MURR V. WISCONSIN: A VICTORY FOR "FAIRNESS AND JUSTICE" IN THE REGULATORY TAKINGS DENOMINATOR ANALYSIS

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INTRODUCTION

Takings law is notoriously muddy. Characterized by ad-hoc balancing tests and opinions full of poorly defined dicta, takings law represents the Supreme Court's attempt to pursue the goals of "fairness and justice" in determining when the government must compensate landowners for burdens imposed on their properties by the government.[1] While the Fifth Amendment tells us that the government must pay landowners "just compensation" whenever it "takes" their property for "public use," it provides little guidance on when a taking has occurred.[2] For decades, the Supreme Court also provided little clarity on when the government must compensate landowners for anything other than physical takings, stating obscurely that compensation is required when a regulation goes "too far."[3]

While the Supreme Court has fleshed out regulatory takings jurisprudence since its original "too far" standard, it had previously given little guidance for lower courts trying to define the unit of property against which a taking is measured. The Court had only stated, circularly, that takings were to be measured against the "parcel as a whole," without defining what the "parcel as a whole" actually is.[4] This question—how to define the "denominator" of the takings equation[5]—is central to regulatory takings analysis because if a regulation not inhering in background principles of property law deprives a landowner of all economic use of her property, then the landowner is automatically entitled to compensation.[6]

In *Murr v. Wisconsin*,[7] the Supreme Court finally confronted the denominator question. Consistent with its previous takings decisions, the Court avoided a bright-line rule. It instead crafted a three-part balancing test focusing

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1. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).
2. U.S. CONST. amend. V.
3. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
4. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).
5. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967) (discussing the "denominator" issue).
6. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).
7. 137 S. Ct. 1933 (2017).

on state and local law, physical characteristics of the property, and the regulated property's prospective value.[8] The third factor, the prospective value of the property, now requires courts to consider the reciprocal advantages that landowners also derive from regulations.[9] Requiring consideration of these benefits will help courts avoid improperly shrinking the denominator when determining whether a taking has occurred.

This Comment analyzes *Murr* and its place in regulatory takings doctrine. Part I traces the history of takings jurisprudence leading up to *Murr*. Part II describes the Court's decision in *Murr*. Part III focuses on the prospective value factor of *Murr*'s three-part balancing test, and explains why that factor will help guide future court decisions in the direction of "fairness and justice."

I. History and Development of Regulatory Takings Doctrine

The protection of private property is deeply engrained in the American ethos. The Founders took inspiration from John Locke,[10] who argued that a central role of government was to protect its citizens' private property.[11] James Madison explained in Federalist No. 10 that the Constitution would be structured so as to prevent the majority from overwhelming the property rights of the landowning minority.[12] To that end, the Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[13] The takings clause "was designed to bar

8. *Id.* at 1945.

9. *Id.* at 1946.

10. *See* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 16 (1985).

11. *See* John Locke, Two Treatises of Government 350–51, 360 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698) ("The great and chief end therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. . . . The supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires, that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it, too gross an absurdity for any man to own.") (emphasis omitted). Some scholars disagree that the Founders were guided by a Lockean philosophy, instead arguing that the founding ideology focused more on civic virtue and communal responsibility. *See* Mark W. Cordes, *The Land Use Legacy of Chief Justice Rehnquist and Justice Stevens: Two Views on Balancing Public and Private Interests in Property*, 34 Environs Envtl. L. & Pol'y J. 1, 5 n.18 (2010) (collecting articles on either side of the debate).

12. Federalist No. 10 (James Madison).

13. U.S. Const. amend. V. The Fifth Amendment is incorporated against the states through the Fourteenth Amendment. *See* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

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."[14]

The protection contained in the Fifth Amendment is inherently in tension with government's need to regulate land use in order to promote the general health, safety, and welfare under the police power.[15] While property rights absolutists argue that every regulation of land use should be considered a taking requiring compensation,[16] this interpretation is inconsistent with takings clause jurisprudence. Indeed, the Supreme Court has recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[17]

A. Regulatory Takings First Recognized

Interpreting the Fifth Amendment so that not every restriction on property use requires compensation for a taking is compatible with early applications of the takings clause and approaches to private property. As first understood, the takings clause applied only to physical invasions of private property, such as "a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[18] Scholars have pointed out that, contrary to the claims of property rights absolutists, land use regulation in the colonies and early United States was actually quite extensive and not limited to nuisance prevention.[19] Early courts upheld a variety of property regulations,[20] viewing private property rights as inherently subject to certain limitations for the good of the community.[21]

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14. Armstrong v. United States, 364 U.S. 40, 49 (1960).

