

REGULATORY TAKING: ANALYSIS OF  
THE U.S. SUPREME COURT JUDGMENT IN *MURR*\*

*Pichayamon Jarueksoontornsakul*\*\*

**Abstract**

Regulatory takings is a situation in which a government regulates to limit private property rights to such a degree that the regulations effectively deprives the property owners of economic reasonable use or value of their property, or to force property owners to formally divest title of the property to the government, for the purpose of public use or public utility development. In this case, property owners will be acquired just compensation. Per U.S. constitution, regulatory taking under the Fifth Amendment requires three factors that was decided by U.S. Supreme Court in *Penn Central Transportation Co. v New York City* as follows: (1) the economic impact of the governmental regulations on the owner, (2) the extent to which the action interferes with distinct investment-backed expectations and (3) the character or nature of the government action. If regulatory taking does not meet all three factors above, it is not regulatory taking under the Fifth Amendment and the property owners have no right to acquire any compensation.

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\*\* Krisdika Counsel (Legal Counsel), professional level, Financial and Treasury Law Division, Office of The Council of State (Krisdika), The Government of Thailand. LL.B. (2<sup>nd</sup> class honors), LL.M. (Thammasat University), LL.M., cum laude (Indiana University Maurer School of Law).

Nevertheless, on June 23, 2017, the U.S. Supreme Court's 5-3 decision in *Murr v Wisconsin* provided more specific guidelines in the 1978 case, *Penn Central Transportation Co. v New York City*, for courts to use in defining "the relevant unit of property" and "parcel as a whole" to perform regulatory takings. This article analyzes whether the Supreme Court, in *Murr*, made the right judgment in defining "the relevant unit of property" and "parcel as a whole" by applying the three factors of the *Penn Cent. Transp. Co.* test, especially the first factor, the extent of economic impact, by considering guidelines from previous regulatory taking cases. However, the author does not agree with the Supreme Court measure for defining "the relevant unit of property" to consider whether the regulation is regulatory taking that the government must pay just compensation because the Supreme Court approach is in reverse order with the previous rulings and guidelines. Instead of considering and defining "the relevant unit of property" so as to analyze how the landowner was affected economically which thus leads to the determination whether a governmental regulation is regulatory taking and the landowner had any right to compensation, the Supreme Court has decided to apply the principle of "economic impact" on the owner to define "the relevant unit of property."

While the determination of defining "the relevant unit of property." and "parcel as a whole" do not happen in Thailand today, this article may be useful for The Royal Thai government in future to amend the law on Immovable property expropriation, to deprive of private property, and to pay just compensation to property owner.

**Keywords:** Regulatory Takings, Constitutional Law, Takings Clause, Private Property, Property Rights, Conceptual Severance, Eminent Domain.

## Introduction

The Supreme Court of the United States recently decided the case, *Murr v Wisconsin*,<sup>1</sup> which put across a new test for answering the “conceptual severance” or “denominator problem,” and the question of whether separate parcels of land, under common ownership, should be evaluated as a single parcel in a regulatory taking analysis. As the economic impact to property owner analysis, one should consider not only whether there still is some value, but also the level of value of the regulated property at the time it was impacted. Taking the economic impact factor into consideration, if treating two adjacent lots owned by a single owner separately would result in one of the properties becoming completely worthless, even there is some value, it should be a regulatory taking which is compensable. On the flip side, if treating two adjacent lots together as one parcel, the owner still makes plenty of use of property and the economic impact of the regulation is inconsequential. It is not compensable taking under the Fifth Amendment.

The case arose from the Murr family’s efforts to sell one of two adjacent lots that they own. The sale of that lot was blocked by land-use regulations of St. Croix County,<sup>2</sup> which rendered the lot chiefly economically worthless. The Supreme Court granted certiorari in *Murr* on this question: In a regulatory taking case, does the “parcel as a whole” concept as described in *Penn Central Transportation Company v City of New York*<sup>3</sup> establish a rule that two legally distinct, but commonly owned and contiguous, parcels must be combined for regulatory takings analysis purposes?<sup>4</sup>

This article is devoted to analyzing how the Court may be right or wrong in the recent *Murr* case and to discussing the issue of “regulatory taking”

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<sup>1</sup> 137 S. Ct. 1933 (2017)

<sup>2</sup> St. Croix County, Wis., Code Of Ordinances ch. 17.36(1)(4)(a) (Jul. 2007) (cited in case)

<sup>3</sup> 438 US 104 (1978)

<sup>4</sup> Richard A. Epstein, ‘Disappointed Expectations: How The Supreme Court Failed To Clean Up Taking Law In *Murr v Wisconsin*’ (2017) 11 N.Y.U. J.L. & Liberty 151, 154

by dividing into three parts: (1) *Murr*'s background, (2) definition of "regulatory taking", including "conceptual severance" (denominator problem) and the relevant court decisions, and (3) analysis of the question whether the Court in *Murr* made the right decision in applying the factors of the *Penn Cent. Transp. Co.* test, especially the first factor-the extent of economic impact-and, most critically whether the Murrs should have received any compensation.

### 1. *Murr*'s Background

Petitioners, the Murrs, are four siblings who own waterfront property along the St. Croix river in Wisconsin. The Murrs' parents purchased two contiguous waterfront parcels in the 1960s as two separately recorded parcels known as Lot E and Lot F. The Murrs' parents held title to Lot E in their own name, and to Lot F in the name of their business. While Lot E remains undeveloped, they built a cabin on Lot F.

In 1976, both lots became subject to new county zoning requirements and protected under federal, state, and local law.<sup>5</sup> The purpose of those state

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<sup>5</sup> In 1972, Congress designated a portion of the St. Croix River as a National Scenic Riverway as "wild, scenic, or recreational" under the Lower St. Croix River Act, which is an amendment to the Wild and Scenic Rivers Act, and included the 52-mile section of the St. Croix River below Taylor Falls to the confluence with the Mississippi River as part of the National Wild and Scenic River System. 16 U.S.C. § 1274(a)(9) (2008). In response, the Wisconsin Legislature enacted Wisconsin Statute § 30.27(1), which recognizes the Lower St. Croix River as part of the national wild and scenic rivers system, and § 30.27(2), which requires the Department of Natural Resources (DNR) to "adopt, 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."

