No *Murr* Tests: *Penn Central* is Enough Already!

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ABSTRACT

Author's synopsis: In Murr v. Wisconsin,[1] *the United States Supreme Court articulated a new Fifth Amendment takings test. The new test muddies the turbid waters of the Takings Clause by creating an additional threshold for property owners, who must now define the relevant property interest prior to proving that government action has "taken" private property. The Court could have reached the same result without resorting to a new test and creating further confusion.*

Prior cases defined the "relevant parcel" in terms of state law and the three Penn Central Transp. Co. v. New York City *factors: the character of the government action, diminution in value, and the economic impact to the landowner.* Murr *departs from that existing law and creates a new threshold that lessens the import of state-specific property law. This new test complicates and elongates the takings claim process. It may make it more difficult for property owners and well-meaning government agencies to identify a valid takings claim.*

In the interests of fairness, predictability, and federalism, courts should defer to local and state laws in determining the parameters of the "relevant parcel." The state laws affecting property rights are inseparable from reasonable investment-backed expectations. Penn Central *should guide "relevant parcel" cases where there is ambiguity in state law or manifest interference with reasonable investment-backed expectations and where there is a significant economic impact—as part of a holistic takings analysis.*

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INTRODUCTION

The Fifth Amendment Takings Clause provides: "nor shall private property be taken for public use without just compensation."[2] The Takings Clause "requires the payment of compensation whenever the government acquires private property for a public purpose."[3] This simple clause has been heavily litigated and is the subject of varying interpretations.[4] The United States Supreme Court has struggled with application of the Takings Clause, using inconsistent applications to the frustration of aggrieved landowners and government agencies.[5]

One point of contention is the "relevant parcel" or "denominator" problem, under which courts and property owners have struggled to define the parameters of the property that has been "taken" by government regulation.[6]

Murr v. Wisconsin presents an unfortunate and unlikely "relevant parcel" conundrum. The parents of the Murr petitioners owned a waterfront lot in Wisconsin and later purchased an adjacent lot as an investment property. Because both lots were substandard in size, they were subject to the State's "merger doctrine" upon being transferred to their children. Because the two lots

2. U.S. Const. amend. V. The Fifth Amendment applies to the states via the Fourteenth Amendment to the U.S. Constitution: "nor shall any state deprive any person of life, liberty or property without due process of law." U.S. Const. amend XIV, § 1; *see also* Chicago Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (holding that the Fifth Amendment is made applicable to the states through the Fourteenth Amendment).

3. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002).

4. *See* Steven J. Eagle, *The Four Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 602 (2014) (stating that "judges, litigants, municipal officials and developers have all tried to make sense of . . . various tests and use them to predict case outcomes."). Professor Eagle posits a fourth factor to the generally-accepted three-factor test. *Id.*

5. *See id.* (stating that the *Penn Central* doctrine "has become a compilation of moving parts that are neither individually coherent nor collectively compatible."); *see also* Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 50 (2017) ("[S]ince the Court first began its quest to carve out bright-line per se takings rules almost thirty-five years ago, scholars, courts, and even Supreme Court Justices have lamented the lack of doctrinal coherence and theoretical foundation in the Court's total takings jurisprudence.").

6. *See* Eagle, *supra* note 4, at 623 ("'Parcel as a whole' is a fetching concept, but is exceedingly difficult and complex to administer in practice.").

merged into a single parcel when the ownership record transferred to one name, the Murr petitioners ("the Murrs") were unable to sell the investment lot separately. The Murrs attempted to obtain a variance, which was denied (although it should have been granted).[7] The Murrs then alleged a taking of their investment property, queuing up the latest chapter in takings and "relevant parcel" jurisprudence.

After the Murrs lost at both the trial court and the Wisconsin Court of Appeals—and the Wisconsin Supreme Court denied review—the U.S. Supreme Court accepted review and created a new test for determining the "relevant parcel" in a takings claim. Adding to the confusion, the new test creates a higher level of proof and a new threshold for takings claims. Now, according to the *Murr* Court, there is a three-part test that a landowner must meet to determine "whether reasonable expectations would lead a landowner to anticipate that [his or her] holdings would be treated as one parcel or as separate tracts":[8]

1. Courts should give substantial weight to the property's treatment, in particular how it is bounded or divided under state and local law;
2. Courts must look to the property's physical characteristics, including the physical relationship of any distinguishable tracts, topography, and the surrounding human and ecological environment;
3. Court's should assess the property's value under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.[9]

The state of takings law is confusing and vague without adding a new three-part test that acts as a prerequisite to a takings claim. Further, the *Murr* threshold concepts are already a part of existing takings analysis, and the test does nothing to clarify the law of the respective rights of parties in takings litigation. It also unreasonably dilutes the role of state law in determining the relevant parcel.[10] Clear state law delineating the parameters of a parcel may ostensibly be trumped by physical characteristics of the property and "the effect of burdened land on the value of other holdings."

In *Murr*, the Wisconsin Court of Appeals got it right in an unpublished decision and the Wisconsin Supreme Court denied review—then the U.S. Supreme Court

7. *See infra* notes 65–73 and accompanying text. *See also* discussion *infra* Part VI.

8. Murr v. Wisconsin, 137 S. Ct. 1933, 1945–46 (2017).

9. *Id.* The dissent discusses a fourth factor: "background customs and the whole of our legal tradition." *Id.* at 1950 (internal citations omitted). This confusing factor further distances the relevance of state law in a "relevant parcel" analysis. *Id.* at 1952.

10. 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) ("Murr's careless treatment of the federalist structure of constitutional property law should make the decision disconcerting not just to takings obsessives, but also to all proponents of federalism and secure property rights.").

granted the Murrs' *writ of certiorari* and amazingly confounded the state of takings law.

The "relevant parcel"—in most takings cases—will ordinarily be determined by a simple application of state property law. In *Murr*, the state law delineated clear lot lines. The combined ownership history of the substandard lots invoked the applicability of the state merger doctrine. There was a single lot for takings purposes. That should have been the end of the inquiry.

I. LEGAL BACKGROUND

A. TAKINGS LAW

The United States Supreme Court has articulated two guidelines for determining when government regulation is so onerous that it constitutes a regulatory taking of a claimant's property under the Fifth and Fourteenth Amendments,[11] triggering the requirement that the government pay "just compensation."[12]

1. *Penn Central*'s Three-Factor Test

The seminal takings case, *Penn Central Transportaion Co. v. New York*, involved an asserted takings claim over the airspace above Grand Central Station in midtown Manhattan. New York City's Landmarks Preservation Commission denied Penn Central's lessee's request to approve plans for construction of a fifty-five story office building over the train station, and Penn Central subsequently alleged a Fifth Amendment taking of rights to use that airspace above the terminal.[13] The appellants contended that the landmarks law deprived it of "any gainful use of their 'air rights' above the terminal and that, irrespective of the value of the remainder of their parcel, the city has 'taken' their right to this superadjacent airspace, thus entitling them to 'just compensation' measured by the fair market value of these air rights."[14] The Supreme Court disagreed, stating that the Penn Central petitioners could not demonstrate a taking simply because they were unable to develop their property in a manner they had previously believed to be possible.[15]

According to the *Penn Central* Court, "when a regulation impedes the use of property without depriving the owner of all economically viable use, a taking still

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11. There is a third takings scenario that is inapplicable here—when government physically invades property, there is a *per se* taking. *See* Loretto v. Teleprompter Manhattan, 458 U.S. 419 (1982).

12. U.S. Const. amend. V.

13. Penn Central Transp. Co. v. New York, 438 U.S. 104, 115–18 (1978). In *Penn Central*, the lessee submitted two plans, one for a 55-story office building that would be cantilevered above the terminal, and the second was a 53-story office building that included removal of some of the terminal's façade. The second proposal was summarily dismissed because "to protect a landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off". *Id.* at 117–18.

14. *Id.* at 130.