15. *See* Raymond Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 299 (1990) ("[A]n increase in the scope of the police power decreases the scope of private property rights; likewise, an expansive notion of private property rights necessitates a limitation on the scope of the police power.").

16. *See generally supra* note 10.

17. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

18. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (quoting Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871); Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879)); *see also* Murr v. Wisconsin, 137 S. Ct. 1933, 1957–58 (2017) (Thomas, J., dissenting).

19. *See, e.g.*, John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1292 (1996).

20. *See, e.g.*, Commonwealth v. Tewksbury, 52 Mass. 55, 57 (1846) ("All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community . . . ."); Mugler v. Kansas, 123 U.S. 623, 665 (1887) ("[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.").

21. *See* Mark W. Cordes, *The Fairness Dimension in Takings Jurisprudence*, 20 KAN. J.L. & PUB. POL'Y 1, 25 (2010) ("American law has long recognized that private property rights are not absolute and are limited to a certain degree by the broader public interest. It is important to

It was not until *Pennsylvania Coal Co. v. Mahon* in 1922 that the Court first recognized that a regulation not effecting a physical intrusion on private property could require takings compensation.[22] In that case, a coal company owning the mineral and support estate, but not the surface estate, on certain lands challenged a Pennsylvania statute prohibiting any coal mining that would cause a subsidence in human homes on the surface.[23] Justice Holmes famously stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[24] In recognizing that some regulations have such stark effects on property use that they should be treated as takings, Justice Holmes warned, "we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[25]

B. Modern Regulatory Takings Tests

While Justice Holmes in *Mahon* opened the door to regulatory takings claims, he provided very little guidance for future courts attempting to determine whether a regulation has gone "too far." Lacking a rule for takings decisions, the Court focused on "fairness and justice" in its takings analysis.[26] The Supreme Court finally laid out more specific guidelines in the 1978 case *Penn Central Transportation Co. v. New York City*.[27] The Court faced the question of whether New York City had "taken" property from Penn Central by denying its application to develop the air space over Grand Central Terminal, which the City had designated as a historic landmark.[28] The Court declined to create a bright-line rule for regulatory takings. Instead, it listed an "essentially ad-hoc" series of factors to consider: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."[29] Landowners arguing that they have suffered a taking under the *Penn Central* test face an uphill battle, with courts generally deferring to government regulation.[30]

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emphasize that this is an inherent limitation in the nature of private property rather than a deprivation of any preexisting rights.").

22. *See Mahon*, 260 U.S. at 415.
23. *See id.* at 412–13.
24. *Id.* at 415.
25. *Id.* at 416.
26. Armstrong v. United States, 364 U.S. 40, 49 (1960).
27. 438 U.S. 104, 124 (1978).
28. *See id.* at 115–19.
29. *Id.* at 124.
30. *See* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1536 n.4 (1994).

In the subsequent case *Lucas v. South Carolina Coastal Council*, the Supreme Court added an additional step to the takings inquiry. The Court in *Lucas* created a categorical rule that any regulation that "denies all economically beneficial or productive use of land" is a per se taking unless the government can demonstrate that the restriction "inhere[s] in the title itself."[31] Thus, while restrictions that are part of the "background principles" of state property and nuisance law will not give rise to a takings claim, new limitations that eradicate all potential economic use of the property constitute per se takings.[32] The *Lucas* categorical taking is reserved for "extraordinary circumstance[s]"[33]: even if a regulation eliminates ninety-five percent of a property's value, the five percent that remains is enough to defeat the takings claim.[34]

Therefore, there are three steps in the takings analysis. To determine if a categorical taking has occurred, courts must determine at the outset whether: 1) the government has physically appropriated private property, or 2) the regulation is so strict as to deny all economic use of the property. If neither of these categorical conditions is met, courts move on to 3) analyze whether a given regulation is a taking under the *Penn Central* balancing test. The Supreme Court has repeatedly emphasized that "[t]he concepts of 'fairness and justice' that underlie the Takings Clause" should guide courts' inquiries.[35]

C. Defining the Denominator

Throughout these cases, the Court has been haunted by the fundamental problem of how to define the property under consideration. Particularly under the *Lucas* test—but also under *Penn Central*—the definition of the property that has allegedly been deprived of all beneficial use becomes crucially important. For instance, a landowner's property may be subject to regulations such that half of the property is developable and half is not. Assuming there are no other uses for the non-developable half, the regulation therefore has deprived that half of the property of all economically beneficial use. If a court only considers the economic effect on that half in the takings analysis, then it will require compensation. However, by zooming out to consider the entire property, it is clear that the regulation has only diminished the property's value by 50

31. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015, 1029 (1992).