In 1973, State of Wisconsin enacted § 30.27(3) which requires all affected municipalities to adopt ordinances at least as restrictive as those of the DNR and which forces the DNR and municipalities to adopt river way zoning that complies with DNR standards. (Wis. Stat. Ann. § 30.27 (West)). The DNR responded by adopting Administrative Code Chapter NR 118. Likewise, in 1975, St. Croix County enacted the Lower St. Croix Riverway Ordinance and

and local regulations is to prevent the use or sale of adjacent lots under common ownership as separate building sites unless they have at least one acre of land suitable for development. The standards, imposed by the legislature, established minimum lot sizes for different zones in the river's vicinity and grandfathered in pre-existing lots rendered "substandard" by the new legal requirements. However, to relax such restriction for substandard lots, the law also created a "merger" provision, an exception to the grandfather clause, for adjacent lands under common ownership.

Albeit both lots are over one acre in size, because of their topography they each have less than one acre suitable for development. So, under the regulations, the parents' two adjacent lots became substandard, which is smaller than the required minimum lot size. However, since the two parcels were formally in separate ownership (the parents' name and the business's name), they were protected by the grandfather clause.

The parents maintained the lands under separate ownership until transferring Lot F to petitioners in 1994 and Lot E to petitioners in 1995. By conveying two separate lots in those years, two adjacent substandard lots become in the Murrs' common ownership and, under merger provision, both lots are effectively merged into a single lot. In 2004, the Murrs planned to either sell or develop Lot E separately. However, government officials told them that zoning regulations adopted in 1975 (that required lots to be of a certain net size) precluded the development of Lot E. Under a grandfather clause in the regulation, the property could still be developed if the lot "is in separate ownership from abutting lands." But because the Murrs also owned the abutting parcel, Lot F, the exception did not apply. The ordinance also precluded the Murrs from selling Lot E to anyone else unless it was combined with Lot F. Therefore, citing the substandard lot regulations that the lots had been merged under local zoning regulations, the county zoning

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revised it in 1977 to make it consistent with NR 118. The Lower St. Croix Riverway Ordinance mirrors Wis. Admin. Code chapter NR § 118.08(4) (Jul. 1, 1980)

board denied the Murrs' request for a zoning variance to allow their plan to proceed.

After being denied a variance, the Murrs filed a complaint in state court alleging that the state had effectively taken their property, Lot E, by depriving them of practically all use without paying just compensation, as required by the Takings Clause in the Fifth Amendment. They alleged that without the ability to sell or develop the lot, it is economically useless.

Nonetheless, the state court rejected the unconstitutional takings claim. The court considered the denominator as Lots E and F together. They explained that when the affected property was considered that way, the Murrs could still make plenty of use of their land. The Murrs could keep both lots and locate their cabin on either lot, or they could sell the two lots together. They just could not treat the land as two separately developable parcels, and that limitation alone was not a taking. The Murrs disagreed and appealed.

Still, the Wisconsin Appeals Court rejected the petitioners' request to analyze the effect of the regulations on Lot E only. Instead, the court affirmed the lower state court by holding that the takings analysis properly focused on the two lots together, as a whole parcel, to which the Murrs still retain beneficial and practical use as a residential lot. The Court also affirmed that the merger regulations did not constitute a taking. In reaching its decision, the Wisconsin Court of Appeals relied on the Supreme Court of Wisconsin's "parcel as a whole" in *Zealy v City of Waukesha*,<sup>6</sup> which followed

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<sup>6</sup>In *Zealy v City of Waukesha*; the Wisconsin Supreme Court held, citing *Just v Marinette County* 201 N.W.2d 761 (Wis. 1972), that calculating the depreciated value of the land must be based on use of the land in its natural state (and not on what it would be worth if developed). The parcel viewed as a whole retains substantial uses (a combination of residential, commercial and agricultural), thus the city's rezoning did not deprive the owner of all, or substantially all, of the use of his land. *Zealy v City of Waukesha* 548 N.W.2d 528, 534 (Wis. 1996)

the rule set forth in *Penn Central Transportation Company v City of New York*,<sup>7</sup> In that case, the U.S. Supreme Court held:

*“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 both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole...<sup>8</sup>*

The Murrs disagreed with the Wisconsin Court of Appeals’ decisions, and filed a petition for writ of certiorari to the U.S. Supreme Court. The question presented before the U.S. Supreme Court is whether the state courts erred in considering Lots E and F together as the denominator in the takings fraction. In other words, whether the lower court decisions are correct for deciding that the Murrs’ property should be evaluated as a single parcel consisting of Lots E and F together under regulatory takings doctrine.

The idea, again, is that the denominator makes a difference: had the state courts considered the regulatory burden using only Lot E as the denominator, they would have been more likely to find a taking because the Murrs could do little with Lot E (though the parties dispute that too). In briefing the question, each party proposed its own denominator test for the court to use going forward.<sup>9</sup>

The U.S. Supreme Court, in a 5-3 majority opinion written by Justice Kennedy, held that (1) in the context of a regulatory takings claim, courts had to consider a number of factors in determining the denominator, including the treatment of the land under state and local law, the physical characteristics of the land, and the prospective value of the regulated lands, and the endeavor is

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<sup>7</sup>(n 3) 104

<sup>8</sup>Ibid., 107

<sup>9</sup>Miriam Seifter, ‘Argument preview: Defining the denominator in regulatory takings law’ (SCOTUSblog, 14 March, 2017) <<http://www.scotusblog.com/2017/03/argument-preview-defining-denominator-regulatory-takings-law/>> accessed 1 August 2018

to determine whether reasonable expectations about property ownership would have led a landowner to anticipate that his holdings would be treated as one parcel or separate tracts; and (2) under the appropriate multi-factor standard, the landowners' property should have been evaluated as a single parcel consisting of two lots together for purposes of the takings analysis because state law had merged the lots, the physical characteristics supported treatment as a unified parcel, and the parcels could not be sold or built upon separately. The Murrs were not deprived of all economically beneficial use of the property and their action was voluntary in bringing the lots under common ownership, after the regulations were enacted. Therefore; there was no compensated taking had occurred.<sup>10</sup>

