grounded in state law.[39] Implicitly, this meant that the parcel should be defined as a matter of federal constitutional law. Interestingly, both briefs were quite coy about acknowledging that the case posed a choice between federal and state law. What is clear is that they were worried that developers could manipulate the size and shape of individual parcels in order to bolster takings claims if the matter were left to state law. As to the content of the proper approach to defining the denominator in this context, both litigants proposed a multifactor balancing test.[40]

The Justices split along similar lines. Justice Kennedy's opinion for the majority adopted a federal constitutional-law solution, which took the form of a multifactor balancing test.[41] Perhaps because the briefs did little to develop the choice-of-law issue, Justice Kennedy offered only a cursory justification for federalizing the question. *Board*

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36. For a discussion of lower court cases that had struggled with the horizontal-definition problem and various possible solutions, see John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI L. REV. 1535 (1994).

37. Petitioners' Brief at 24–32, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1459199, at *24–32; Petitioners' Reply Brief at 7–11, *Murr*, 137 S. Ct. 1933 (No. 15-214), 2016 WL 4072806, at *7–11.

38. Brief for Respondent State of Wisconsin at 29–37, *Murr*, 137 S. Ct. 1933 (No. 15-214), 2016 WL 3227033, at *29–37 [hereinafter Brief for State of Wisconsin].

39. Brief for the United States as Amici Curiae Supporting Respondents at 20, 23, *Murr*, 137 S. Ct. 1933 (No. 15-214), 2016 WL 3398637, at *20, *23 [hereinafter Brief for the United States].

40. Brief for Respondent St. Croix Cty. at 52, *Murr*, 137 S. Ct. 1933 (No. 15-214), 2016 WL 3254214, at *52; Brief for the United States, *supra* note 39, at 20–22.

41. *Murr*, 137 S. Ct. at 1946–49.

of Regents v. Roth and the many cases citing the primacy of state law in creating and defining property were not mentioned.[42] Instead, Justice Kennedy stated that "the Court has expressed caution" about the proposition that "property rights under the Takings Clause should be coextensive with those under state law."[43] The only support for the proposition that such "caution" was appropriate was a prior opinion by Justice Kennedy holding that regulations in effect when property is acquired do not automatically become background principles qualifying owner expectations.[44] It is reasonably clear from the opinion that the motive for opting for federal law, following the government submissions, was fear of manipulation of denominators, or "gamesmanship" to use Justice Kennedy's term.[45] In Justice Kennedy's exposition, however, fear of government manipulation to *defeat* takings claims received equal billing with fear of developer manipulation of the size of parcels to *manufacture* takings claims.

Chief Justice Roberts, in dissent, clearly recognized the centrality of the choice-of-law issue, and came down forthrightly in favor of state law.[46] The Chief Justice objected to federalizing the definition of parcel on the grounds that this was contrary to precedent (namely, the many references in the cases to *Board of Regents v. Roth*), and (at least in the majority's formulation) that this confused the question of what property is at stake with the question of whether the regulation constitutes a taking.[47] He also suggested, briefly, that the concern with manipulation was overblown.[48] There was no discussion in either opinion of the possibility of a federal-patterning definition.

My objective in the remainder of these remarks is to offer a different solution to the numerator/denominator puzzle in the context of fixing the horizontal dimensions of an interest in land. My proposal consists

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42. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972), and cases cited *supra* note 5.

43. *Id.* at 1944.

44. *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606 (2001)). The issue in *Palazzolo* was whether a regulatory limitation on the use of property that was in effect when the title to the property was acquired automatically eliminates any investment-backed expectation inconsistent with the regulation. 533 U.S. at 626–27. In keeping with Justice Kennedy's balancing proclivities, the Court held such a limitation was a factor to take into account, but was not dispositive. *Id.* at 626.

45. *Murr*, 137 S. Ct. at 1948.

46. *Id.* at 1953–54 (Roberts, C.J., dissenting).

47. *Id.* at 1953–56 (Roberts, C.J., dissenting).