32. *Id.* at 1029–30. This caveat means that the per se rule will not apply to restrictions on property use that "do no more than duplicate the result that could have been achieved in the courts" through private or public nuisance law. *Id.*

33. *Id.* at 1017.

34. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (citing *Lucas*, 505 U.S. at 1019 n.8).

35. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001); *see also Tahoe-Sierra*, 535 U.S. at 342; Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

percent—certainly not enough to constitute a categorical taking under *Lucas*, and likely not enough to sway the *Penn Central* test in favor of a taking either.[36]

Frank Michelman, writing in 1967, was one of the early scholars to address this issue.[37] He described it as the "denominator" question, asking "if . . . the loss in value of the affected property would compose the numerator—what value supplies the denominator?"[38] The Court, too, has struggled with this question.[39] In *Penn Central*, the majority rejected appellants' argument that the challenged regulation was a taking because it had effectively "deprived them of any gainful use of their 'air rights' above the Terminal."[40] Instead, the Court stated that "the parcel as a whole" must form the denominator in the takings analysis.[41] In other cases, the Court has described the "bundle" of rights conveyed with a property and explained that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[42]

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36. For example, in *Lost Tree Vill. Corp. v. United States*, a developer brought a takings claim after the Army Corps of Engineers denied its development application for a portion of its property ("Plat 57") that was covered in wetlands. *See* 707 F.3d 1286, 1291 (Fed. Cir. 2013). The lower court defined the "parcel" as Plat 57 along with adjacent plats held by the development company. *See* Lost Tree Vill. Corp. v. United States, 100 Fed. Cl. 412, 435 (2011). Based largely on the fact that the denial only reduced the value of the "parcel as a whole" by 58.4%, the lower court found that a taking had not occurred. *See id.* at 437–39. On appeal, the Federal Circuit reversed the lower court's decision. *Lost Tree*, 707 F.3d at 1288. It determined that because the developer had treated Plat 57 separately from the rest of its holdings, the "parcel as a whole" was actually Plat 57 alone, considered separately from the developer's adjacent property. *See id.* at 1293–95. The court therefore remanded to the lower court to determine what percentage of the parcel's value had been eliminated, which would then direct the analysis under either the *Lucas* or *Penn Central* framework. *See id.* at 1295. On remand, the lower court determined that the permit denial had deprived Plat 57 of 99.4% of its value, which it categorized as a per se taking under *Lucas*. *See* Lost Tree Vill. Corp. v. United States, 115 Fed. Cl. 219, 233 (2014), *aff'd*, 787 F.3d 1111 (Fed. Cir. 2015).

37. *See* Michelman, *supra* note 5, at 1192.

38. *Id.*

39. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 327; Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question."); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" (quoting Michelman, *supra* note 5, at 1192)).

40. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) ("'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.").

41. *Id.* at 130–31.

42. Andrus v. Allard, 444 U.S. 51, 65–66 (1979).

Defining the denominator is exceedingly important because under the Court's takings tests, "the answer to this question may be outcome determinative."[43]

Courts have analyzed the denominator along four dimensions: horizontal, vertical, functional, and temporal.[44] The horizontal axis concerns the division of land on the surface—for example, if a developer owns several lots.[45] The vertical axis divides property rights into vertical slices, such as in *Penn Central* when appellants claimed a taking of their air rights to build above the existing structure.[46] In the functional dimension, landowners try to claim that specific property rights have been taken, rather than point to physical effects on their land.[47] In *Hodel v. Irving*, for instance, the Court required compensation for a taking of the rights of descent and devise.[48] Finally, the temporal axis involves the taking of property over a period of time.[49]

The Court's "parcel as a whole" rule seems reasonably straightforward, but has proven anything but in practice. Erratic precedent from the Supreme Court has led to confused and inconsistent denominator decisions by lower courts.[50] The rule is also circular in that it leaves courts with no clear definition of the "parcel." The Court has reached different outcomes for strikingly similar regulations—for instance, of both air rights[51] and mining rights[52] on the vertical axis. In their struggles to define the "parcel as a whole," courts have sometimes narrowed the denominator to more closely match the area affected by the chal-

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

44. *See* Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 193 (2004).

45. *See, e.g.*, Ciampitti v. United States, 22 Cl. Ct. 310, 320 (Cl. Ct., 1991) (rejecting a takings claim where a regulation prohibited development of fourteen out of forty-five acres purchased).

46. *See Penn Central*, 438 U.S. at 130.

47. *See* Wright, *supra* note 44, at 206–14.