## **2. Definition of a “regulatory taking”, including “conceptual severance” (denominator problem) and the relevant court decisions**

A “taking” is generally understood as an action by which the government “directly interferes with or substantially disturbs the owner’s use and enjoyment of the property.”<sup>11</sup> A government may take property in two ways: (1) by physically appropriating the property; or (2) by regulating or limiting the use of property in such a way as to destroy one or more of the fundamental attributes of ownership (the right to possess, exclude others, or make reasonable economic use of the property), or require the property owner to provide public benefit rather than mitigating some public cost caused by a proposed use. While a physical taking occurs when the government encroaches upon or occupies private land, a taking by regulation consists of government action that deprives a landowner of a property interest without involving the physical encroachment upon or occupation of private property.<sup>12</sup>

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<sup>10</sup> *Murr* (n 1) 1936

<sup>11</sup> *Brothers v United States* 594 F.2d 740, 742 (9th Cir. 1979) (citing *Pete v United States* 531 F.2d 1018, 1031 (1976))

<sup>12</sup> *Bassett v United States* 55 Fed. Cl. 63, 65 (2002)

In the first type of case, the government typically exercises its eminent domain power, which is called a “direct condemnation”. In this situation, the government admits that it wishes to take or has taken private property from an individual and then brings the individual into court to obtain the property in exchange for just compensation.

In the second type of case, the government does not offer any compensation and must be sued for a taking. Such a suit is called an “inverse condemnation” action,<sup>13</sup> which the government defends by claiming that it is using police power instead of its power of eminent domain. In this situation, a landowner who succeeds in his claim against the government will be paid compensation. The second type of case can be divided into two sub-categories, which are “regulatory taking” or taking in fact, where the government takes property by issuing regulations,<sup>14</sup> and “per se taking”<sup>15</sup> or categorical taking”, where the government takes property by destroying a fundamental attribute of ownership.

Under the Fifth Amendment of the U.S. Constitution, private property cannot be taken for public use, without just compensation;<sup>16</sup> this is called the “Taking Clause” and it applies to the states through the Fourteenth Amendment.<sup>17</sup> It is clear that when the government physically seizes private

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<sup>13</sup> The Municipal Research and Services Center, ‘Regulatory Takings’ (Explore Topics) (Oct. 9, 2017) <<http://mrsc.org/Home/Explore-Topics/Legal/Planning/Regulatory-Takings.aspx>> accessed 1 August 2018

<sup>14</sup> The regulation of the property’s use is so severe that it goes too far, as Justice Holmes put it in *Pennsylvania Coal Co. v Mahon* 260 US 393 (1922)

<sup>15</sup> *Loretto v Teleprompter Manhattan CATV Corp.* 458 US 419 (1982)

<sup>16</sup> US Const. Amend. v “...nor shall private property be taken for public use, without just compensation.”

<sup>17</sup> US Const. Amend. XIV, § 1. “...; nor shall any State deprive any person of life, liberty, or property, without due process of law...”

For the relationship between the Fifth Amendment and the Fourteenth Amendment, see *Chicago, B. & Q.R. Co. v City of Chicago* 166 US 226 (1897) and John D. Echeverria & Sharron Dennis, ‘The Takings Issue And The Due Process Clause: A Way Out Of A Doctrinal Confusion’ (1993) 17 VT. L. Rev. 695, 709-10. See also William Michael

property for public use, such as for building a highway or a park, the government will have to pay just compensation to the land owner. In defining just compensation, the United State Supreme Court sets forth that it is to be measured by the market value of the property at the time of the taking,<sup>18</sup> which is equal to the difference between the market value of property before and after the invasion. Justice Marshall explained the fair market value standard as follows:

*In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property “in as good a position pecuniarily as if his property had not been taken.” Olson v United States, 292 US 246, 255 (1934). However, this principle of indemnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. ... The Court therefore has employed the concept of fair market value to determine the condemnee’s loss.*<sup>19</sup>

The phrase “regulatory taking” appears to be an oxymoron, since a valid police power regulation is not a compensable taking,<sup>20</sup> and because a court is able to strike down an invalid regulation. In other words, taking by regulation may not pay compensation if the government used police power. As

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Treanor, Note, ‘The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment’, (1985) 94 Yale L.J. 694

<sup>18</sup> *United States v 50 Acres of Land* 469 US 24 (1984). See also *Klopping v City of Whittier* 8 Cal. 3d 39, 42 (1972) The Court stated that the “date of the taking”, for purposes of calculation of fair market value of the land, should be before enacting regulation which cause the value of the land to decrease.

<sup>19</sup> *United States v 564.54 Acres of Land* 441 US 506, 510-11 (1979)

<sup>20</sup> The classic understanding of the police power is the power to protect the “safety, health, peace, good order, and morals of the community.” (*Crowley v Christensen* 137 US 86, 89 (1890)) In *Mugler v Kansas* 123 US 623, 665 (1887) stated “[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.”

mentioned, there are two types of government power for taking private property: the power of eminent domain and the police power. The power of eminent domain is the power of government to acquire private property for public use, while the police power is the power to adopt regulations to promote the public health, safety, and welfare of a community.<sup>21</sup> Nonetheless, for the most part, regulatory taking claims assert that purported police power regulations actually constitute covert or implicit takings. The term “police power”<sup>22</sup> refers to state regulatory power.<sup>23</sup> In *Commonwealth v Alger*,<sup>24</sup> Massachusetts Chief Justice Lemuel Shaw decided that although the government used its power by limiting the landowner’s usage (the prohibition of warehousing gunpowder in inhabited areas, construction rules designed to

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<sup>21</sup> The court in *Commonwealth v Alger* stated, “All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.” *Commonwealth v Alger* 61 Mass. 53, 85 (1851)

<sup>22</sup> The term “police power” was first used in 1827 by Chief Justice Marshall, to delimit the scope of federal and state authority, in *Brown v Maryland* 25 US 419 (1827) But it was first widely used because of *Mayor of New York v Miln* 36 US 102 (1837); D. Benjamin Barros, ‘The Police Power and the Takings Clause 58’ (2004) U. Miami L. Rev. 471, 476 and this term in modern doctrine was known by Chief Justice Lemuel Shaw in the 1851 case: *Commonwealth* Ibid 53

<sup>23</sup> D. Benjamin Barros (n 22) 473

<sup>24</sup> *Commonwealth* (n 21) 53, 85

limit the risk of fire, and use regulations prohibiting the location of contagious disease hospitals), and the prohibitions on such uses diminish the value of the property and cause economic harm to the property owner, the constitution did not require compensation because they are exercises of the police power, not the power of eminent domain.<sup>25</sup>

However, the Supreme Court, in *Pennsylvania Coal Co. v Mahon*,<sup>26</sup> first recognized a relationship between the takings clause in the Fifth Amendment and regulation of property.<sup>27</sup> The Court decided that the Fifth Amendment's Takings Clause applies not only when government directly condemns property through eminent domain or physically takes property, but also when a government regulation "goes too far" in restricting the use of property,<sup>28</sup> which is called a "regulatory taking."