48. *Id.* at 1953 ("[S]uch obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and discern.").

of what I will characterize as a "thin" federal-patterning definition. One part of the patterning definition consists of the rule prohibiting conceptual severance. Only actual holdings should be considered, not hypothetical holdings.[49] The other part consists of the rule that actual lot lines established under state law presumptively control, subject to an exception if it can be shown that the lines have been deliberately drawn to enhance the prospect of federal constitutional-takings liability. This is a patterning definition rather than a pure-state law approach because it contains federal content—the rejection of conceptual severance and the instruction to treat lot lines as established by state law as presumptively controlling absent manipulation to create liability. It is a thin rather than a thick patterning definition because in nearly all cases the answers generated by these rules will be grounded in state law, rather than federal constitutional law.

The justification for this proposed approach is in three parts. The first consists of the argument that a purely federal definition of parcel injects unnecessary complexity into regulatory takings cases. The second, which is contingent on the form of the federal rule adopted by Justice Kennedy, consists of the argument that a multifactor balancing test is particularly undesirable in determining the denominator in this context. The third is based on concerns about manipulability, cited by the government parties in the *Murr* case and echoed by Justice Kennedy's majority opinion. Justice Kennedy's worry about government manipulation, I argue, can be handled by traditional doctrine that would disregard state law that lacks a fair and substantial basis when used to defeat a federal constitutional right. The government's anxiety about developer manipulation can be handled by building a narrow exception into the patterning definition that would allow courts to disregard lots lines that have been manipulated to manufacture a takings claim.

III. THE COMPLEXITY PROBLEM

My proposed federal-patterning definition would give lot lines as established under state law presumptive effect in fixing the horizontal

49. Although the Court has not offered an explicit justification for the rule against conceptual severance, the most plausible justification would seem to be a concern about potential manipulation of denominators to bolster takings claims. In this respect, the rule against conceptual severance is simply one manifestation of a larger patterning rule disallowing attempts by landowners to manipulate denominators.

dimensions of the whole parcel. One reason is to simplify the inquiry and make it relatively easy for state regulators and state court judges—the first-line enforcers of regulatory takings law—to comprehend and apply in fixing the denominator.

To begin, different states have adopted different approaches to determining the horizontal boundaries of parcels of land. As Wisconsin's Brief pointed out,[50] some states use metes-and-bounds surveys and some follow the federal-rectangular survey. Regardless of which of these basic survey methods is followed, urban land is typically divided into blocks that are, in turn, divided into lots. So you have three different systems that exist in various combinations in different states.

Moreover, states differ as to the legal requirements for establishing parcel boundaries.[51] Some require the formal recordation of plats showing separate parcels in order to give legal effect to individual lot descriptions by survey, others do not. Perhaps most relevant to the *Murr* dispute, some states require the merger of lots as a matter of law when certain things happen, such as contiguous lots coming into common ownership. Others provide that merger occurs only after a formal process initiated by an owner or others when previous lot designations are canceled and new descriptions are issued.

Another consideration is that determining the scope of parcels by these methods serves multiple purposes. Discrete parcels are nearly always used for preparing property tax bills. They are also critical in doing title searches, whether for purposes of preparing deeds of sale, processing land in probate proceedings, or using land as collateral for secured loans. They play a critical role in bankruptcy. For example, if the Murrs' plumbing company went bankrupt before the lots were transferred to the Murr children, Lot F would be an asset of the company in bankruptcy, but Lot E would not.[52]

The state law governing parcel identification also plays a critical role in resolving boundary disputes and adverse possession cases. And most relevantly, state rules for identifying parcels are used in establishing zoning districts and in resolving requests for zoning

50. Brief for State of Wisconsin, *supra* note 38, at 6–7.

51. *See, e.g.*, *id.* at 11–13.

52. Title to Lot F was held in the name of the Murrs' plumbing company between 1963 and 1994, when it was conveyed to their children. *Murr*, 137 S. Ct. at 1940–41 (majority opinion). Lot E was always owned by either the senior Murrs or their children. *Id.* at 1941.

variances, amendments, or special use permits.[53] There is much to be said for using the same set of rules for all purposes. Under current law, which relies on state law, this is possible.[54] Adopting a special federal definition of "parcel" for takings purposes would inevitably mean that there would be two different legal regimes for defining parcels, at least for some purposes.