48. *See* Hodel v. Irving, 481 U.S. 704, 717–18 (1987).

49. *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 319–21 (2002) (a thirty-two-month moratorium on development did not constitute a taking). While the government owes property owners compensation for a regulation that has already imposed a taking and is later rescinded, *see* First English Evangelical Lutheran Church v. Cty. of L.A., 482 U.S. 304, 321 (1987), not every temporary regulation that would be a taking if it were permanent requires compensation, *see Tahoe-Sierra*, 535 U.S. at 332.

50. *See* Fee, *supra* note 30, at 1545–49.

51. *Compare Penn Central*, 438 U.S. at 130 (finding no taking when government action deprived landowner of air rights), *with* Griggs v. Allegheny Cty., 369 U.S. 84, 89 (1962) (finding a taking when government action deprived landowner of air rights), *and* United States v. Causby, 328 U.S. 256, 265 (1946) (same).

52. *Compare* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 501–02 (1987) (finding no taking when government regulation functionally deprived coal companies of support estate), *with* Pa. Coal Co. v. Mahon, 260 U.S. 393, 412–14 (1922) (finding a taking when government regulation functionally deprived coal companies of support estate).

lenged regulation,[53] and sometimes broadened it to include noncontiguous property.[54]

Moreover, the Court in *Lucas* indicated dissatisfaction with the strict "parcel as a whole" rule.[55] The majority signaled in footnote seven that the Court might be willing to revisit the denominator issue, bemoaning the Court's "inconsistent pronouncements" and suggesting that "[t]he answer . . . may lie in how the owner's reasonable expectations have been shaped by the State's law of property."[56] The Court repeated this discomfort a decade later in *Palazzolo v. Rhode Island*, another case that touched on the denominator question but did not directly confront it.[57] There, the Court held that a pre-acquisition regulation could still effect a taking and remanded for a *Penn Central* analysis when wetlands regulations prevented the landowner from developing some, but not all, of his property.[58] Writing for the majority, Justice Kennedy noted that the Court had "at times expressed discomfort" with the "parcel as a whole" rule, but stated "[w]hatever the merits of these criticisms, we will not explore the point here."[59] The Court appeared poised to move away from the "parcel as a whole" rule and toward a test narrowing the denominator—and thus requiring compensation for more regulatory takings claims.[60]

II. The Denominator Question Answered in *Murr v. Wisconsin*

A. The Facts

In *Murr v. Wisconsin*, the Court finally confronted the "difficult, persisting question of what is the proper denominator in the takings fraction."[61] *Murr*

53. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 391–93 (1988) (considering only 12.5 acres for which permit was denied, rather than entire property).

54. *See* Ciampitti v. United States, 22 Cl. Ct. 310, 320 (1991).

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

56. *Id.*

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

58. *See id.* at 627–32; *see also* Benjamin Allee, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 Fordham L. Rev. 1957, 1958 (2002) ("[E]ither Palazzolo has lost some of the value of all of his property—18/20 [acres]—or all of the value of some of his property—18/18 [acres].").

59. *Palazzolo*, 533 U.S. at 631.

60. The Supreme Court reaffirmed the parcel as a whole rule as applied to temporal severance in the 2002 case *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326–27 (2002), but experts disagreed as to the scope of that holding. *See* Laura Lydigsen, *"Fairness and Justice" after* Tahoe-Sierra Preservation Council, Inc. V. Tahoe Regional Planning Agency*: Subsequent Regulatory Takings Decisions under the "Parcel as a Whole" Framework*, 82 Wash. U. L.Q. 1513, 1515 (2004) ("There is little agreement among scholars about the impact of *Tahoe-Sierra*.").

61. *Palazzolo*, 533 U.S. at 631; *see generally* Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

involved a denominator dispute on the horizontal axis.[62] The petitioners in *Murr* were four siblings who owned two adjacent lots on the St. Croix River.[63] One of the lots had a cabin already built on it, while the other remained empty.[64] Land use regulations in Wisconsin and St. Croix County prohibit development or sale of lots with less than one acre of buildable land.[65] The ordinance includes a grandfather provision exempting substandard lots separately owned prior to the regulation but otherwise merges adjacent, commonly owned substandard lots.[66] Each of the two lots, which the Murr siblings' parents had transferred to them after the regulations took effect, were substandard, so they were merged under Wisconsin law.[67]