15. *Id.*

may be found based on a 'complex of factors' including: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct[16] investment backed expectations; and (3) the character of the government "action"[17] ("the *Penn Central* test"). The *Penn Central* test constitutes an "ad hoc factual inquiry, designed to allow careful examination and weighing of all the relevant circumstances."[18]

The two competing interests that are balanced in a takings analysis are (1) an individual's right to retain the interests and exercise of freedoms that are at the core of private property ownership—the preservation of freedom and the empowerment of an individual to shape and plan their own destiny[19]—; and (2) the government's well-established power to "adjust rights for the public good."[20]

The takings analysis—and the three-factor *Penn Central* test in particular—has been lauded as flexible,[21] but it is mostly decried as maddeningly unpredictable[22] and favoring the government in most situations.[23] As discussed below, the *Murr* test only exacerbates these concerns. It creates more uncertainty and establishes a new threshold for property owners who must satisfy the three *Murr* factors before then turning to the three *Penn Central* factors to prove their takings case.

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16. *Cf*. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (referring to "*reasonable*"—instead of "distinct"—investment-backed expectations).

17. Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017) (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing *Penn Central*, 438 U.S. at 124)). Some commentators have argued there is a fourth factor—the degree to which a small class of property owner is called upon "to bear burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960); *compare* Steven T. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, PENN. ST. L. REV. 601 (2014) (arguing the "parcel as a whole" rule should be a fourth Penn Central factor), *with* 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) (arguing that *Penn Central* "created two, rather than three factors: (1) the impact of the challenged regulation on the claimant, viewed in light of the claimant's investment-backed expectations; and (2) the character of the government action, viewed in light of the principle that actions that closely resemble direct exercises of eminent domain are more likely to be compensable takings.").

18. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002).

19. *Murr*, 137 S. Ct. at 1943.

20. *Id*. "In all instances, the [takings] analysis must be driven 'by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."'" *Id*. (quoting *Palazzolo* at 617–618).

21. *See, e.g*., Wensmann Realty v. City of Eagan, 734 N.W.2d 623, 633 (2007) ("The *Penn Central* approach is flexible with the factors being balanced.").

22. *See, e.g*., Jed Rubenfield, *Usings*, 102 YALE L.J. 1077, 1089 (1993); Richard Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223, 226–27 (2011).

23. Fewer than 10% of regulatory takings claims are successful in lower courts when applying a *Penn Central* analysis. *Lucas* regulatory/wipeout claims have had somewhat more success. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM & MARY L. REV. 35, 58–59 tbl. 2–3 (2016).

2. The *Lucas* "Total Wipeout" Test

According to *Lucas v. South Carolina Coastal Council*,[24] a regulation which "denies all economically viable beneficially or productive use of land will require compensation under the takings clause—unless the regulation is consistent with 'background principles of property and nuisance law.'"[25] This is an important exception to the *Penn Central* test—when a landowner can prove that all economically viable use of the property has been denied.

In *Lucas*, a property owner bought two ocean-front lots in South Carolina for $975,000 in 1976.[26] In 1978, the State passed a Beachfront Management Act that prevented Lucas from building on either of his two lots.[27] He sued, alleging the Act constituted a taking of his property.[28] The U.S. Supreme Court agreed and adopted a new test: a regulation that deprives land of all economically beneficial use is always a taking unless it is consistent with background principles of property and nuisance law.[29]

In other words, if there is a "total wipeout" of all economically viable use of the property, there is an automatic taking unless the government can show the regulations are consistent with preventing a nuisance or preventing conduct that state property law would not have allowed anyway.[30]

Now, a takings petitioner alleging a *Lucas* "total wipeout" of their property interest will have to meet the threshold *Murr* test to define the parameters of a parcel before proving the regulation deprived the petitioner of all economically beneficial use of the property.

B. THE RELEVANT PARCEL ISSUE

Historically, before courts have reached a takings analysis to determine if just compensation is due, they first have to determine the parameters of the property "taken."[31] The "relevant parcel" or "denominator problem" concerns the identification of the property that is the subject of a takings claim, upon which the government has interfered. It is in the claimant's interest to define the parameters of the property taken as narrowly as possible. The government has exactly the

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

25. *See Murr*, 137 S. Ct. at 1943 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001); *see also Lucas*, 505 U.S. at 1029.

26. *Lucas*, 505 U.S. at 1006.

27. *Id.*

28. *Id.* at 1009.

29. *Id.* at 1031.

30. *See also* Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) (extending the *Lucas* "total takings" jurisprudence to instances where the government appropriates personal property such as raisins).

31. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property" and "one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction").

opposite incentive. Government agencies will try to define the relevant property as broadly as possible, to include all the owners' property. This definitional exercise will frequently determine the outcome of the case.[32]

Any analysis of the "relevant parcel" starts with the ubiquitous quote from *Penn Central*, upon which the Wisconsin Court of Appeals and the State of Wisconsin relied:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, *this court focuses rather on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole*—here, the city tax block designated as the 'landmark site.'[33]

Importantly, the *Penn Central* Court was expressly concerned about the "character of the action and the nature and extent of interference with rights in the *parcel as a whole*."[34] The impact to the air rights was considered part of the impact on Penn Central's investment-backed expectations of the entire parcel, as opposed to just an independent impact to the air rights.[35] The *Penn Central* Court consequently included both the air rights and the underlying parcel as a single "parcel as a whole" before looking at the impact of the Landmark Board's ruling and determining there was no taking.

Other courts have struggled with the "relevant parcel" issue after *Penn Central*'s holding that the airspace above Grand Central Station could not be bifurcated from the remainder of the parcel for takings purposes.[36]

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32. *See* Daniel A. Farber, Murr v. Wisconsin *and the Future of Takings Law*, 2017 SUP. CT. REV. 115, 120; *see generally* Murr v. Wisconsin, 137 S. Ct. 1933, 1952 (2017) (Roberts, J., dissenting); Eagle, *supra* note 4, at 623 ("[C]laimants and the government both have strong incentives to manipulate the relevant parcel.").

33. Eagle, *supra* note 4, at 622 (emphasis added); Penn Cent. Transp. Co. v. City of New York, 98 S. Ct. 2646, 2662 (1978).

34. Eagle, *supra* note 4, at 622.

35. *See Penn Cent.*, 98 S. Ct. at 2665 ("[A]ppellants may continue to use the property precisely as it has been used for the past 65 years . . . the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.").

36. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (stating that identifying the relevant parcel for regulatory takings purposes is a "difficult, persisting question."); *see also* Cane Tenn. Inc. v. United States, 62 Fed. Cl. 703 (2004). *Cane Tennessee* involved interests in coal royalties. The petitioners alleged that the government took their property without just compensation when the Secretary of the Interior designated land as unsuitable for surface mining. *Cane Tenn. Inc.*, 62 Fed. Cl. at 706. In finding a taking, the court excluded the royalty interests from the "relevant parcel." *Id.* In making its determination, the *Cane* court invented additional factors for determining the "relevant parcel." "In applying the 'parcel as a whole' rule, not only must the court 'look beyond the regulated portion of the property' . . . the court must also focus on 'the economic expectations of the claimant' with respect to the property." *Id.* at 709. "Additional relevant factual considerations in making the 'parcel as a whole' determination include: (1) the degree of contiguity between property interests; (2) the dates of acquisition of property interests; (3) the extent to which a parcel has been treated as a single unit, and (4) the extent to which the regulated lands enhance the value of the remaining lands." *Id.*

The "relevant parcel" was also at issue in *Lucas*. Footnote seven of the *Lucas* case lays the groundwork for the notion that state law governs the legal parameters of the parcel as a whole:

> The answer to the difficult question of identifying the relevant parcel may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e. whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[37]

In *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, a bi-state regional agency imposed a thirty-two-month building moratorium around Lake Tahoe, so that it could complete a new comprehensive plan for the area.[38] The Supreme Court found there was no taking by looking at the parameters of the moratorium in the context of the "parcel as a whole."[39]

According to the *Tahoe Sierra* Court, "an interest in real property is defined by metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest."[40] The Court looked at the context of the life of the regulated property and determined there was no total wipeout of the value of the property under *Lucas*, despite the fact that the petitioners were unable to build on their property for the entire duration of the moratorium.[41]

II. *MURR V. WISCONSIN* BACKGROUND

A. THE MURRS' PROPERTY

The St. Croix River begins in northern Wisconsin and flows approximately 170 miles util it joins the Mississippi River—it also forms part of the boundary

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37. Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992); *but see* District Intown Props. v. District of Columbia,198 F.3d 874, 880–81 (D.C. Cir. 1999) (applying *Penn Central's* "reasonable investment-backed expectations" test in determining whether an entire lot or each individual subdivided lot constituted a "relevant parcel" for a takings analysis). According to District Intown, "[t]he *Lucas* dictum casts aspersions on the state court's elevation of one factor, unity of ownership, over other factors in determining the relevant parcel. The District Court engaged in no such 'extreme' conduct here; it did not look to all of District Intown's holdings in the vicinity of Cathedral Mansions South to evaluate the economic effect of the regulation at issue here; it looked to contiguous property that was purchased and treated as a single unit by appellants." *Id*. at 881. And "District Intown could not have had any reasonable investment-backed expectations of development given the background regulatory structure at the time of subdivision." *Id*. at 877.

38. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 (2002).

39. *Id*. at 332 ("[A] permanent deprivation of the owner's use of the entire area is a taking of the 'parcel as a whole' whereas a temporary restriction that merely causes a diminution in value is not.").

40. *Id*. at 331–32.

41. *Id*. at 332; *but see* Ark. Game & Fish Comm'n v. United States, 568 U.S. 23 (2012) (stating that a parcel subject to temporary government-induced flooding was not barred from a Fifth Amendment taking claim just because it was not permanent).

between Minnesota and Wisconsin.[42] Approximately twelve miles east of St. Paul Minnesota, near the town of Troy, Wisconsin, the river slows and widens and is referred to as "Lake St. Croix."[43] "Tourists and residents have long extolled the picturesque grandeur of the river and surrounding area."[44]

The two parcels at issue in *Murr v. Wisconsin* lie on the shore of Lake St. Croix. The Murr Petitioners who brought the case to the U.S. Supreme Court are two sisters and two brothers under whose name the two parcels at issue are commonly-owned and recorded (hereinafter collectively referred to as "Murr" or the "Murrs"). The Murrs' parents deeded the two lots to their children, the Murrs, in the mid-1990s.[45]

The relevant chain of title began in 1960, when Murrs' parents bought a lot on the shore of Lake St. Croix near Troy, Wisconsin ("Lot E"). Soon after purchasing the lot, the Murrs' parents built a small recreational cabin approximately 100 feet from the shore of the lake.[46] In 1961, the parents transferred title to Lot E to the family plumbing company on the advice of the family accountant.[47] In 1963, the parents purchased a neighboring lot, which they held in their own names ("Lot F").[48] The lots remained under this separate ownership scheme until the property was transferred to the Murrs. Lot F was conveyed in 1994 and Lot E in 1995.[49]

Each of the two Murr lots at issue is approximately 1.25 acres in total. However, the two lots only contain .48 and .50 acres of land suitable for development because of the area topography.[50] The lots are bisected by a steep 130-foot bluff, with the top and bottom of each lot served by separate roads.[51] Both lots are approximately 100 feet wide.

B. WISCONSIN LAW

The St. Croix River was designated for federal protection under the Wild and Scenic Rivers Act in 1972. Wisconsin law, in concert with federal provisions,[52] also recognizes the lower St. Croix River as part of the national wild and scenic rivers system.[53] The Wisconsin Legislature has consequently charged the State

42. Murr v. Wisconsin, 137 S. Ct. 1933, 1939 (2017).
43. *Id*. at 1939–40.
44. *Id*. at 1940 (citing E. Ellett, Summer Rambles in the West 136–37 (1853)).
45. *Id*. at 1941.
46. *See* Brief for Respondent at 11a, Murr v. Wisconsin, (No. 15-214), 2016 WL 3254214, at 11. There is currently a 200-foot setback requirement from the ordinary high-water mark of the lake. St. Croix County Ord. § 17.36.G.5.c.1.
47. Petition for Writ of Certiorai at 4–5.
48. *Id*.
49. *Id*.
50. Murr v. St. Croix County Bd. Of Adjustment, 796 N.W. 837, 841 (Wis. App. 2010), *review denied* 335 Wis.2d 146 (2011).
51. *Id*.
52. *See* Federal Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (2012).
53. Wis. Stat. § 30.27(1) (2018).

Department of Natural Resources with adopting "by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the lower St. Croix River."[54]

The relevant Wisconsin statutes further state that buildable lots in the Lower St. Croix area, including the Murr property, must have at least one acre of land suitable for development.[55] Adjacent lots under common ownership may not be sold or developed as separate lots if they do not meet the one-acre minimum requirement.[56] This law became effective in 1976 and included a "grandfathering provision" which relaxed the restriction for nonconforming lots which were "in separate ownership from abutting lands" on January 1, 1976.[57] The St. Croix County zoning ordinance contains an identical provision as required by state law, and the County permits variances from the applicable regulations for "unnecessary hardship."[58]

The wide-ranging purposes of Wisconsin's corollary to the Wild and Scenic Rivers Act are to:

> (1) Reduc[e] the adverse effects of over-crowding and poorly planned shoreline and bluff area development;
> (2) Prevent soil erosions and pollution and contamination of surface water and groundwater;
> (3) Provid[e] sufficient space on lots for sanitary facilities;
> (4) Minimize[e] flood damage;
> (5) Maintain property values;
> (6) Preserv[e] and maintain the exceptional scenic, cultural, and natural characteristics of the water and related land of the Lower St. Croix Riverway.[59]

The State is also expressly trying to ultimately phase out substandard lots in the long term;[60] and:

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54. *Id.* § 30.27(2).

55. Wis. Admin. Code §§ NR 118.04, 118.03(27), 118.06(1)(b) (2017). The land suitable for development is the "net project area," which is defined as "developable land are minus slope preservation zones, flood plains, road rights-of-way and wetlands." *Id.* § NR 118.03(27). The Murrs' two parcels, even when combined, do not meet the minimum "net project area."

56. *Id.* § NR 118.08(4)(a)(2).

57. 438 U.S. 130. *See* Murr v. St. Croix Cty. Bd. of Adjustment, 796 N.W. 2d 837, 844 (2011) ("the intent of the exception for existing lots is to protect people who acquire the property before the ordinance was passed from being deprived of their property value.").

58. Wis. Admin. Code § NR 118.09(4)(b); ST. CROIX CTY., WIS., ORDINANCE § 17.09.265 ("Unnecessary Hardship: Where special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions governing areas, setbacks, frontage, height or density unnecessarily burdensome or unreasonable in light of the purposes of this ordinance.").

59. ST. CROIX CTY., WIS., CODE OF ORDINANCES, LAND USE AND DEV. SUBCH. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DIST. § 17.36.

60. Oral Argument at 41, Murr v. Wis., 137 S. Ct. 1933, (No. 15-214), 2016 WL 1048381 (2017).

> Uncontrolled use of the shorelands and pollution of navigable waters of the County adversely affect the public health, safety, convenience and the general welfare and impairs the tax base. The state legislature has delegated responsibility to the counties to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and land uses, and preserve shore cover and natural beauty.[61]

C. THE ROAD TO THE U.S. SUPREME COURT

The Murrs wanted to reconstruct their vacation cabin on higher ground using fill, due to repeated flooding of their waterfront lot.[62] Working with the town planning commission, the Murrs requested a new building site further from the river to reduce the environmental impact.[63] The Murrs also requested eight variances[64] or special exception permits in connection with their desire to rebuild the cabin: (1) a variance to sell or use two contiguous substandard lots in common ownership as separate building sites; (2) a variance to reconstruct and expand a nonconforming structure outside its original footprint; (3) a variance to fill, grade, and place a structure in the slope preservation zone; (4) a special exception to fill and grade within 40 feet of the slope preservation zone; (5) a special exception to fill and grade more than 2000 square feet; (6) a variance to construct retaining walls and stairs inside the ordinary high-water mark setback; (7) a variance to reconstruct a patio within the ordinary high-water mark; and (8) a variance to construct a deck within the ordinary high-water mark setback.[65]

The St. Croix County Board of Adjustment held a public hearing on the Murrs' application and denied all eight requests in a written decision.[66] Both the County's zoning staff and state Department of Natural Resources opposed the Murrs' application.[67] The Murrs subsequently sought review before the Circuit Court and prevailed on seven of the eight requests, overturning the Board of Adjustment. Only the denial of the Murrs' request to sell or use two contiguous lots in common ownership was upheld.[68] The Court of Appeals reversed the Circuit Court's decision and reinstated the Board of Adjustment's ruling denying

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61. ST. CROIX CTY., WIS., CODE OF ORDINANCES SUBCH. IIII. SHORELAND ZONING § 17.26 (2).