There are two tests for considering whether land use regulation is a Taking.

First, some regulations are takings per se. In *Lucas v South Carolina Coastal Council*,<sup>29</sup> the U.S. Supreme Court held that in the relatively rare circumstance in which a land-use regulation denies a property owner all "economically viable use of his land," the Fifth Amendment requires payment of compensation (with limited exceptions) despite a legitimate public purpose of preventing serious harm to the public.<sup>30</sup> Justice Scalia, in *Lucas*, explained that in past regulatory takings cases, at least two categories of regulatory action were found to be "compensable" without inquiry into the "public interests advanced in support of the restraint." The first category consists of regulations that cause an actual physical "invasion" of property. (Construing *Loretto v*

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<sup>25</sup> Ibid

<sup>26</sup> *Pennsylvania Coal Co.* (n 14) 393

<sup>27</sup> Ibid 413

<sup>28</sup> Ibid 415

<sup>29</sup> 505 US 1003 (1992)

<sup>30</sup> Ibid 1006

*Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982)).<sup>31</sup> The second category occurs when regulation denies all “economically beneficial or productive use of the land.” (Construing *Keystone Bituminous Coal Ass’n. v DeBenedictis*, 480 US 470, 495 (1987)).<sup>32</sup>

Second, other regulations are taking under *Penn Central Transportation Co. v New York City*,<sup>33</sup> called “regulatory takings.” A regulatory taking will be found when a regulation goes too far.<sup>34</sup> Claiming under the regulatory takings doctrine, if there is no per se taking, the property owner must show a substantial and measurable decline in market value as a result of the regulations because there are no facial takings under regulatory takings analysis.<sup>35</sup> This regulatory taking test arose as a result of New York City's efforts to apply its historic preservation law to the Grand Central Station.<sup>36</sup> The Supreme Court reviewed its earlier cases and concluded that takings actions are “essentially ad hoc, factual inquiries” to apply the “goes too far” test.<sup>37</sup>

In *Penn Cent. Transp. Co.*, New York City enacted the Landmarks Preservation Law to enable the city to designate certain buildings and neighborhoods as historical landmarks. *Penn Central Transportation Co.*

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<sup>31</sup> In *Loretto*, the plaintiff Loretto purchased a five-story apartment building in New York City. Under New York law, a landlord must permit a cable television company to install its cable facilities upon his property. In the case, the defendant Teleprompter Manhattan CATV Corp. installed cable facilities that occupied portions of Loretto’s roof and the side of her building. The U.S. Supreme Court ruled that a permanent physical occupation authorized by government is a taking requiring the payment of just compensation without regard to the public interests that it may serve or the fact that it only has a minimal economic impact on the property owner. *Loretto* (n 15) See also *Kaiser Aetna v United States* 444 US 164 (1979), and the rights to descent and devise in *Hodel v Irving* 481 US 704 (1987)

<sup>32</sup> *Lucas* (n 29) 1015

<sup>33</sup> *Penn Cent. Transp. Co.* (n 3)

<sup>34</sup> *Pennsylvania Coal Co.* (n 14) 412

<sup>35</sup> See *Keystone Bituminous Coal Ass’n v DeBenedictis* 480 US 470 (1987)

<sup>36</sup> *Penn Cent. Transp. Co.* (n 3)

<sup>37</sup> *Ibid* 124

(Penn Central) owned the Grand Central Terminal in New York City which was designated as a historical landmark under the law. Penn Central leased the airspace above the Grand Central Terminal for fifty years before submitting proposals for building designs to the New York City Commission and applying permission to construct an office building above the Grand Central Terminal. The Commission denied that request on the ground that the Grand Central Terminal was an historical landmark. Penn Central brought suit in New York Supreme Court against New York City alleging that the City Commission's application of the Landmarks Preservation Law which denied its rights to build an office building above the Grand Central Terminal and receive revenue from the building constituted a taking of the company's property without just compensation as required by the Fifth and Fourteenth Amendments.

In an effort to begin to give some content to regulatory takings analysis, the U.S. Supreme Court identified three factors with "particular significance" in regulatory taking cases for determining when a governmental regulation goes too far.<sup>38</sup> A new multi-factor test was articulated for determining when a regulation requires the payment of just compensation to a property owner. When determining whether a state action constitutes a taking of private property for public use with the requirement of just compensation under the Fifth and Fourteenth Amendments, courts should consider the economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation. The Court found no taking.<sup>39</sup> Under the test of *Penn Cent. Transp. Co.*, courts look at the unique facts of each case, paying special attention to three factors: the economic impact of the regulation, the property owner's reasonable

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<sup>38</sup> The Court's statement in *Penn Cent. Transp. Co.* that these three factors have "particular significance" might be read to suggest that other factors could be relevant as well. However, the Court has never explicitly expanded upon this list of factors. *Ibid* 124

<sup>39</sup> *Ibid* 127

investment-backed expectations, and the character of the government action. In *Penn Cent. Transp. Co.*, the Court applied these factors as follows:

(1) The “economic impact” of the governmental regulations on the owner. The economic impact of the law on Penn Central does not constitute a total diminution of the value of its property, as it can still generate revenue from renting out portions of the Grand Central Terminal. It is merely prohibited from gaining additional revenue from leasing the airspace rights above the building.