The Murrs sued in state court to challenge the ordinance. They argued that the building regulations had deprived them of "all economically viable use" of the undeveloped lot—a per se taking.[68] The Murrs submitted evidence that the regulation had knocked the undeveloped lot's value down to $40,000.[69] Wisconsin and the County countered that the "denominator" for the takings analysis was actually the two combined parcels rather than the original lot lines of the undeveloped lot.[70] Wisconsin courts sided with the County.[71] Wisconsin's Court of Appeals cited the high remaining value of the combined parcels as evidence that the regulation did not effect a taking.[72] Merged, the lots had a combined value of $698,300; as separate buildable properties they were worth $771,000.[73]

Murr thus presented a perfect opportunity to confront the denominator question along the horizontal axis. If the Court analyzed the regulation's effect only on the undeveloped lot, the Murr siblings could make a strong argument that the regulation had deprived the lot of all economically beneficial use. If, on the other hand, the Court viewed the parcel as a whole as both lots combined, then the Murrs' property had scarcely lost any value at all and the regulation was almost certainly not a taking.

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62. *See Murr*, 137 S. Ct. at 1940–42.
63. *Id.* at 1940.
64. *Id.* at 1940–41.
65. *Id.* at 1940.
66. *Id.*
67. *See id.*
68. *See* Brief for Petitioner Joseph P. Murr, et al. at 12–13, *Murr* (No. 15-214); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
69. *See Murr*, 137 S. Ct. at 1941.
70. *See* Brief for Respondent State of Wisconsin at 38, *Murr* (No. 15-214); Brief for Respondent St. Croix County at 32, *Murr* (No. 15-214).
71. *Murr*, 137 S. Ct. at 1941–42.
72. *See id.* at 1942. The Supreme Court of Wisconsin denied the Murrs' petition for discretionary review. *Id.*
73. *Id.* at 1941.

B. The Test

Each party in the case advocated for a different test for the denominator. The Murrs contended "that lot lines define the relevant parcel in every instance, making [the undeveloped lot alone] the necessary denominator."[74] The State of Wisconsin argued that the Court should decide the denominator on the basis of state law: in this case, since state law merged the two lots, the lots together formed the denominator.[75] The State based its argument in part on footnote seven in *Lucas*.[76] Finally, St. Croix County argued against a bright line test, and instead recommended that the Court weigh several different factors in the denominator analysis.[77] While lot lines were one relevant factor, the County also encouraged the Court to consider "contiguousness, ownership history, and unity of use, in deciding how the Takings Clause's concerns with 'fairness and justice' warrant defining the parcel in a particular case."[78]

The Supreme Court affirmed the Wisconsin Court of Appeals in holding that the regulation had not effected a taking of the Murrs' property.[79] Writing for a five-justice majority, Justice Kennedy rejected both the Murrs' and the State's proposed tests.[80] He wrote that "no single consideration can supply the exclusive test for determining the denominator."[81] Instead, the Court adopted a balancing test similar to the one advocated by the County.[82] This test requires courts to weigh three factors: "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land."[83] Taken together, these factors are intended to help courts "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."[84]

The Court then explained why each of those factors indicated that the Wisconsin regulations did not constitute a taking of the Murrs' property.[85] The first factor, the treatment of the land under state and local law, weighed against

74. *Id.* at 1947.

75. *See id.* at 1946.

76. *Id.*

77. *See* Brief for Respondent St. Croix County at 23, *Murr* (No. 15-214).

78. *Id.*

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

80. *See id.* at 1946–48.

81. *Id.* at 1945.

82. *See id.* at 1945–46.

83. *Id.* at 1945. The test the Court settled on is remarkably similar to the test advocated at oral argument by St. Croix County. *See* Transcript of Oral Argument at 51–52, *Murr* (No. 15-214).

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

85. *See id.* at 1948–49.

the Murrs because state and local regulations merged their two properties.[86] The second factor, the physical characteristics of the land, also indicated that the two lots should be viewed as a single unified parcel.[87] The Court found significant not only that the two lots are contiguous, but also that they are located on the Lower St. Croix, a Wild and Scenic River.[88] These preexisting physical characteristics gave the Murrs notice that future regulation might restrict their use of the property.[89] Finally, the prospective value of the regulated land, the third factor, confirmed that it was correct to treat the lots as a single, unified parcel.[90] The Court explained that "the benefits of using the property as an integrated whole" substantially mitigated the regulation's burden, for instance by "allowing increased privacy and recreational space, plus the optimal location of any improvements."[91] The Court cited the fact that appraisers had pegged the unified parcel's value at $698,300—"far greater than the summed value of the separate regulated lots"—as further support for considering the lots as one parcel.[92]

Lastly, the Court turned to the *Penn Central* analysis.[93] It quickly dismissed any claim that the Murrs had suffered a taking under the regulations.[94] The economic impact of the regulation, the Murrs' investment-backed expectations, and the character of the government action all counseled against holding that the Murrs had suffered a compensable taking.[95]