62. The lot lies in a floodplain. *See* Brief for Respondent at 13, Murr v. Wis., (No. 15-214), 2016 WL 3254214, at 13.

63. *Id*. at 3a.

64. The County Code defines a variance as "an authorization by the Board of Adjustment for the creation, modification, or maintenance of a building or structure in a manner that deviates from dimensional standards (not uses) contained in this ordinance." ST. CROIX CTY., WIS., CODE OF ORDINANCES § 17.09.233.

65. Murr v. St. Croix Cty. Bd. of Adjustment, 796 N.W.2d 837, 841 (2011).

66. *Id*.

67. *Id*.

68. *Id*.

all eight of the Murrs' requests.[69]

The Court of Appeals found in favor of the Board of Adjustment because the Murrs' interpretation of the Wisconsin code did nothing to protect property values; unnecessarily and arbitrarily provided greater rights to subsequent substandard lot owners than to those who owned at the time of the provisions' effective date; and failed to preserve the visual and ecological environment.[70] The court also found that the Murrs were charged with knowledge of existing zoning laws[71] and that "merger of adjacent substandard lots that come under common ownership will preserve the environment in the same way that mergers of lots already under common ownership would do. The failure to merge would have the opposite effect, with no countervailing property value concern."[72]

After this loss at the Court of Appeals, the Murrs subsequently brought a takings claim—under the Wisconsin Constitution[73]—against the State and County, alleging that they had been "deprived of all or practically all of the use of Lot E because the lot cannot be sold or developed as a separate lot."[74] The Circuit Court ruled in favor of the County and State on summary judgment, first finding that the claim was time barred because "the Ordinance 'had immediate economic consequences' when it was enacted."[75] Despite this finding, the Circuit Court reached the merits of the Murrs' claim, determining "the applicable law required it to look at the effect of the Ordinance on the Murrs' property as a whole, not each lot individually."[76] The Circuit Court held there was not a taking "because the Murrs' property, taken as a whole, could be used for residential purposes," including a residence on top of the bluff, entirely on Lot E, entirely on Lot F, or could straddle both lots.[77] Further, the court found the Murrs' merged lots "retained significant value, citing an appraisal opining that the merger decreased the property value by less than ten percent."[78] In an unpublished opinion, the Court of Appeals—in *Murr v. State*—affirmed the Circuit Court, dismissing the Murrs' takings claim.[79]

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69. *Id.*

70. *Id.* at 844.

71. *Id.* (citing State *ex rel.* Markdale Corp. v. Bd. of Appeals of Milwaukee, 27 Wis.2d 154, 162, 133 N.W.2d 795 (1965); *see also* Murr v. State, No. 2013AP2828, 2014 WL 7271581, at *8 (Wis. Ct. App. Dec. 23, 2014) ("In sum, the Murrs knew or should have known that their lots were 'heavily regulated from the get-go.'" (citing R.W. Docks & Slips v. State. 628 N.W.2d 781 (Wis. 2011))).

72. *Murr*, 796 N.W.2d at 844.

73. Wis. Const. art. I, § 13 ("The property of no person shall be taken for public use without just compensation therefor").

74. *Murr*, 2014 WL 7271581, at *2.

75. *Id.* (internal alterations omitted).

76. *Id.*

77. *Id.*

78. *Id.* The Murrs disagree with this conclusion and argued that the record includes expert opinions that Lot E is "up to 90% less valuable than land that can be independently developed." *Id.*

79. *Id.*

To prove a regulatory taking under Wisconsin Law, "in the absence of physical occupation, the facts alleged must demonstrate that a government restriction 'deprives the owner of all, or substantially all, of the beneficial use of his property.'"[80] A court must first, however, determine "what, precisely *is* the property at issue;"[81] and the "United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ."[82] Courts are to focus "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[83]

In the Murrs' takings action, the Court of Appeals found "there is no dispute that the Murrs own contiguous property, and their property suffices as a single, buildable lot under the ordinance. Regardless of how the property is subdivided, contiguousness is the key fact . . . ."[84] Further, the well-established rule in Wisconsin is that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."[85] With respect to the Murrs' argument that they had always intended to develop or sell lot E individually, the court stated this was an argument under the *Penn Central* factors, assessing the degree to which the regulation interfered with the owner's investment-backed expectations.[86]

The Wisconsin Supreme Court denied the Murrs' request for review, and the U.S. Supreme Court granted certiorari, ostensibly to provide guidance on the "relevant parcel issue." The question presented to the Court by the Murrs in their writ of certiorari was: "in a regulatory taking case, does the 'parcel as a whole' concept described in Penn Central Transportation Company v. City of New York, 438 U.S. 104, 130–31 (1978) establish a rule that two legally distinct, but commonly owned continuous parcels must be combined for takings analysis purposes?"[87]

D. THE *MURR* DECISION

Against this backdrop of "relevant parcel" jurisprudence, the *Murr* Court took a relatively simple matter—which should have been decided under the applicable

80. *Id.* at *1 (citing Howell Plaza, Inc. v. State Highway Comm'n, 226 N.W.2d 185 (1975)).

81. *Id.* at *4 (emphasis in original) (citing Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996)). In *Zealy*, the landowner argued that a City had taken his property when it created a conservatory district over 8.2 acres of his 10.4 acre parcel, precluding development over most of the property. The court rejected the owners attempt to segment the parcel, concluding a 'landowner's property in such a case should be considered as a whole.'" *Id.*

82. *Id.*

83. *Id.* (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978)).

84. *Id.*

85. *Id.* at *5.

86. *Id.* at *8.

87. Petition for Writ of Certiorari at 1. The assumption that the parcels are "legally distinct" as stated in the "question presented" is not predetermined as the Murrs suggest, but is rather the gravamen of the Court's inquiry. See, e.g., *Murr*, 2014 WL 7271581, at *5 ("contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.").

state law—and invented a new test with far reaching implications for the future of Fifth Amendment takings jurisprudence.

The straightforward question before the court was: "what is the proper unit of property against which to assess the effect of the challenged governmental action?"[88] Put another way, "[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."[89] In framing the question as such, the Court takes a broad perspective of the relevant parcel issue generally, rather than focusing on the merger doctrine that was before the Court.[90]

The *Murr* Court begins by identifying two concepts for identifying the relevant parcel, which can be "unduly narrow."[91]

First, courts do not limit the scope of the relevant parcel in an artificial manner, to the portion of property to which the regulation is targeted.[92] The Court cites approvingly to the ubiquitous *Penn Central* clause: "takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[93] The Court also cites to *Tahoe Sierra*, noting that "defining the property interest taken in terms of the very regulation being challenged is circular" and that approach would overstate the effect of the regulation on the property, turning every delay into a total ban."[94]

Second, the *Murr* Court takes the view that property rights under the Takings Clause should be coextensive with those under state law.[95] The Court then notes that "no single consideration can supply the exclusive test for determining the denominator.[96] Instead the court must consider a number of factors."[97]

The Court then sets forth the new test consisting of three factors that must be weighed in determining the relevant parcel at issue ("the *Murr* Test").

First, courts should "give substantial weight to the treatment of the land, in particular how it is bounded or divided under state and local law."[98] The court then discusses how this factor should be considered in the context of the "reasonable expectations of an acquirer of land" and the "legitimate restrictions affecting the

88. Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017).
89. *Id*. at 1943–44.
90. *Contra* note 88 and accompanying text (question presented in the Murrs' writ of certiorari).
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*. at 1945.
97. *Id*.
98. *Id*.

use and disposition of the property."[99] A state restriction that predates the claimant's acquisition, however, can still be one factor that landowners may consider in forming those reasonable expectations about the use of their property.[100] In other words, the first factor of the *Murr* three-part test is largely a restatement of the "reasonable expectations" prong of the *Penn Central* test.