(2) The extent to which the action “interferes with distinct investment-backed expectations.” The Court asserted that Penn Central’s investment-backed expectations are not significantly impaired by the regulation. The regulation permits Penn Central not only to profit from the Terminal but also to obtain a “reasonable return” on its investment, where the revenue from developed airspace was not an option when Penn Central first invested in the property.

(3) The “character” or “nature” of the government action. The Court commented that a “taking” may more readily be found when the interference with property can be characterized as a physical invasion by the government,<sup>40</sup> than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. The governmental invasion caused by the regulation is not physical but the

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<sup>40</sup> In the decades following *Penn Cent. Transp. Co.*, the Supreme Court qualified the open-ended “too far” test by announcing a per se rule on takings. In *Loretto*, defendant Teleprompter Manhattan CATV Corporation installed some cable boxes and cable lines on top of Loretto’s apartment building without her permission, pursuant to a state law authorizing such installations. *Loretto* (n 15) 422–23. Finding that the installation constituted a permanent physical occupation, the Court held that because “a permanent physical occupation authorized by government is a taking,” regardless of the public interest at stake or the extent of physical occupation, the state law effected a taking, requiring compensation. *Ibid* 426, 455

government action in the case is merely a prohibition on further development of Penn Central's property.<sup>41</sup>

These three factors can be thought of as proxies for eminent domain-like conduct. The heart of the inquiry is whether the regulation is more like an act of eminent domain or a routine exercise of state police powers to regulate public health and safety.<sup>42</sup>

Under the Supreme Court's regulatory takings doctrine per *Penn Cent. Transp. Co.*, courts must determine, as one of factors, the regulation's economic impact—the extent to which the regulation impacts the property's value. To determine how much economic impact of the governmental regulations on the owner, the court considers the burden on the landowner's right in using property as a whole. But whether land is valueless depends on whether the "relevant parcel" is the two lots combined as one lot, or just the regulated portion of the property. There are many factors that might determine what the relevant parcel is. The deed, adjacency, the single transaction, and the nature of the regulation, could be used to determine the relevant parcel, with varying results. The question of when a parcel is treated as one or two is the issue of "conceptual severance,"<sup>43</sup> also known as the "denominator problem."<sup>44</sup> (The denominator problem is a legal precursor to the ultimate question of fairness embodied in the Armstrong principle<sup>45</sup> and is a question on how to pick the denominator for measuring the extent of a loss, by considering a number of factors in determining

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<sup>41</sup> *Penn Cent. Transp. Co.* (n 3) 107

<sup>42</sup> *Lingle v Chevron U.S.A., Inc.* 544 US 528, 539 (2005)

<sup>43</sup> The term "conceptual severance" is first neologized by Margaret Jane Radin (Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 Colum. L. Rev. 1667, 1676)

<sup>44</sup> Frank I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 Harv. L. Rev. 1165, 1192–1193

<sup>45</sup> See William Michael Treanor, 'The Armstrong Principle, the Narratives of Takings, and Compensation Statutes' (1997) 38 Wm. & Mary L. Rev. 1151

the proper denominator of the takings inquiry.<sup>46</sup> The denominator problem needs a flexible approach, designed to account for factual differs.”<sup>47</sup>)

The word “conceptual severance,” as the process of using only the property interest affected by the regulation, was created by Professor Margaret Jane Radin. She defined “conceptual severance” to consist of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually “severs” from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually, construes those strands in the aggregate as a separate whole thing.”<sup>48</sup>

Whether an owner can conceptually sever determines how much diminution of value the property owner has suffered as a result of the adoption of some regulations. For proving value diminution, the property owner attempts to conceptually sever his property physically, functionally, or temporally effect to his bundle of rights so that a regulation diminishes a significant portion or all of the severed property’s value.

Four categories of conceptual severance have emerged in the scholarly commentary. Those are vertical, functional, temporal, and horizontal severance.<sup>49</sup>

(1) **Vertical severance** – the U.S. Supreme Court has consistently rejected vertical severance since *Penn Cent. Transp. Co.* in 1978. The Court rejected the Penn Central’s argument that the law effectively took away all of its air rights.<sup>50</sup> Rejecting vertical severance, the Court held that the city’s Landmarks Preservation law did not go too far and thus did not affect a

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<sup>46</sup> Frank I. Michelman (n 44)

<sup>47</sup> *Loveladies Harbor v United States*, 28 F.3d 1171 (Fed. Cir. 1994)

<sup>48</sup> Margaret Jane Radin (n 43)

<sup>49</sup> David A. Dana & Thomas W. Merrill, *Property: Takings* (Foundation Press New York 2002) 135

<sup>50</sup> See *Penn Cent. Transp. Co.* (n 3) 130

taking of Penn Central's property.<sup>51</sup> The divisions of a parcel into air rights in *Penn Cent. Transp. Co.* is an example of vertical division of land. The other examples are the divisions of a parcel into surface rights, or subsurface rights.<sup>52</sup>

However, before *Penn Cent. Transp. Co.*, in 1922, the Court in *Pennsylvania Coal Co. v Mahon*<sup>53</sup> recognized the fundamental private property rights versus public tension again by mentioning that where the regulation rendered coal mining commercially impracticable and caused sufficient diminution in property value, it should be considered a taking.

In *Pennsylvania Coal Co.*, there had been an actual severance of the property subject to the regulation, that is, the subsurface mineral rights. The dispute began when the coal company conveyed the surface of a plot of land it owned to Mahon but retained the right to mine underneath the property while Mahon's right was subject to the risks associated with mining that caused subsidence. After that, the Commonwealth of Pennsylvania enacted the Kohler Act, preventing coal mining. Consequently, as a result of the regulation, the property owner (the coal company) suffered essentially a total loss of its support estate. The Court partly based its decision on protecting property rights, seeking to achieve a balance between the requirements of the

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<sup>51</sup> See *Penn Cent. Transp. Co.* (n 3) 137-138