III. The *Murr* Denominator Test Will Promote "Fairness and Justice" in Future Takings Decisions

The *Murr* opinion firmly rejects shrinking the takings denominator in the aftermath of *Lucas* and *Palazzolo*. Rather than adopting the bright-line rule proposed by either the Murr siblings or the State of Wisconsin, the Court crafted a three-part balancing test that weighs state and local law, the physical characteristics of the land, and the land's value after the regulation.[96] Application of these factors is likely to result in courts defining the parcel broadly in most instances. In particular, the third factor—the prospective value of the

86. *See id.* at 1948. The Court observed that this merger took place only because of the Murrs' choice to bring the lots under common ownership. *Id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *Id.* at 1948–49.

91. *Id.*

92. *Id.*

93. *Id.* at 1949.

94. *Id.*

95. *See id.*

96. *See id.* at 1945.

property—will help guide courts in many cases to a broader denominator. This outcome best supports "fairness and justice" in the takings inquiry.

A. Regulatory Givings and Reciprocity of Advantage

The Court in *Murr* recognized that the challenged regulation both benefited and burdened the property. The benefits that accrue to a property from government action have been called "givings."[97] Obvious examples of givings are direct government actions that benefit certain properties, such as granting permits or providing basic infrastructure. Givings can also be less direct: for example, by restricting land development, government regulations may shrink the availability of developable land and increase the value of what remains.[98] The Murr property likely benefited from government givings through the provision of basic government services such as roads and sewage, but also through more targeted givings from the decrease in developable property available because of the challenged regulation.

Related to givings is the concept of reciprocity of advantage. Reciprocity of advantage refers, broadly, to the give and take of regulatory benefits and burdens that naturally derive from "living and doing business in a civilized community."[99] Reciprocity of advantage is the recognition that while "the benefits and burdens of any particular economic regulation are distributed unequally . . . because each property owner benefits from certain regulations that are imposed on others, the overall scheme of regulation provides a net benefit for individual property owners."[100]

Reciprocity can be broken down into two types: specific and general.[101] Specific reciprocity comes from "the reciprocal burdens and benefits flowing from the actual regulation in question."[102] General reciprocity derives from "the reciprocal benefits of regulatory life in general."[103] It presumes that we all benefit from living in a society subject to an overall regulatory framework, and that the benefits of this framework mitigate any regulatory costs we face as individu-

97. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 551 (2001) (categorizing different types of givings).

98. *See* Cordes, *supra* note 21, at 19.

99. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 422 (1922).

100. Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 4 (2004).

101. *See* Cordes, *supra* note 21, at 20.

102. *Id.*

103. *Id.* at 21.

als.[104] Arguably, the breadth of general reciprocity could eliminate regulatory takings entirely.[105]

The Murr siblings benefited from specific reciprocity under the challenged regulation because surrounding properties were also subjected to the same restrictions. Physically, the Murrs' lots are far from ideal: each lot consists of a narrow bluff bisected by a steep slope that drops down to the lower portion of the property within the river's floodplain.[106] Even when the two lots are combined, the total possible buildable area is less than one acre.[107] Despite these physical limitations, the development restrictions help ensure that the Murrs' property is extremely valuable.[108] The restrictions keep property values in the area high by preserving the natural beauty and integrity of the St. Croix River while restricting the availability of buildable land. Thus, even with only one house allowed between the two lots, the land was worth almost seven hundred thousand dollars.[109] The Murrs also experienced general reciprocity simply through living in society in which the government has the ability to prevent individuals from using their properties to harm others.

B. Reciprocity of Advantage in Previous Decisions

Previous Supreme Court opinions have recognized reciprocity of advantage as a factor in justifying regulations, but none before *Murr* included it as a direct factor in determining the denominator. These earlier cases primarily refer to specific reciprocity.[110] Justice Holmes invoked reciprocity of advantage as a potential defense to takings claims in *Mahon*, although he did not find that it mitigated the taking in that case.[111] The regulation in *Mahon* restricted coal companies from engaging in mining activities that would destabilize the surface estate.[112] Justice Holmes saw the benefits from that regulation as accruing solely to the surface estate owners, and the harms falling entirely on the coal companies.[113] Because the coal companies' regulatory burdens were not eased by reciprocity of advantage, the government owed them takings compensation.

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104. *See* Schwartz, *supra* note 100, at 4–5.

105. *See id.* (arguing that "the presumption that the property owner achieves a net benefit from the overall regulatory scheme should be non-rebuttable, requiring rejection of the takings claim").