Under the first prong of the *Murr* test, the Court noted the legislative purpose of the merger provision and the fact that the Murrs acted voluntarily in merging the two lots under the applicable rule.[101] "As a result, the "valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property."[102]

Second, "courts must look to the physical characteristics of the landowners' property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation"[103] In other words, a court should assess the reasonable expectations of the landowner to the extent those expectations are reasonably guided by regulations that normally accompany land with distinguishing characteristics (such as proximity to the shoreline). This is reminiscent of the "reasonable expectations" and the "character of the government action" prongs of *Penn Central*.

Under the second prong of the *Murr* test, the Court noted that the unique topography of the parcels "make[s] it reasonable to expect their range of potential uses might be limited" and "[p]etitioner could have anticipated public regulations might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land."[104] The Murrs should have adjusted their reasonable expectations for development accordingly, since this was a shoreline area marked by steep bluffs. Further, the character of the government action is environmental protection of a sensitive river environment—a laudable regulation under the federal Wild and Scenic Rivers Act that applies to an expansive area.

The third prong of the *Murr* three-part test is simply the "economic impact" prong of the *Penn Central* test. According to *Murr*, "courts should assess the

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99. *Id.* (citing Ballard v. Hunter, 204 U.S. 241, 262, 27 S.Ct. 261 (1907)) ("of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings.").

100. *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 627, 121 S. Ct. 2448 (2001)) ("some enactments are unreasonable and do not become less so through passage of time or title.").

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

102. *Id.*

103. *Id.* at 1945 (citing Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J. concurring) ("coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.")).

104. *Id.* at 1948.

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."[105]

Under the third prong of the *Murr* test, the Court stated that the merger law restricting the alienation of one of their lots "is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements."[106] The Court also noted that the combined value of the lots together under the merger provision was $698,300, "which is far greater than the summed value of the separate regulated lots."[107] There was, therefore, little economic impact.

In sum, the three-part test articulated by the *Murr* Court could have easily been couched as simply providing guidance for courts to implement a *Penn Central* analysis to determine the "relevant parcel" in a takings case.

Next, the Court rejects the state's quest to adopt a "formalistic rule" to guide the relevant parcel inquiry.[108] Wisconsin, according to the *Murr* Court, argued in favor of tying the definition of the relevant parcel to state law, noting the footnote in *Lucas* which "suggests the answer to the denominator question may lie in how the owner's reasonable expectations have been shaped by the state's law of property—i.e. whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."[109]

The *Murr* Court declined to go as far as Wisconsin had urged. According to *Murr*, the new test "considers state law, but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property."[110] However, the *Murr* Court's rejection of the state's argument does little to provide guidance to the relevant parcel analysis. It confuses the application of state law by encouraging courts to look beyond jurisdictional borders.[111]

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105. *Id.* at 1946.

106. *Id.* at 1948.

107. *Id.* at 1949. Petitioners dispute this contention. Petitioners' Brief on the Merits at 2 (Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 4072806 ("Such factual disputes regarding appraisal methods and the degree of economic impact are subjects properly left for determination on remand.").

108. *Id.*

109. *Id.* at 1946; *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

110. *Murr*, 137 S. Ct. at 1947.

111. *See id.* at 1956 (Roberts, J., dissenting) ("Today's decision 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."); *see also* Brady, *supra* note 10, at abstract ("Despite its resort to multiple factors to determine the relevant unit of property, *Murr* is most striking because of an important one it minimizes: state-specific positive law.").

E. *PALAZZOLO* DOESN'T HELP

In *Palazzolo v. Rhode Island*, the Supreme Court found that a change in ownership does not extinguish a takings claim.[112] The Murrs had relied on *Palazzolo* for the proposition that the change in ownership from the parents to the children did not extinguish their right to bring a taking claims.[113]

In *Palazzolo*, the aggrieved landowner formed a company with some partners to purchase three lots constituting approximately twenty waterfront acres of investment land in Westerly, Rhode Island.[114] The landowner subsequently bought out his partners and became the sole shareholder of the company. Soon thereafter, he tried to develop the property, which involved filling wetlands. Each development proposal was denied due to the adverse environmental impact.[115]

Several years later, in 1971, the State of Rhode Island adopted new regulations that prohibited filling in wetlands. In 1978, the company stopped paying taxes, and its charter was revoked, which had the effect of transferring title of the property to the sole shareholder, the landowner.[116] In 1985, the landowner again tried to develop his property and his permit application was denied because of the 1971 regulations. He sued, claiming the law violated the Takings Clause under *Lucas v. South Carolina*.[117]

The state argued that because the law passed in 1971 and the landowner took ownership in 1978, his takings claim fails because he acquired the property subject to the new law.[118] The State of Rhode Island asserted that post-enactment purchasers cannot challenge a regulation as a takings claim because property rights are created by the state, and prospective legislation by the state shapes reasonable investment-backed expectations so subsequent owners cannot claim injury from lost value, because they purchased (or took title) with advance notice of the regulation.[119]

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112. *See* Oral Argument at 9, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1048381. ("In Palazzolo, all we said was that if the seller has a takings claim, it's not extinguished just because the property is transferred; that the buyer could have the exact same takings claim.") (Kagan, J.).

113. *See* Petitioners' Reply Brief on the Merits at 12–16, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 4072806. ("[*Palazzolo*] undercuts the notion that changed expectations resulting from enactment of the challenged ordinance can define the takings claim, or the relevant parcel."); *see id.* at 14 (arguing that a claim that the Murr siblings have "no reasonable expectation because the restrictions were already enacted, is to put an expiration date on the takings clause, as described in *Palazzolo*"); *see also* Oral Argument at 8, 9, 18, 19, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1048381 (Petitioner discussing to *Palazzolo*.).

114. Palazzolo v. Rhode Island, 533 U.S. 606, 613 (2001).

115. *Id.* at 614.

116. *Id.*

117. *Id.* at 615–16.

118. *Id.*

119. *Id.* at 627.

The *Palazzolo* court rejected the state's reasoning:

> Were we to accept the State's rule, the post-enactment transfer of title would absolve the state of its obligation to defend any action restricting land use, no matter how extreme and unreasonable. A state would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[120]

Therefore, a taking cause of action is not extinguished by the sale of property–even if a purchaser is aware of the regulation and pays a reduced price for the land because of it. As the Court put it, "the State may not put so Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions."[121]

Although *Palazzolo* stands for the proposition that a takings claim is not extinguished because of a change in ownership,[122] the facts do not neatly support the Murrs' arguments.[123] Unlike *Palazzolo*—where both the prior and the current property owner had the same takings claim—the Murrs' parents did not have a takings claim due to the 1975 merger law because they were "grandfathered" in and presumably could have sold either of the lots independently if they so wished.[124] The two lots only merged into one—precluding separate sale of the previously independent lots—when both lots came under common ownership of the Murr children in the mid-1990s. Putting the two lots into common ownership was a voluntary exercise that triggered the merger doctrine. *Palazzolo* is inapplicable.

III. MOVING FORWARD—*PENN CENTRAL* REALLY IS ENOUGH

The situation in *Penn Central* is fundamentally the same as the situation in *Murr*. Although the Murrs may have believed Lot F was available for development (despite Wisconsin's merger statute), the bare denial of the ability to develop that parcel did not establish a taking. The Murrs voluntarily put

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120. *Id.*

121. *Id.* The Court ultimately rejected Palazzolo's takings argument, even though the applicable wetlands regulations reduced the value of the property from $3.2 million to $200,000. Palazzolo argued for a total taking under *Lucas* but the Court ultimately remanded for a *Penn Central* analysis. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992); *see also* J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 759–60 (2017) (parsing Justice Kennedy's famous *Palazzolo* quote about Locke and Hobbes).