Another factor to take into account is that local lawyers and officials will have developed significant expertise in applying the relevant state-law rules for ascertaining the horizontal boundaries of land parcels. There is, if you will, significant human capital invested in understanding and applying these rules. In contrast, there is zero expertise at this point in applying a special federal constitutional definition of parcel.

Those of us who spend a lot of time thinking about regulatory takings issues tend to forget how extremely episodic these cases are, relative to the large mass of land transactions that raise other issues.[55] Local property lawyers, state officials, and state judges will be familiar with the state process for defining parcels. It makes sense to piggyback on this local knowledge. Takings cases are sufficiently rare that no relevant expertise is likely to develop for applying a special federal constitutional definition of parcel if it diverges in any significant way from the state definition. Moreover, since regulatory takings challenges will emerge primarily out of fights over zoning, there are particularly good reasons for using the same set of rules for zoning purposes and for resolving occasional constitutional challenges to zoning decisions.

IV. THE BALANCING-TEST PROBLEM

We also have to ask: what would a purely federal constitutional definition of parcel look like? Judging by Justice Kennedy's effort in

53. The *Murr* case arose on a denial of the family's request for a variance from applicable zoning regulations. *Id.*

54. Wisconsin statutory law would seem to point in this direction. *See* WIS. STAT. § 236.28 (2016) ("[T]he lots in [a] plat shall be described by the name of the plat and the lot and block . . . for all purposes, including those of assessment, taxation, devise, descent and conveyance.").

55. An interesting source in this regard is a fifty-state survey of takings law commissioned by an ABA committee. *See* AM. BAR ASS'N CONDEMNATION, ZONING & LAND USE COMM., THE LAW OF EMINENT DOMAIN: FIFTY-STATE SURVEY (William G. Blake ed., 2012). The survey reveals a surprising dearth of authority in many states about how to handle regulatory takings claims.

Murr, it is a kind of bouillabaisse put together from the catch of the day. Justice Kennedy's opinion for the majority said that "no single consideration can supply the exclusive test for determining the denominator."[56] Instead, a "multifactor standard" is required,[57] one that includes consideration of a state law's treatment of the land along with its physical characteristics and prospective value. But even these factors were qualified by the Court. The state-law treatment is relevant only if it is "reasonable."[58] The physical characteristics include "the parcel's associated topography, and the surrounding human and ecological environment."[59] The prospective value must consider benefits from the regulation such as "increasing privacy, expanding recreational space, or preserving surrounding natural beauty."[60] The ultimate question in every case is 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."[61] In short—in what may be the biggest understatement of all regulatory takings jurisprudence—"the question of the proper parcel in regulatory takings cases cannot be solved by any simple test."[62]

I have an innate aversion to multifactor balancing tests. I always suspect that they are a placeholder designed to provide a basis for a decision when the proponent has no theory about how the matter in question should be decided. What multifactor balancing amounts to, in practice, is a delegation of authority to courts to decide matters ex post as they see fit. Such approaches have virtually no predictability. This invites litigation and makes it hard to settle cases. It also undermines the central purpose of having a property regime in the first place, which is to protect expectations about the control and use of resources.

In this particular context, the multifactor approach also yields up a kind of mind-boggling complexity. In effect, the federal definition of parcel requires the use of a multifactor balancing test to define the horizontal dimensions of a parcel, with no predetermined weight given to any of the factors. This is just to figure out what the denominator

56. *Murr*, 137 S. Ct. at 1945.
57. *Id.* at 1948.
58. *Id.* at 1945.
59. *Id.*
60. *Id.* at 1946.
61. *Id.* at 1945.
62. *Id.* at 1950.

should be for doing the numerator/denominator test. The numerator/denominator test, in turn, is just one of three factors under the *Penn Central*–multifactor balancing test. So in effect you have one multifactor balancing test piled on top of another multifactor balancing test. To borrow Maureen Brady's expression, *Murr* is "*Penn Central* squared."[63]