<sup>52</sup> However, it seems the U.S. Supreme court, in the past, accepted vertical severance. The Court in *Pennsylvania Coal Co.* held that Pennsylvania Coal Co. had only acquired surface rights and not the right to supporting property underneath the land. When it could not exercise the only valuable right it possessed which was to mine the property for profit because the subsurface rights to a property be taken by The Kohler Act for the public, such Act went beyond a regulation and became a taking. The Court considered the magnitude of diminution of the value of property and found that when a diminution reaches a certain point the government must compensate for it. (*Pennsylvania Coal Co.* (n 14) 413; Also, see *McCarran Int'l Airport v Sisolak*, where the Court stated, "Like most property rights, the use of the airspace and subadjacent land may be the subject of valid zoning and related regulations which do not give rise to a takings claim." (*McCarran Int'l Airport v Sisolak* 122 Nev. 645 (2006))

<sup>53</sup> *Pennsylvania Coal Co.* (n 14)

protection of property rights and advancing the state's interest in regulating property for health, safety, and the common welfare. The court asserted that a state may pass laws in the valid exercise of its police powers that has incidental impact on property values, but when the law causes sufficient diminution in property value, the state must take the land by eminent domain and provide compensation. While the use of property may be regulated, overregulation will be considered a taking. It is a question of degree on calculating the diminution in value. The issue is whether the court starts with the total value of the landowner's rights, or whether the court conceptually severs the surface rights and the subsurface mineral rights and the support estates. If the court does this conceptual severance, it would say that the landowner has lost 100 percent of his support rights - a total wipeout - rather than, say, five percent of his total value. In this case, the statute does not seek to correct a public nuisance, because only one home is affected, and it does not intend to protect personal safety, since Mahon knew the risks involved in purchasing the land. Thus, the statute does not fall within the government's police power. Instead, it should be considered a taking.<sup>54</sup>

(2) **Functional Severance** – the court accepted this kind of conceptual severance. Functional severance is grounded in the notion that property is a bundle of rights.<sup>55</sup> The bundle of rights traditionally include the rights to use, possess, exclude, and dispose.<sup>56</sup>

The court in *Keystone Bituminous Coal Ass'n v DeBenedictus*<sup>57</sup> ruled that in determining whether a regulation restricting the use of property constitutes a

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<sup>54</sup> Ibid 412

<sup>55</sup> See Courtney C. Tedrowe, 'Conceptual Severance and Takings in the Federal Circuit' (2000) 85 Cornell L. Rev. 586 (exploring the relationship between the bundle of rights metaphor and conceptual severance).

<sup>56</sup> See Richard A. Epstein, *Takings: Private Property And The Power Of Eminent Domain* (Harvard University Press London 1985) 59 (advocating for an extremely liberal and individualistic conception of property where property consists of the rights of "possession, use, and disposition")

<sup>57</sup> *Keystone Bituminous Coal Ass'n* (n 35) 470

taking of the property, the courts consider the parcel of property as a whole, rather than as a bundle of discrete parts.<sup>58</sup> In 1966, the Pennsylvania legislature enacted the Subsidence and Land Conservation Act, which prohibited mining coal when doing so might cause subsidence of land. Land subsidence due to coal mining is a significant problem in Pennsylvania as it has caused widespread property damage. The Keystone Bituminous Coal Association brought suit in federal court against various state officials as defendants who were in charge of determining what coal could not be mined and enforcing the prohibition on mining. Keystone claimed that the Subsidence Act's prohibition on mining coal constituted a taking requiring just compensation. Keystone also claimed that the regulations were a taking because they prevented the mining companies from exercising their rights to the support estates of their land.<sup>59</sup> In this case, the court found that Subsidence and Land Conservation Act did not prevent all economically viable uses of the mine companies' land. While the mine company, Keystone, claimed that it was denied all economically viable uses of the coal on which it is compelled to leave in the ground and of the support estates that it purchased under Pennsylvania law, courts determine whether regulations are takings by looking at how the regulations will affect parcels of property taken as a whole. Where an owner possesses a full bundle of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.<sup>60</sup> The Court in *Keystone* also found no taking because there was no showing of the diminution of value in land resulting from the regulation.<sup>61</sup>

However, if the regulation denies all economically beneficial or productive use of land, the court decided that a taking occurred. The U.S. Supreme Court in *Lucas v South Carolina Coastal Council*,<sup>62</sup> carved out an

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<sup>58</sup> Ibid 497

<sup>59</sup> The State of Pennsylvania recognizes three types of estates: surface estate, mineral estate, and support estate. Ibid 478

<sup>60</sup> Ibid 473

<sup>61</sup> Ibid 512

<sup>62</sup> *Lucas* (n 29) 1003

exception to the multifactor test articulated in *Penn Cent. Transp. Co.* when government regulations have a severe enough economic impact on the use of property, amounting to a permanent physical occupation of land. The Court adopted a “per se” rule that declared that in the “extraordinary circumstance” in which a regulation caused a property owner to lose all economically beneficial uses of the land, a taking necessarily resulted – a per se taking.<sup>63</sup> The Supreme Court held that David Lucas, who purchased two beachfront lots on a South Carolina barrier island with the expectation of constructing single-family homes, had suffered a “taking” of his property by government enactment of the Beachfront Management Act, which prohibited the building of any permanent residential structures on the lots. Lucas's plans were completely frustrated, and the value of his two lots plummeted to almost nothing. The Court ruling, written by Justice Antonin Scalia, held that although government may generally restrict the use of private property without compensation, a taking occurs when the regulation denies all economically beneficial or productive use of land,<sup>64</sup> and that constitutes a per se taking.<sup>65</sup> Thus, the Fifth Amendment would guarantee him just compensation for “total takings.”<sup>66</sup>

Per a footnote in *Lucas*, Justice Scalia suggested looking to state law specifically to see whether state law recognizes or protects the specific property interest at issue, as a factor in the relevant parcel determination.<sup>67</sup>

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<sup>63</sup> Ibid 1019

<sup>64</sup> Ibid 1015. Regulatory taking cases should not be confused with cases involving an actual physical invasion of the property, which called Per se taking or categorical taking. Cf. *Loretto v Teleprompter Manhattan CATV Corp.* the court held that when a physical invasion of private property is involved, a taking occurs no matter how small the affected land segment may be. (*Loretto* (n 15))

<sup>65</sup> Ibid 1015-16

<sup>66</sup> But if the loss of economic value is “total” but “temporary, the courts decided it is not taking. See *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency* 535 US 302 (2002)

<sup>67</sup> The court stated that “Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the property interest against which the loss of value is to be measured.