122. *See Palazzolo*, 533 U.S. at 626–27 ("The theory underlying the argument that post-enactment purchasers cannot challenge a regulations under the Takings Clause seems to run on these lines: Property rights are created by the state" and "regulations that are unreasonable or onerous do not become less so through passage of time or title").

123. *See, e.g.*, Petitioners' Reply Brief on the Merits at 13, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 4072806 ([T]he transfer of title from the parents to the children vests the same property interest as was held by the parents.").

124. *See supra* note 25 and accompanying text.

substandard Lots E and F into the same ownership names after the merger law had passed, and there is no serious question whether they are subject to the merger statute and that the lots have effectively merged into one for both takings and development purposes. The law is clear that one takes property subject to the applicable laws and mistake or misunderstanding cannot be a justification for separating Lots E and F when defining the relevant parcel in a takings case.[125] Every decision maker in the procedural history in the *Murr* case—from the St. Croix County Board of Adjustment to the United States Supreme Court—has made this determination.

In *Penn Central*, the relevant parcel was the entire parcel as recognized under state law—not just the airspace that was disproportionately limited by the applicable landmarks regulation. In *Murr*, the relevant parcel was the entire parcel as recognized under state law—not just the historic parcel that the family was unable to sell separately.

In *Murr*, as in *Penn Central*, the analysis begins and ends with this simple application of state law in determining the "parcel as a whole." The Wisconsin Code and the County laws apply, the two substandard lots under common ownership have merged into one and there is no taking. This is not a complicated case. The Wisconsin Court of Appeals got the outcome right in an unpublished decision.[126] There was really nothing to see here. The parcel, when viewed as a whole, as required by *Penn Central*, is the single lot constituting a combination of historic Lots E and F under the applicable state law. To hold otherwise would be to portion off the entire property interest in identifying the relevant parcel—a proposition directly rejected by the U.S. Supreme Court in myriad decisions.[127]

Reasonable investment-backed expectations are inseparable from the claimants understanding of the state law defining the parameters of the parcel.

To the extent there is an ambiguity over the parameters of the relevant parcel or state law in creating the parcel has itself arguably effected a taking, a property owner may then turn to balancing the three *Penn Central* factors as part of a

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125. *See* Murr v. State, No. 2013AP2828, 2014 WL 7271581, at *8 (Wis. Ct. App. Dec. 23, 2014) ("Because Murr is charged with knowledge of existing zoning laws, as a subsequent owner she was already in a better position than any person who owned at the [Ordinance's effective date].") (citing State *ex rel*. Markdale Corp. v. Bd. of Appeals of Milwaukee, 27 Wis.2d. 154, 162 (1965)).

126. *Contra Murr*, 137 S. Ct. at 1956 (Roberts, J. dissenting) ("As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state principles, Lots E and F are legally distinct parcels of land."). The Court of Appeals engages in an analysis of the Murr's reasonable investment back expectations, but it was unequivocal in its application of Wisconsin law: "There is no dispute that their property suffices as a single, buildable lot under the Ordinance." *Murr*, 2014 WL 7271581, at *5. This should not be a matter of applying "general state principles" as Justice Roberts urges—the applicability of the merger law is clear.

127. *See, e.g*., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) ("'Taking' jurisprudence does not divide a single parcel into discrete segments in an attempt to determine whether rights in a particular segment have been entirely abrogated.") (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978)).

holistic takings analysis. In the *Murr* case, the 1975 enactment of the merger ordinance did not effect a taking, since the lots did not merge under the local ordinance until they were put into the same ownership names. The Murrs argue that the taking is effected by "application"—not the enactment—of the ordinance.[128] However, there is no serious contention the law is ambiguous. Going beyond the parameters of state law to define the relevant parcel should be a highly unusual situation. The *Murr* test may open up floodgates of creative arguments that the scope of a parcel should be determined by something other than state law[129]—including the property laws of other states. A petitioner may now argue that the relevant parcel is something other than the parameters established by clear state law—by relying on the topography of the land and "the effect of burdened land on the value of other holdings."

As a practical matter, the relevant parcel test is *already* incorporated into the *Penn Central* factors, and a petitioner alleging a regulatory taking is (present case aside) not normally going to argue the relevant parcel case in a vacuum.[130] The petitioner will incorporate the *Penn Central* factors into the understanding of the parameters of the relevant parcel—including the reasonable investment-backed expectations of using the property within the boundaries defined by state law, the character of the government action in recognizing those property boundaries, and the economic impact of limiting those boundaries.

Counsel for the State of Wisconsin warned against creating "Penn Central Squared" if the Court were to incorporate the *Penn Central* factors into a "relevant parcel" analysis.[131] However, absent a *Loretto*-style physical invasion, the *Penn Central* factors are going to be squarely before the Court and argued in a petition.[132]

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128. Petitioners' Brief on the Merits at 2, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1459199. The Murr's argument here isn't entirely clear. *See* Oral Argument at 7, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1048381 ("The taking occurs in 1975 when the regulations redefined property rights."). In any event, there could have been no valid takings claim when the 1975 law passed since the Murr parents could have sold Lot E via the "grandfather clause." *See supra* note 25 and accompanying text.

129. *See Murr*, 137 S. Ct. at 1954 (Roberts, J., dissenting) ("There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.").

130. And even in *Murr*, the Court considered the *Penn Central* factors in delineating the "relevant parcel" in both the opinion and in oral argument. *See* Oral Argument at 19–20, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1048381.

131. Oral Argument at 35, 46, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1048381.

132. Even then, petitioners will argue *Penn Central* in the alternative. A government defendant may also raise the "relevant parcel" issue as an affirmative defense to a takings claim, alleging that the petitioner has miscalculated the parameters of the property interest alleged to have been "taken." Under *Loretto*, even a minor permanent physical occupation of property constitutes a per se compensable Fifth Amendment taking. Loretto v. Teleprompter Manhattan, 458 U.S. 419, 434–35 (1982). *Loretto* involved the government-sanctioned installation of cable boxes on private property in New York City. *Id.* at 423.

The *Murr* test *itself* creates a quasi-*Penn-Central* Squared situation—"the government's regulatory interest comes into play not once, but twice—first when identifying the relevant parcel and again when determining whether the regulation has placed too great a regulatory burden on that property"[133]—both times applying a *Penn Central* analysis!

The Court of Appeals in *Murr v. State*, after determining that the two parcels were clearly subject to the merger law, dismissed the Murrs' claim on both "parcel as a whole" and *Penn Central* grounds:

> In sum, the Murrs knew or should have know that their lots were "heavily regulated from the get-go." This reasoning also disposes of the Murrs' assertion that they have always intended Lot E to be developed or sold individually. We regard this as an argument under the factor assessing the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property. The Murrs presumably knew that bringing their substandard, adjacent parcels into common ownership resulted a merger under the ordinance. Accordingly, even if the Murrs did intend to separately develop or sell Lot E, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after having acquired Lot F in 1994. In short, the Murrs "never possessed an unfettered 'right'" to treat the lots separately.[134]

The unremarkable notion that the identification of the parameters of the "relevant parcel" lies—in part—on the reasonable expectation of the owner, as identified in state law, was also emphasized in *Lucas*:

> The answer to the difficult question of identifying the relevant parcel may lie in how the owner's reasonable expectations have been shaped by the State's law of property–i.e. whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the interest in land that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law.[135]

The *Murr* Court of Appeals also looked at the first prong of *Penn Central* in finding there was no genuine issue of material fact with respect to the decrease in property value:

> The Murrs disagree with the circuit court's conclusion that the property decreased in value by less than ten percent when considered as a whole versus

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

134. Murr v. State, No. 2013AP2828, 2014 WL 7271581, at *7 (Wisc. Ct. App. Dec. 23, 2014) (citing Murr v. St. Croix Bd. of Adjustment, 796 N.W.2d 837 (2011)).

135. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992); *accord Murr*, 137 S. Ct. at 1948 ("[T]he valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property.").