In *Lucas*-type cases, the effect of the multifactor test to define the parcel is effectively to transform a subset of total takings cases (those where there is some question about the horizontal scope of the parcel) into de facto–*Penn Central* cases. If you hate *Lucas* and love *Penn Central*, this is perhaps a good thing. But it seems like a backhanded way to partially overrule *Lucas*, which has turned out to be a pretty harmless precedent in practice.[64] Either way, regulatory takings law, which is already far too complicated and confusing, becomes virtually incomprehensible to all but the most diligent student-note writers. It will be utterly baffling to most local-land use lawyers and state court judges. Given that the Supreme Court has done very little in the forty years since *Penn Central* was decided to clarify the factors it identified there,[65] it is fanciful to think that the Court will provide significant guidance to state court judges struggling to apply the new federal constitutional definition of parcel.

The primary effect of the Court's adoption of an ad hoc, federal constitutional-balancing test for determining the horizontal dimensions of the "parcel as a whole" will be to increase the costs of litigating regulatory takings cases, magnify the uncertainty of the outcome, and give the government another argument that can be used to defeat such claims. If a federal constitutional rule is imperative in these circumstances, the rule adopted by the Wisconsin Court of Appeals—that contiguous lots under the same ownership should always be regarded as a single parcel—would be infinitely preferable.[66] This

63. 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); s*ee also* Nicole Stelle Garnett, *From a Muddle to a Mudslide:* Murr v. Wisconsin, 2017 CATO SUP. CT. REV. 131.

64. *See* Krier & Sterk, *supra* note 2, at 87 (finding that only about 3.5 % of regulatory takings cases involve *Lucas*-type claims and only about half are successful).

65. Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 652 (2012).

66. *See* Petition for Writ of Certiorari at A-1, *Murr*, 137 S. Ct. 1933 (reproducing the opinion in Murr v. Wisconsin, No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. Dec. 23, 2014) (unpublished)). The Court majority expressed doubt about whether the Court of Appeals

would at least be relatively clear and would likely reduce the costs of litigating regulatory takings claims. Sometimes a bit of over- or underinclusiveness can result in more enforcement of constitutional rights than a more fine-grained but confusing and costly approach.[67]

V. THE RISK OF MANIPULATION

Given these objections, what explains the Court's decision to federalize the law for determining the horizontal boundaries of parcels of land for takings purposes? The short answer is that the government parties in *Murr*, and the majority of Justices who joined Justice Kennedy's opinion, were worried about "gamesmanship."[68] Reading the briefs, it is clear that the government lawyers were anxious about manipulation by developers. Especially in the context of subdivision development, developers have considerable discretion in drawing and recording lot lines. The government lawyers worried that if the horizontal scope of parcel is determined wholly as a matter of state law, developers would be able to manipulate the denominator to manufacture plausible regulatory takings claims where they would otherwise not exist.[69]

This is not a completely idle concern. The Solicitor General cited several cases (including *Lost Tree Village*,[70] where the government's petition for writ of certiorari was held for *Murr*) in which a developer sold off the vast majority of lots in a subdivision and then brought a takings challenge against a development restriction on the small number of remaining lots.[71] Although these cases confirm that the risk of manipulation is real, they do not tell us anything about the magnitude of the risk. I would observe, in this connection, that

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had adopted a bright-line rule, but said, "To the extent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology, as distinct from the result." *Murr*, 137 S. Ct. at 1949.

67. *See* Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 920–26 (1999).

68. 137 S. Ct. at 1948.

69. *See, e.g.*, notes 37–40 and accompanying texts. I refer throughout to manipulation by "developers," since real estate developers will be the property owners most frequently involved in regulatory takings disputes. But of course the principles discussed apply to all property owners.

70. Lost Tree Vill. Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015).

71. For other cases allegedly involving gamesmanship by developers, see Brief for the United States, *supra* note 39, at 22–23.

there is no evidence that the Murr family set about to manipulate the demarcation of Lots E and F in order to generate a takings claim. Rather than create federal constitutional rules to head off a perceived risk of manipulation, which may or may not be a significant problem, it would seem to be more prudent to wait until a case of manipulation actually arises before determining whether a federal definition is needed as a response.