However, the court did not decide how to determine the relevant parcel of land, within the meaning of *Penn Cent. Transp. Co.*, that is subject to the regulatory taking, especially when the landowner owns multiple parcels in the vicinity, some of which have been purchased and sold over multiple transactions.

(3) **Temporal Severance** – this kind of conceptual severance was accepted, then rejected, by the court. It may be the most confusing form of conceptual severance because time plays varying roles in property. Time is a characteristic of property interests (e.g., leaseholds or defeasible fees).<sup>68</sup> Further, time can characterize as the government action (i.e., the effective duration of the regulation). Additionally, time can also be a characteristic of the taking denominator (e.g., regulation prohibits owner to use property from 2017 to 2018).<sup>69</sup> The question was first addressed in *First English Evangelical Lutheran Church v County of Los Angeles*,<sup>70</sup> which held that, under the Takings Clause, a taking requires just compensation, regardless of whether the offending government regulation is later rescinded and the taking is made merely temporary, not permanent.<sup>71</sup>

However, in 2002, the Supreme Court reversed its previous holding in *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*.<sup>72</sup> The Court in *Tahoe* decided that if the loss of economic value is “total” but

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When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.” *Lucas* (n 29) 1016 fn.7

<sup>68</sup> See Danaya C. Wright, ‘A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis’ (2004) 34 *Envtl. L.* 175, 214

<sup>69</sup> Angela Chang, ‘Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights’ (2013) 98 *Cornell L. Rev.* 965, 975-976

<sup>70</sup> 482 US 304 (1987)

<sup>71</sup> *Ibid* 318, 321

<sup>72</sup> *Tahoe-Sierra Pres. Council* (n 66)

“temporary, then it is not a taking. In that case, a 32-month development moratorium for certain areas in the Tahoe basin denied all economic use of its property during that 32-month period.”<sup>73</sup> However, by citing *Penn Cent. Transp. Co.*’s “parcel as a whole” rule, and distinguishing plaintiffs’ claim from *Lucas* that dealt with a permanent regulation that deprived an individual of all viable economic use of a fee simple estate, Justice Stevens rejected temporal severance, holding that plaintiffs cannot conceptually sever the 32-month fragment from the remaining fee simple estate and claim that the moratoria effected a taking of the 32-month segment.<sup>74</sup>

(4) **Horizontal Severance** – this is the conceptual severance stereotype that usually emerges in one’s mind when thinking about land use regulatory taking claims, and is the heart of conceptual severance.<sup>75</sup> Horizontal severance is a necessary question in determining the extent of the property owner’s loss and ultimately whether the property owner is entitled to just compensation.

In *Palazzolo v Rhode Island*,<sup>76</sup> the court cited the multi-factors in *Penn Cent. Transp. Co.* The court stated that where a regulation places some limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.<sup>77</sup> In this case Anthony Palazzolo owned a waterfront parcel of land in the town of Westerly, located in the State of Rhode Island. Nearly all of Palazzolo’s property was designated as coastal wetlands under Rhode Island law. The property was designated as such when Palazzolo acquired it, and the effect of such a designation was to prohibit the development of the property. Despite the designation, Palazzolo submitted

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<sup>73</sup> Ibid 312

<sup>74</sup> Ibid 331

<sup>75</sup> Angela Chang (n 69) 977

<sup>76</sup> 533 US 606 (2001)

<sup>77</sup> Ibid 611

several proposals to the Rhode Island Coastal Resources Management Council, the state organization responsible for protecting wetlands, seeking permission to fill the marshes located on his property and develop it for public use. The Council denied all of Palazzolo's proposals, and he filed suit in Rhode Island state court on the grounds that the Council's application of its restrictive wetlands policies and denial of his proposals constituted a taking of his property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Superior Court of Rhode Island rejected Palazzolo's claim, and he appealed. The Supreme Court of Rhode Island also rejected Palazzolo's claim and held that his takings claim was not ripe, that he had no right to challenge land regulations in place on his property at the time he acquired it. The court held further that the *Lucas* ruling did not apply because Palazzolo had not lost all economically beneficial use of his property because Palazzolo could develop an upland portion that had an estimated worth of \$200,000. Therefore, Palazzolo could not recover under *Penn Cent. Transp. Co.*<sup>78</sup>

The case raises the question as to what the Court meant when it established the rule of "parcel as a whole" in *Penn Cent. Transp. Co.* During the following forty years, the Court has provided little guidance on the meaning and proper application of Penn Central's three factors, perpetuating the essentially ad hoc approach to takings analysis<sup>79</sup> and contributing to the widespread view that regulatory takings is an especially confusing field of law.<sup>80</sup> The Court has many times repeated the list of *Penn Cent. Transp. Co.* factors,

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<sup>78</sup> Ibid

<sup>79</sup> See *Tahoe-Sierra Preservation Council, Inc.* (n 66) 302, 326 quoting *Lucas* (n 29) 1015 In turn quoting *Penn Cent. Transp. Co.* (n 3) 124 ("In the decades following [Penn Central], we have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries'")

<sup>80</sup> See D. Benjamin Barros (n 22) 471 fn.1 (bemoaning the "widespread confusion" created by Supreme Court takings jurisprudence and citing numerous prior articles making similar complaints)

but has never refined the meaning of those factors, or explained how they should be weighted,<sup>81</sup> and also never explained how to consider “as a whole”.