> two separate lots. Rather, the Murrs ague the record includes expert opinions that Lot E is "up to 90% less valuable than land that can be independently developed."
>
> Any disagreement between experts as to the value of the property does not create a genuine issue of material fact in this case. The Murrs' valuation argument assumes that they had an unfettered right to use their land as they pleased at the inception their ownership. This is not so. The Ordinance was on the books for nearly two decades before the Murrs became the common owners of Lots E and F.[136]

Finally, in furtherance of the final *Penn Central* factor, the character of the government action here is to eliminate substandard lots in environmentally sensitive areas without adversely affecting property values. In *Murr*, the State of Wisconsin was pursuing an important goal of protecting environmentally sensitive areas and it was reasonable to expect that property owners would adjust their reasonable investment backed expectations accordingly. The environment is better served by lesser development along the shoreline.[137]

Prof. Richard Epstein, a leading scholar in takings law,[138] erroneously disputes this point, stating:

> Justice Kennedy at no point asks the simple question whether the environmental risks that come from someone building on that second part of plan are greater because the two lots were merged by operation of state law. The answer is clearly no. At this point, Justice Kennedy's stated concern with the 'fragile' nature of the local environment drops out because, given all the other substantive restrictions that are in place, the environmental issues are no greater here than they are under the alternative scenario where the conveyancing niceties had been observed.[139]

In so stating, Epstein loses the proverbial forest for the trees. Wisconsin's merger doctrine, as applied in *Murr* and any similar other case, limits development of all substandard lots along shorelines in furtherance of legitimate environmental objectives.[140] The parcels at issue in Murr are not the only ones affected

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136. *Murr*, 2014 WL 7271581, at *7.

137. *See supra* notes 25–27 and accompanying text (discussing the policy behind Wisconsin's corollary to the Wild and Scenic Rivers Act).

138. Richard Epstein is the Laurence Tisch Professor of Law at New York University School of Law. His writings were cited in both *Lucas*, 505 U.S. at 1015, and Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

139. Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J. L. & LIBERTY 151, 173–74 (2017); *see id*. at 179 ("[it] is hard to see any justification for the [merger] ordinance. Clearly, an ordinary cabin on Lot E is no more a nuisance than the cabin already on lot F, or indeed for any cabin along the St. Croix River."). It is not, however, a single cabin but the cumulative effect of greater waterfront development.

140. *See supra* notes 25–27 and accompanying text*; see also* Göran Sundblad & Ulf Bergström, S*horeline Development and Degradation of Coastal Fish Reproduction Habitats*, Ambio, 2014 Dec; 43 (8): 1020, 1020 ("Shoreline construction is a slow process that alters the environment over human

by the merger law—the effect of new development is cumulative. The character of the government action prong of *Penn Central* therefore supports the application of the state merger doctrine in defining the "relevant parcel."

In accord, the *Murr* Court of Appeals' analysis demonstrates that parties and courts are already looking first to state law in the context of the relevant parcel. Although not a perfect solution, state-defined property interests are a better predictor of the "parcel as a whole"—when coupled with the *Penn Central* factors—than the test articulated by the Supreme Court in *Murr*. In fact, simple reliance on state law is reinforced by the *Penn Central* factors themselves.

IV. LET THE STATES DECIDE (UNLESS THEY SHOULDN'T)

The clear majority of Fifth Amendment takings cases should be settled under this simple maxim: State law dictates the parameters of the "relevant parcel."[141]

This is a straightforward and predictable rule that is not a significant departure from the pre-*Murr* state of the law. Property owners (including the Murrs) and government entities are better equipped to assess their rights under state and local laws than they are to predict the outcome of *Penn Centrals*' three-part ad hoc balancing test *combined with* the new test articulated by the U.S. Supreme Court in *Murr v. Wisconsin*. Each state may have its own peculiarities about the application of property law—an issue about which the Supreme Court expressed concern[142]—but in each case, locals are better able to understand (and influence) their own state's regulations than the outcome of the *Murr* balancing test.[143]

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generations. If allowed to proceed too far, it may give rise to profound changes in ecosystem functioning, which are not only difficult to detect in advance, but, given that the drivers can only be slowly managed, may also be unavoidable once the changes are underway.").

141. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1948 (2017) ("[T]he valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property."); *see id.* at 1953 (Roberts, J., dissenting) ("State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue."); *see id.* at 1954 ("*Penn Central* provides no basis for disregarding state property lines when identifying the 'parcel as a whole'"); *see also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 560 U.S. 702, 732 (2010) ("The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established."). The Murrs' argument fails, in part, when they argue that state law applies with respect to the lot lines that support their position, but state law does not apply in the context of the merger provision of state law. *See* Oral Argument at 16, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1048381 (Kagan, J.) ("[O]ne of the oddities of your position is that you seem to be taking half of state law . . . And you seem to be saying: well, we look to state law for the lot lines, but then we ignore state law for the question of when lots are merged.").

142. *Murr*, 137 S. Ct. at 1948 ("Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure of reasonable expectations of property owners."); *see also id.* ("The ease of modifying lot lines also creates the risk of gamesmanship by landowners, who might seek to alter the lines in anticipation of regulation that seems likely to affect only part of their property.").

143. *See* Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980) ("[P]roperty interests . . . are not created by the Constitution.") (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)); *see also*

The same maxim applies to a "background principles" defense for "total wipe-out" claims under *Lucas*[144]—particularly if there is a question about the "relevant parcel." State law defining parcel boundaries and the limits of property interests are unquestionably "background principles" of property law,[145] and under *Lucas*, a government agency can evade a takings claim—even if there is a "total wipe-out" of all economically viable use of property—if it can show the regulation is consistent with those principles. Upon such a showing, there is a *per se* taking and no need to complete a *Penn Central* analysis.

A state's treatment of parcel boundaries—even the merger of adjacent substandard lots—is part of a state's "background principles" that cannot result in a taking every time a lot is merged.[146] If there is a legitimate question about the parameters of a property interest—under either a *Lucas* or *Penn Central* theory—the *Penn Central* test applies to determine *both* whether there is a taking and the parameters of the property interest.[147] It's a single

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Stop the Beach, 560 U.S. at 732 ("The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established"); *Bd. of Regents*, 408 U.S. at 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law [.]"); *see also* Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 310 (1993) ("[S]tates are free to shape [property law] as they severally choose.").

144. Each of the *Murr* parties argues that *Lucas* supports their position. *See, e.g.*, Brief for Respondent State of Wisconsin at 37, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 3227033 ("Contiguous, commonly owned land lots are one 'parcel' under the approach suggested by *Lucas* where—as here—the lots are merged under state law."); Petitioners' Reply Brief on the Merits at 6, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 4072806 ("In *Lucas*, the particular interest was fee simple title. That is the same interest in land that the Murrs assert. They own fee simple title to Lot E. As this Court recognizes, a fee simple is a particular property interest with a long history of protection.") (citation omitted).

145. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) ("The 'total taking' inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources . . . ."); *see also id.* at 1035 (Kennedy, J. concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.").

146. The Murrs argue that background principles don't apply because "you can't have a background principle that applies to one person but not to another." Oral Argument at 11, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1048381. However, the merger provision would apply to any similarly situated landowner, and it had been in place for more than 18 years. *See supra* notes 55–57 and accompanying text.

147. *But see* Stewart E. Sterk, *Dueling Denominators and the Demise of* Lucas, 60 ARIZ. L. REV. 67, 69 (2018) (arguing that "Murr may signal the end for the per se rule invalidating regulations that deny landowners all economically productive use of their land"); *see also* Blais, *supra* note 5, at 48 ("[T]he Court in *Murr* merely exacerbated the core flaws of the *Lucas* bright-line rule. Now, more than ever, it is imperative that the Court recognize and begin to dismantle the total takings myth."); Luke A. Wake, *The Enduring (Muted) Legacy of* Lucas, 28 GEO. MASON U. CIV. RTS. L. J. 1, 26 (2017) ("Murr seems to increase the likelihood that courts will apply Penn Central rather than Lucas where a claimant owns properties, otherwise recognized as separate and lawfully divided.").

analysis.[148] This approach is entirely consistent with Justice Kennedy's concurrent opinion in *Lucas* where he stated that an inquiry into a claimant's reasonable investment-backed expectations is required for *all* takings claims.[149]

According to Prof. Maureen Brady,[150] "*Murr* 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."[151] "[B]y inviting courts to use 'reasonable law and regulation to construct compensable property interests, the first factor of *Murr* demands that sort of cross-state comparison."[152] Therefore, the laws of foreign states become relevant—even dispositive—in determining the relevant parcel under *Murr*.[153] This is an absurd result. Property owners like the Murrs can't possibly be charged with knowing the history of land use laws across the United States to make simple land use decisions that may impact future takings claims. This result is also at odds with the principles of federalism—states should be allowed to decide their own definitions of property boundaries.