106. *See* Joint Appendix at 29–32, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214).

107. *See Murr*, 137 S. Ct. at 1940.

108. *See* Joint Appendix at 52, *Murr* (No. 15-214) ("The river frontage, especially, is quite valuable and highly desired by purchasers.").

109. *See id.* at 58–59.

110. *See id.* at 20.

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

112. *See id.* at 412–13.

113. *See id.* at 415–16.

Justice Brennan took the reciprocity justification even further in *Penn Central* when he refused to consider Penn Central's air rights separately from the property's remaining value.[114] Unlike typical zoning laws, which apply equally to all properties within a given area, the restrictions in *Penn Central* applied only to a smattering of properties throughout the city, and those properties were severely burdened.[115] The Court dismissed Penn Central's argument that it was "solely burdened and unbenefited" by the regulation.[116] Instead, the majority embraced the premise that the landmarks law benefited Penn Central because "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."[117] This benefit was not a specific reciprocal benefit to the property's economic value or usefulness, but rather to the general well-being of Penn Central's owners as denizens of New York City. Even an attenuated benefit, if given controlling power, could eliminate the need for any regulatory takings compensation.

The court once again emphasized the importance of reciprocity of advantage in *Tahoe-Sierra*. The majority found a "clear" reciprocity of advantage derived from the challenged development moratorium.[118] While the moratorium burdened property owners by temporarily prohibiting development, it also benefitted these same owners by affording regional planners ample time to craft a well-thought out, informed development plan for the area.[119] This in turn kept property values high by preventing "inefficient and ill-conceived growth."[120] In fact, the moratorium was instated because too much development was muddying the famously clear waters of Lake Tahoe.[121] The moratorium benefited all owners around the lake by preventing degradation of the very resource that made their property valuable in the first place.[122] The Court thus refused to sever the segment of time during which the development moratorium was in place and find that a per se taking had occurred under *Lucas*.[123]

C. Murr's Incorporation of Reciprocity of Advantage Will Justly Limit Findings of Regulatory Takings

Murr followed in the steps of a significant number of Supreme Court decisions discussing reciprocity of advantage. While each of these cases discussed

114. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).
115. *See id.* at 131–32.
116. *See id.* at 134.
117. *See id.* at 134–35.
118. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 341 (2002).
119. *See id.* at 339.
120. *See id.*
121. *See id.* at 307–09.
122. *See id.* at 307 ("The lake's unsurpassed beauty, it seems, is the wellspring of its undoing.").
123. *See id.* at 331–32.

reciprocity of advantage, though, none specified its role in the takings analysis. The concept of reciprocity drifted through many opinions, but was never actually included as a factor in a takings test. In these previous decisions, "the Court developed expansive applications of the reciprocity principle, but relegated them to the status of interesting dicta in that they were not the underlying rationale of the decision."[124] *Murr* is significant because, for the first time, the Supreme Court included reciprocity of advantage as a specific factor to be considered in the denominator analysis in takings cases.

1. The Economic Benefits Stemming from Land Use Regulations Should Factor into the Denominator Analysis

If the Court is truly seeking "fairness and justice" in its takings jurisprudence, then reciprocity of advantage is a crucial factor to consider. *Murr* is the first case to explicitly recognize that if a regulation actually contributes to the value of a piece of property at the same time that it burdens the property, then it makes little sense to consider only the burdened portion of the property when defining the denominator. To do so would discount the substantial benefits stemming from many regulations and result in distorted analyses of land values post-regulation.

Regulations such as land-use restrictions often generate significant economic benefits for land at the same time that they limit use. Restrictions that apply to all properties in an area, such as the minimum lot size regulations in *Murr*, increase the value of land in that area. Minimum lot size regulations increase property values by ensuring greater privacy and protecting the scenic beauty of an area. The availability of buildable land in an area is restricted as the desirable features of that area are protected. These factors combined to help make the Murr siblings' property so valuable, even though the property itself presented serious physical challenges.[125] Similarly, restrictions such as wetlands regulations help prevent flooding and protect other ecosystem services.[126] It would be artificially narrow to consider the economic burdens of the restriction as applied to the property without also considering the benefits that accrue to the property because everyone around it is subject to the same restrictions.

These benefits reflect the principle of complementarity—that certain types of property create value when combined that is absent when they are separate.[127]

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124. *See* Coletta, *supra* note 15, at 335.

125. *See* Joint Appendix at 29–32, Murr v. Wisconsin, 137 S. Ct. 1933 (2017) (No. 15-214). In describing the property, the appraisal noted the preexisting cabin on the lower part of the property flooded approximately every ten years and that the property presented serious difficulties for septic tank absorption fields. *Id.* at 31–32.