A more general point is that, putting aside takings claims, manipulation of lots lines is something that makes property in land a valuable institution. Property is scalable, meaning one can add to or subtract from existing property and still have property.[72] Specifically, the ability of a landowner to subdivide the land into smaller lots or parcels can enhance the value of the land. Similarly, the ability of an owner to acquire contiguous lots and consolidate them into a larger tract can also enhance the value of the land. This is a primary reason why state law gives owners substantial freedom to add to and subtract from existing rights in land, which is another way of saying that state law gives owners the freedom to manipulate lot lines. What is a matter of concern is the potential manipulation of lot lines to create or defeat a constitutional claim for just compensation. It is important that in devising some way to avoid this socially undesirable form of manipulation we do not interfere with the socially desirable forms.

A second and related point is that manipulating denominators to gin up takings claims is not a very promising way to make money in real estate. Regulatory takings claims almost never succeed,[73] and they require a large investment of time and effort in litigation. A much better way to make money is to plat a subdivision in such a way as to sell lots to prospective purchasers at attractive prices. So, one would expect that manipulation to create or defeat takings claims would be relatively rare behavior.

A third consideration is that it is far from clear that local governments need a federal definition of parcel in order to protect themselves from parcel-manipulating developers. If takings claims succeed based

72. *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1713 (2012).

73. Empirical surveys of cases that apply the *Penn Central*-ad hoc test concur that only about ten percent of claimants are successful. *See* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or One Strike Rule?*, 22 FED. CIR. B.J. 677 (2013); Krier & Sterk, *supra* note 2, at 89.

on challenges to local land use regulations, local governments are the ones that have to pay. This should give them ample incentive to develop rules or doctrines *as a matter of state law* that would disallow plats or plat amendments that seem designed to concoct takings claims. For example, a plat that demarcates lots that exactly trace the boundaries of a wetland could be disallowed. An analogy here is the doctrine of abuse of rights, sometimes relied upon by state court judges to refuse to enforce principles of law when they are manipulated to extort money from others or otherwise engage in opportunistic behavior.[74] Under general principles of subsidiarity, it makes sense to see if state law can head off manipulation rather than jumping to federalization of a key component of property law.

Although the danger of manipulation by private developers was the focus of the government lawyers in *Murr*, Justice Kennedy turned the prospect of manipulation into a bidirectional concern. One danger of using state law to define parcels, he wrote, is that a state might define parcel to include multiple tracts only tangentially related to each other or even all property owned by a person, anywhere in the state. These sorts of moves would "improperly . . . fortify" the state against takings claims.[75] He cited no example of this happening in the nearly one hundred years since diminution in value was introduced as a relevant variable in takings cases. Given the general hostility to takings of property by the government—as illustrated by the widespread amendment of state laws in response to the *Kelo* decision[76]—the posited fear of state manipulation of the concept of parcel for the sole purpose of defeating takings claims strikes me as far-fetched. Again, the proper response would seem to be to wait for an actual case of such manipulation before deciding whether a federal constitutional response is warranted.

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74. There is no formal doctrine of abuse of rights in the common law. *See* Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687 (2010). Some have argued, however, that the principle is implicit in the law of equity. Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37 (1995). A prominent common-law case thought to embody the principle is Edwards v. Allouez Mining Co., 38 Mich. 46 (1878) (Cooley, J.) (declining to enjoin a nuisance at the behest of a landowner who purchased property in the hope of extracting a large payment from another property owner).

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

76. *See generally* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 141–64 (2015).

VI. THE PATTERNING-DEFINITION ALTERNATIVE

It nevertheless remains true that five Justices in *Murr* were convinced that manipulation of denominators was a sufficiently worrisome prospect that the definition of parcel, for Takings Clause purposes, could not be left to state law. The solution they adopted was complete federalization. My view, to the contrary, is that the most that is needed to handle the worry about manipulation is a thin federal-patterning definition. In addressing the proper legal response to potential risks of manipulation, one must divide the inquiry between government manipulation to defeat takings liability, and developer manipulation to generate takings liability.