This approach also addresses the concerns about unscrupulous actors discussed by the *Murr* court.[154] If, for example, a propert owner manipulates a property boundary in a manner that creates a taking claim by segregating all wetlands into a single parcel, the property owner should not be able to claim a valid taking because there could be no reasonable investment-backed expectations in developing a parcel created for such purposes. Conversely, if the government denied a legitimate boundary line or limited a property interest in a manner that is designed to prevent a taking, *Penn Central's* "character of the government action" prong would militate strongly in favor of the claimant.

State property law is already inextricably interwoven with the parameters of property interests. It should therefore drive the relevant parcel analysis. The Court should only turn to the *Penn Central* to determine the relevant parcel in exceptional circumstances.

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148. If the claimant argues a Lucas "total wipeout" of the property's value, the claimant will have no problem showing a loss in value and in reasonable investment-backed expectations. *See* Wake, *supra* note 147, at 7 ("Mr. Lucas had a strong *Penn Central* argument".).

149. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

150. Prof. Brady is an Associate Professor of Law at the University of Virginia School of Law.

151. Brady, *supra* note 10, at 56; *see also* Wake, *supra* note 147, at 24 ("In *Murr v. Wisconsin*, the U.S. Supreme Court recently disavowed the notion that courts should give presumptive weight to lawfully segmented lot lines.").

152. Brady, *supra* note 10, at 67.

153. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1947 (2017) (discussing the history of "merger provisions" in other states and stating that a rule in which state lot lines define parcel boundaries would "[cast doubt] on the many merger provisions that exist nationwide today.").

154. *See id*. at 1946 ("May the State define the relevant parcel in a way that permits it to escape its responsibility to justify regulation in light of legitimate property expectations?").

V. JUSTICE FOR THE MURRS

There is a justifiable sense of unfairness in the Court's decision that is expressed in the Murrs' argument; if they had held the property under any other ownership regimen than using the exact same names for both lots, they would have been able to sell either of their substandard lots individually.[155] Any stranger could have purchased and resold Lot E under the attendant regulatory scheme.[156] There is also little doubt that the Murrs were shocked that they were unable to sell Lot E, which they had intended as an investment property.[157] However, this sort of manifest unfairness is suitably addressed in the *Penn Central* test—if there has been no interference with reasonable investment-backed expectations and little diminution of value there is no argument that there is a taking, regardless of what the property owner may have thought about the property's utility and divisibility.

The Murrs should not necessarily have lost their case, only the relevant parcel issue.[158] Although there is likely no total "wipeout" of the value of the combined lots under a *Lucas* analysis,[159] a court should still look at the *Penn Central* factors, under the current state of the law. The argument may not be far-fetched, and it was not squarely before the Court. The Murrs can certainly show that each of their eight requests for variances or special exceptions had been denied. Their development options are significantly limited, and they are likely entirely precluded from building anywhere near the shoreline due to both flooding and environmental regulations. Unfortunately, the *Murr* Court—in *dicta*—determined that the Murrs' situation would not meet the *Penn Central* test, even though the petitioners did not brief the individual *Penn Central* factors.[160]

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155. Petitioners' Brief on the Merits at 7, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214), 2016 WL 1459199 ("Despite being defined by zoning regulations as substandard, Lot E could still be sold or developed if it was owned by *anyone other than the Murr siblings*.") (emphasis in original).

156. *See* Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J. L. & LIBERTY 151 (2017) (stating that a simple mistake in conveyancing, easily avoided, should not wipe out development rights that any other owner could possess over the undeveloped parcel) see id. at 173 ("Why should state power be at its zenith because of [an] elementary procedural oversight?"). This is precisely why the Murrs' case should have been disposed by obtaining a variance at the County Board of Adjustment.

157. Petitioner's Brief on the Merits at 4 ("In the words of Donna Murr, the family was 'flabbergasted' to learn that the regulations precluded separate use, development, and sale of Lot E.").

158. *See Murr*, 137 S. Ct. at 1944 ("Defining the property at the outset, however, should not necessarily preordain the outcome in every case.").

159. *Id*. at 1949 ("Petitioners have not suffered a taking under *Lucas*, as they have not been deprived of all economically beneficial use of their property.") (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

160. *Murr*, 137 S. Ct. at 1949. *See generally* Petitioners' Brief on the Merits. In Dissent, Justice Roberts stated that the case should be remanded for "the court to identify the relevant property using ordinary principles of Wisconsin property law. After making that state determination, the next step would be to determine whether the challenged ordinance amounts to a 'taking" under a Penn Central analysis." *Murr*, 137 S. Ct. at 1956–57. Under the reasoning in this article, the entire case could also

Finally, the importance of the application of state law is further demonstrated by the outcome of the Murr matter—the Wisconsin legislature changed the law in response to the Murrs' desire to bifurcate and sell one of their substandard lots.[161] This case is, after all, about an application of state law regarding boundary lines and the laws that create a merger. The Murrs' two parcels merged into one by clear operation of the applicable statute—even though the county had not changed the location of the property lines in its records. Now that statute has been changed by the Wisconsin legislature and the Murrs may sell parcel E as they had (apparently) intended.

It was ultimately a happy ending for the Murrs and justifiably so. Through no fault of their own, the Murr children were initially unable to sell a substandard lot to pay for improvements to a cabin that had been threatened by recent flooding. The Murrs should have been provided relief by the local Board of Adjustment, which handled variances. Instead, their claim went all the way to the United States Supreme Court and the Murrs' legacy to the legal community is an unwieldly and unnecessary test that may make it harder for future property owners to bring takings claims. The Murrs' final relief was provided by the state legislature, which has the ultimate authority over the definition of lot lines in the state, and therefore, defines the relevant parcel.

CONCLUSION

Any analysis of the relevant parcel in a takings claim must begin with the parameters of state law. In most cases, the inquiry will end there, and the court will proceed to determine whether there is a deprivation of all economically beneficial use of the property under *Lucas* or whether the taking meets the *Penn Central* three-part test.

The individual states have historically regulated, defined and limited a property owner's interest in land. A parcel owner's understanding of rights and the parameters of a parcel is rooted in an understanding of the local jurisdiction's ordinances and state codes, not in a vague three-part test that attempts to analyze property rights across a broad swath of interests.

Each state has its own property laws, which delineate the parameters of individual parcels. Residents are charged with knowing those laws. They are also in the best position to change unfair laws by appealing to elected officials. In the clear majority of Fifth Amendment takings cases, a state's law will end the relevant parcel inquiry. In the unlikely event that a state tampers with (for

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have been remanded for a determination of the parameters of the parcel and whether there has been a taking under *Penn Central*'s three factors—under the same test.

161. *See* Bruce Vielmetti, *Wisconsin cabin owners who lost at U.S. Supreme Court win in the Wisconsin Legislature*, MILWAUKEE JOURNAL SENTINEL, Nov. 7, 2017 (stating that the Wisconsin legislature passed "a bill that would let property owners build on and sell substandard lots if they were legal when they were created. It would also prohibit merging adjacent lots that share the same owner without the owner's permission.").

example) lot lines to evade an otherwise valid takings claim, a claimant should be able to challenge the presumption of the validity of the state law application by employing the standard *Penn Central* analysis. If the property owner's reasonable investment-backed expectations are dashed and there is an appreciable diminution in value, the claimant should prevail because the claimant can also prove that the character of the government action is invalid.

A claimant's reliance on and understanding of state law is inextricably linked to their reasonable investment-backed expectations. One would reasonably expect to be able to develop one's property in accord with the applicable local regulations. Unfortunately, the *Murr* test complicates this simple calculus.