126. *See* EPA, Why Are Wetlands Important?, https://perma.cc/H5ZM-JXJL.

127. *See* Transcript of Oral Argument at 52, *Murr* (No. 15-214); *see also Murr*, 137 S. Ct. at 1949.

As St. Croix County explained at oral argument, shoes are an extreme example of this phenomenon.[128] A left or right shoe on its own is worth very little, but when combined they gain much greater value as a pair.[129] The complementarity principle applies, albeit to a lesser degree, to land as well. While the developed and undeveloped lots in *Murr* were, respectively, worth $373,000 and $40,000 as separate lots under the regulations, when combined into one larger buildable parcel they were worth $698,300.[130] The value of the unified property was "far greater" than the values of the separated regulated lots added together.[131] The unified larger property offered prospective buyers significantly increased beachfront, buildable area, design flexibility, and privacy. In *Murr*, these benefits were so great that the single, one-home property was only 10% less valuable than the lots treated as two separate properties with potential for a home on each.[132] Severing the "parcel" in such a situation simply would not make sense, as keeping the lots together ensures that the owner does not lose the full value of the regulated area.

Considering the prospective value of the regulated land therefore promotes "fairness and justice" in the takings analysis. It encourages courts to "[d]efine the parcel in a way which evaluates the real impact" of regulations.[133] In contrast, defining the denominator to match the regulated portion of a property creates an artificially narrow view of a regulation's impacts by focusing on its costs while ignoring the benefits to the larger property as a whole.

2. Reciprocity of Advantage Fits into the Broader Takings Framework

Reciprocity of advantage complements the overall framework of takings jurisprudence. First, takings law is not intended to insure owners against every decrease in their property's value caused by regulations.[134] Rather, courts must follow the guideposts of fairness and justice to determine whether a regulation has gone "too far." Just because the value of a property has decreased due to regulation—as in *Murr*—does not mean that a taking has occurred. Compensation will not be required in most cases.[135] Nor must burdens be spread evenly

128. Transcript of Oral Argument at 52, *Murr* (No. 15-214).

129. *See id.*

130. *Murr*, 137 S. Ct. at 1948–49.

131. *Id.* at 1949.

132. *Id.* at 1941.

133. Transcript of Oral Argument at 51, *Murr* (No. 15-214).

134. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

135. *See id.* ("The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.").

across property owners. As the Court recognized in *Penn Central*, "[i]t is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.'"[136] The concept of general reciprocity of advantage helps explain these limitations: we all benefit enormously from living in a society whose government is capable of regulating our land use and that of our neighbors. Occasional decreases in property value are a small price to pay for this privilege. The *Murr* test does not itself adopt a general reciprocity test like the one the Court endorsed in *Penn Central*, but it accords with the overall principle that true regulatory takings are rare.

Moreover, the prospective value of the land is just one factor in determining the denominator, and it is not the last step in the takings analysis. In some instances when the prospective value weighs in favor of considering a broader parcel, state and local law and the physical characteristics of the land will tip the scale in the direction of segmenting the parcel. Conversely, there may be times when a regulation does not benefit the burdened property, but state and local law and the land's physical characteristics result in the court considering a broader parcel when determining whether a regulation has taken the full value of a property. Finally, it is important to recognize that determining the denominator is only one step in the broader takings analysis. The size of the denominator will often answer the *Lucas* question of whether a regulation has "deprived a landowner of all economically beneficial uses" of her property.[137] But even if a categorical taking has not occurred under *Lucas*, the court must still consider the *Penn Central* factors before denying a takings claim. Regardless of the size of the parcel that the court ultimately settles on as the denominator, the landowner retains the right to explain to the court why she believes a regulation impacting her land has gone "too far." Consideration of the prospective value of the land is merely one piece in the overall takings scheme, but it is a crucial one for promoting the aims of "fairness and justice."

Conclusion

In *Murr v. Wisconsin*, the Supreme Court finally addressed head-on the question of how to determine the scope of the "parcel as a whole" in takings cases. Avoiding a bright-line rule, Justice Kennedy crafted a three-part test requiring consideration of state and local law, physical characteristics of the land, and its prospective value. It remains to be seen how heavily future courts weigh each factor and in what ways this test shifts denominator decisions in the future. What is clear, though, is that by including reciprocity of advantage as a

136. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133 (1978).

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

factor for consideration in the denominator decision, the Supreme Court in *Murr* contributed an important tool to help promote the goals of fairness and justice in the takings analysis.