The risk of government manipulation is the risk that state legislatures or courts will change or interpret *state law* in such a way as to expand the scope of parcels—that is, expand the denominator—and thereby shrink diminution in value. This is similar to the risk that has episodically arisen in other contexts when state governments have attempted to manipulate state law to evade or frustrate the enforcement of federal rights.[77] The time-honored way of policing this kind of manipulation of state law is something called the "fair and substantial basis" test.[78] The test applies when some proposition of state law is an antecedent to the enforcement of federal rights. Federal courts, when they suspect that state law has been manipulated to frustrate federal rights, will review a purported change in or reinterpretation of state law to determine whether it has a "fair and substantial basis" in pre-existing state law. Brantley Webb, in a comprehensive note in the *Yale Law Review*, shows that the test is only applied when there are strong reasons to suspect evasion of

77. For a general discussion of the many contexts in which the issue arises, see Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1957–86 (2003).

78. The "fair and substantial basis" test was considered as a possible way of resolving "judicial takings" claims in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 560 U.S. 702 (2010). Justice Scalia's plurality opinion acknowledged that the test has been used in cases that evaded the Court's ability to review federal questions (*id.* at 725–26) but argued that a better formulation, in the context of a judicial takings claim, was whether the state court had eliminated an "established property right." *Id.* at 726. His proposed formulation failed to command a majority. In the context of a state manipulating the state law of land boundaries in order to defeat a regulatory takings claim, the tried-and-true test for dealing with evasions of federal rights seems appropriate.

federal rights. When such evidence is missing, federal courts routinely defer to the state authorities' understanding of state law.[79] This seems to me to provide the answer to Justice Kennedy's worry about state-government manipulation of denominators to defeat takings claims.

The problem of developer manipulation is different. Developers have no power to change state law. Indeed, the danger of manipulation in this context comes about from developers using state law *in a perfectly lawful manner* to make changes in lot lines. Adjusting lot lines is something that developers, like every landowner, have broad discretion to do. The concern is that developers will use the discretion conferred by state law in such a way as to shrink the horizontal dimensions of lot lines, thereby reducing the denominator and making it more likely that they can prevail in a regulatory takings claim. What is needed is some legal basis for judges, when they confront this kind of manipulation, to be able to deem the proper dimensions of a parcel to be something other than what the developer would have them to be. Because the problem here is created by the lawful use of state law to generate a federal constitutional claim where none should exist, the solution must come from federal constitutional law.

To the extent, then, that we credit the danger of developer manipulation of lot lines—as did five Justices in *Murr*—the federal-patterning definition of "parcel as a whole" must include the power to designate the horizontal dimensions of a parcel to be other than what they are under state law. The power to redraw lot lines in this fashion should be exercised only when a court is convinced that the lot lines have been manipulated by a developer in an effort to create or maximize the plausibility of a regulatory takings claim. If not convinced that the lines have been drawn in an effort to manipulate the takings inquiry, the lot lines as established by the developer should be accepted as is and should define the horizontal extent of the relevant parcel.

What kind of evidence should be considered in deciding whether the lot lines are the product of developer manipulation? Obviously, it will be rare to uncover "smoking gun" evidence of intent to draw lot lines to bolster a takings case. At least this will be rare as long as the attorney-client privilege exists. Two types of circumstantial

79. E. Brantley Webb, *How to Review State Court Determinations of State Law in Constitutional Cases*, 120 YALE L.J. 1192 (2011).

evidence would seem to be sufficient to raise a red flag that manipulation is likely occurring.

One type of evidence would be lot lines that are drawn to correspond to the scope of a challenged regulation. For example, if a developer challenges a building set-back regulation and establishes lot lines that exactly correspond to the area required to comply with the set-back provision, this would be strong evidence that the lots lines have been established in an effort to declare the set-back regulation a taking.[80] The same would follow for lot lines that correspond to a wetland, the critical habitat of an endangered species, or an open-space requirement.

A second type of evidence would be lot lines drawn in such a way that they have no plausible commercial value.[81] Here the inference of manipulation is less clear-cut. Sometimes developers make mistakes about what the market will find attractive. But if it appears that lot lines have been drawn in such a way that they have no plausible commercial value, this at least should give rise to further inquiry into whether the motivation may have been to bolster a takings claim.

The main point is that these sorts of inquiries should be undertaken only when the government has a legitimate basis for claiming that lot lines have been manipulated in order to create or bolster a claim of a regulatory taking. Such cases will be unusual. In the ordinary, run-of-the-mill regulatory takings case, the lot lines established under state law should be used in fixing the horizontal dimensions of the "parcel as a whole" for the purposes of computing diminution in value.

VII. THE PROPER DISPOSITION

Suppose I am right that *Murr* should have been resolved by adopting a thin federal-patterning definition that treats lots lines established under state law as presumptively valid unless a court is convinced that the lines have been manipulated to bolster a takings claim. What, then, was the proper measure of the "parcel as a

80. *See, e.g.*, Fee, *supra* note 36, at 1559.

81. This is Fee's test for determining the horizontal scope of the denominator. *See* Fee *supra* note 36, at 1557–62. He would evidently apply this test in all cases, whereas in my formulation it would be relevant only as circumstantial evidence of developer manipulation.

whole" in *Murr*? As previously indicated, there was no evidence the Murrs acquired Lots E and F in an effort to manipulate the numerator/denominator inquiry under federal takings law. Consequently, there was no basis, under my proposed patterning definition, to disregard the relevant definition of parcel under Wisconsin law. So how did Wisconsin law define the parcel in this case: Lot E alone, or Lots E and F merged together?

It turns out that the answer was not very clear. The question boils down to whether Wisconsin, or more accurately, St. Croix County, had a rule of law requiring that contiguous lots be merged into a single lot in circumstances like the one involving the Murrs. Wisconsin's brief relied on the Wisconsin Court of Appeals's decision rejecting the family's request for a variance. That decision said, at one point, that under the relevant county-zoning rules Lots E and F were "effectively merged."[82] But note carefully the qualifier: "effectively." What does effectively merged mean? Does it mean that the minimum-lot size regulation had the same practical effect as if the lots had been merged? This is not the same as saying they were merged as a matter of law.

In the second decision by the Wisconsin Court of Appeals that addressed the Murrs' constitutional challenge, the court said flatly that the transfer of Lot E to the Murr children "brought the lots under common ownership and resulted in a merger of the two lots under [the local ordinance]."[83] But this decision, which was unpublished, was based on the understanding that *for regulatory takings purposes* contiguous lots must always be regarded as merged—an idea expressly disapproved by the U.S. Supreme Court.[84] The Wisconsin Supreme Court declined to review either of the Court of Appeals' decisions in the *Murr* controversy.

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82. Murr v. St. Croix Cty. Bd. of Adjustment, 332 Wis. 2d 172, 184, 796 N.W. 2d 837, 844 (Wis. App. 2011). Several paragraphs later, the court stated: "[M]erger of adjacent substandard lots that come under common ownership will preserve the environment in the same ways that merger of lots already under common ownership would do. The failure to merge would have the opposite effect, with no countervailing property value concern." *Id.* at 184, 796 N.W. 2d at 844. This also falls short of saying that the lots were merged as a matter of law, as opposed to "effectively merged" because of the prohibition of building on "substandard" lots contiguous with another lot.

83. Murr v. Wisconsin, No. 2013AP2828, 2014 WL 7271581, at *1 (Wis. Ct. App. Dec. 23, 2014) (unpublished).

84. *See supra* note 66.

In effect, there was no Wisconsin precedent, before the *Murr* controversy arose, that ruled the St. Croix zoning ordinance required a merger of contiguous lots as a matter of law. The County and the National Association of Counties, as amicus curiae, argued at length that merger provisions have a "long and rich" history and have never been held to cause a taking.[85] This is true but was beside the point. The real question was whether Wisconsin, either through state statute, the local ordinance, state common law, or otherwise, had a mandatory merger rule. As to that question, *only one* authority was cited by the governments—the first Wisconsin Court of Appeals decision in *Murr*. And that decision said only that the lots were "effectively merged," not that they were merged as a matter of law.[86]

In these circumstances, if the Court had concluded that under the relevant federal-patterning definition the scope of the relevant parcel was controlled by state law, the proper course was to remand the case to the Wisconsin courts, with instructions for those courts to clarify whether, under Wisconsin law, a zoning ordinance like the one in St. Croix County requires the merger of contiguous lots *as a matter of law*. Rather than adopting a federal constitutional definition of parcel, which will only be a source of endless confusion and litigation, the U.S. Supreme Court should have asked Wisconsin's courts to clarify what Wisconsin law says about the scope of the relevant parcel. The answer to this question would then establish whether the denominator for the purpose of the regulatory takings claim was one lot or two.

The last thing I should note is that the resolution of the relevant denominator, under Wisconsin property law, would not resolve the regulatory takings question. Even if it turned out that Wisconsin law treated Lots E and F as distinct parcels, it would still be necessary to show that the diminution in value caused by the minimum-lot-size requirement caused a taking of Lot E. The County argued that the highest and best use of Lot E was as an auxiliary holding to Lot F—which, of course, is the current state of affairs. Both lots are owned by the Murrs, and they have a variety of options for developing the two lots together. But it does not appear that the

85. Brief of Amici Curiae National Ass'n of Counties in Support of Respondents, Murr v. Wisconsin, 137 S. Ct. 1933 (No. 15-214), 2016 WL 3383223, at *5–10.

86. *Murr*, 332 Wis. 2d at 184, 796 N.W. 2d at 844.

Wisconsin courts made a specific finding to this effect. The Supreme Court suggested that the reduction in value was on the order of ten percent, but this appears to be based on the assumption that Lots E and F should be treated as merged into a single parcel.[87] The relevant question in determining the diminution in value, assuming Lot E was a separate parcel, required more precisely focused evidence, on remand. What was required was a finding of what Lot E would fetch if it could be sold without restriction versus its value as an auxiliary holding to Lot F. The relevant diminution in value, which we will never know, was almost certainly not great enough to establish a taking under the *Lucas* version of the numerator/denominator test, which requires a complete elimination of beneficial value. What it would mean under the *Penn Central* version of regulatory takings doctrine is, as always, deeply uncertain.

CONCLUSION

To summarize briefly, the horizontal dimensions of "the parcel as a whole" should be determined under a thin federal-patterning definition. That definition, as previous decisions have established, prohibits conceptual severance. It should also permit courts to disregard established lot lines if they have been adopted in an effort to manipulate the regulatory takings inquiry. Otherwise, the horizontal dimensions of the parcel should be determined by the way lot lines have been configured under state law. In the *Murr* case, it was unclear whether Wisconsin law would treat the Murrs' two lots as separate parcels or as a single, merged parcel. The case should have been remanded to the Wisconsin courts for an answer. Even if Lot E standing alone is the relevant parcel, it is far from clear that the minimum-lot-size requirement was a taking, since the lot still had significant value in its current or possible future use in conjunction with Lot F.

Nothing I have said in this Article about the proper approach to defining the denominator should be taken as an endorsement of the diminution-in-value approach to regulatory takings. If anything, the

87. *Murr*, 137 S. Ct. at 1941 (citing the Wisconsin Circuit Court decision, *Murr*, 332 Wis. 2d, at 177–78, 184–85, 796 N.W. 2d, at 841, 844).

hash the Court made of this question in *Murr* strongly supports the conclusion that diminution in value is the wrong test for identifying regulations that should be regarded as a taking requiring just compensation. Here, as elsewhere, the path-dependent nature of the Court's constitutional jurisprudence has led the Court to burrow deeper and deeper into a hole that should not have been dug in the first place. But that is a topic for another day.[88] My point here is that the choice between state and federal law is inevitable given the nature of the right created by the Takings Clause. And the Court would be well served by giving more thought to the possibility of intermediate solutions, such as the federal-patterning definition, before federalizing bits and pieces of doctrine in this area.

88. For a condensed version of my own thoughts on this score, see Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENV'T L. 1, 28–32 (2018).