Suppose a landowner buys two identically sized, adjacent lots with separate deeds in a single transaction; black lot and white lot. Afterward, a regulation forbids all construction on the black lot. Accordingly, if the landowner would like to bring a case by claiming the regulation has taken his property and seek compensation, under the Supreme Court’s regulatory taking doctrine in *Penn Cent. Transp. Co.* claiming such regulation goes too far, one factor that the court has to consider is the economic impact of such regulation. To consider the regulation’s economic impact, the court has to determine the extent to which the regulation impacts the property’s value. If the regulation renders the property valueless or 100 percent loss, the regulation constitutes a taking, requiring just compensation.<sup>82</sup> But if the loss is less than 100 percent the percentage is not the only consideration. The Supreme Court has indicated that reductions in value of over 90 percent are not necessarily sufficiently onerous to constitute a taking.<sup>83</sup> In other words, the U.S. court generally has required diminutions well in excess of 85 percent to find a regulatory taking.<sup>84</sup>

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<sup>81</sup> Holly Doremus, ‘Takings and Transition’ (2003) 19 J. Land Use & Envtl. L. 1, 7

<sup>82</sup> See *Lucas* (n 29) 1003

<sup>83</sup> See *Agins v City of Tiburon* 447 US 255 (1980) (no taking with an eighty-five percent reduction in value); *Village of Euclid v Ambler Realty Co.* 272 US 365 (1926) (no taking with a seventy-five percent reduction in value). Cf. *Hadacheck v Sebastian* 239 US 394 (1915) (no taking with a 92.5 percent diminution in value – but not *Penn Cent. Transp. Co.* analysis)

<sup>84</sup> *Walcek v United States* 49 Fed. Cl. 248, 271 (2001) The Court in *Walcek* cited one anomalous decision, *Florida Rock Indus., Inc. v United States* 45 Fed. Cl. 21, 36 (1999) in which the court had concluded that a 73.1% diminution in value was indicative of a *Penn Cent. Transp. Co.* taking. However, the significance of this outlier should be discounted because the court also relied in part on a finding that the owner could only recoup half of its original investment in the property. That calculation was based on the assumption that the owner’s basis in the property should be adjusted for inflation, an approach that was

However, there is still a question of how close the deprivation is to a total loss when the regulation only affects part of the parcel. Such question is the question of conceptual severance or the denominator problem. The answer depends on what the meaning of “parcel as a whole” is and whether the relevant parcel is the two lots combined as one lot, or just the black lot portion of the property. If the relevant parcel is only the black lot which is evaluated as separate parcels, it means the government has taken total value of the owner’s property. On the contrary, if the relevant parcel is the two lots combined and is evaluated as single parcel, it means the regulation impairs only 25 percent or 50 percent of the relevant parcel, thus no taking has arisen.

So, before *Murr*, the meaning of the phrase “as a whole” was unclear. What is the parcel for which the diminution in value should be measured? This problem often referred to as finding the appropriate denominator.<sup>85</sup> The harm or diminution in value resulting from a regulation, in the meaning of “as a whole”, will vary depending upon whether the loss is calculated on the portion of the parcel affected by the regulation, the parcel measured by its physical boundaries, or all the lands held by the owner affected by the regulation. The Supreme Court answered these inquiries in *Murr*, in which the Court defines the meaning in practice of the term “parcel as a whole”. The question in *Murr* is whether two separately adjacent parcels of land, under common ownership, should be evaluated as a single parcel in a regulatory taking analysis.

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subsequently disapproved by the Federal Circuit in its decision affirming the trial court’s ruling in *Walcek v United States* 303 F.3d 1349 (Fed. Cir. 2002)

<sup>85</sup> *Lucas* (n 29) 1016 fn.7; *Pennsylvania Coal Co.* (n 14) 419 (Brandeis, J., dissenting)

### 3. Analysis of question whether the court in *Murr* made the right decision on the question of Taking and Compensation

In *Murr*, the problematic ordinance did not deny the Murrs all economic benefit because the Murrs can use their lands but cannot sell them separately, so the standard for considering whether there is regulatory taking is the *Penn Cent. Transp. Co.* test. The court, in *Murr*, stated that states create property rights with respect to particular things, and, in the context of real property, those things are horizontally bounded plots of land, so, the first thing to do is to identify the relevant “private property.”<sup>86</sup> The precise question in this case is how the “parcel as a whole” test of *Penn Cent. Transp. Co.* applies to two contiguous parcels that came under common ownership by different routes.<sup>87</sup> The U.S. Supreme Court upheld the Wisconsin Supreme Court’s ruling that two contiguous lots should be considered one parcel for the purposes of the government regulatory taking.

However, to determine whether there is regulatory taking, the Court should determine that a landowner possesses a valid stick in the bundle of property rights affected by the governmental action. If that landowner does possess such interest, the court will proceed to the second step, i.e., determining whether the government action at issue constituted a taking of that stick.

#### 3.1 The definition of private property

The first question in this case, to determine whether there is regulatory taking under the *Penn Cent. Transp. Co.* test, should be what the meaning or scope of private property is. In a private property system, in the case of each object, the individual person whose name is attached to that object is a person who determines how the object shall be used and by whom, and his decision

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<sup>86</sup> *Murr* (n 1) 1953

<sup>87</sup> Richard A. Epstein (n 4) 151-152

would be upheld by the society as final<sup>88</sup> when there is any dispute about what is to be done with the object. Such privileged position is called ownership. Property is as an essentially abstract set of legal rights, usually with respect to tangible things.<sup>89</sup> It is a commonplace that property is a bundle of rights.<sup>90</sup> Ownership under the bundle-of-rights metaphor represents rights that one is entitled to vis-a-vis other people.<sup>91</sup> According to John Lewis, the bundle-of-rights metaphor was rooted in the individual's instinctive sense that ownership of a thing meant, in practical terms, "the right to dispose of a thing in this way or that, the right to use a thing in this way or that, the right to compel a neighbor to desist from doing this or that," and so forth.<sup>92</sup>

The Supreme Court of the United States in *Phillips v Wash. Legal Found.*,<sup>93</sup> set forth how to determine what private property is. In that case, the Court stated that for purposes of the takings clause of the Federal Constitution's Fifth Amendment, interest earned on client funds held by lawyers in trust accounts pursuant to a state's "interest on lawyers trust account" (IOLTA) program is private property, because (1) possession, control, and disposition are valuable property rights that inhere in such interest income, even though the property may have no economically realizable value to the owner; (2) the value of such interest income is (a) created by the owners' funds and (b) not "government-created value," that is, the product of increased efficiency, economies of scale, or pooling of funds by the government; and (3) the state's confiscation of such interest income does not amount to a fee for services performed, as funds held in IOLTA accounts are managed entirely by

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<sup>88</sup> Jeremy Waldron, 'What Is Private Property?' (1985) 5 Oxford Journal of Legal Studies 313, 327

<sup>89</sup> Leif Wenar, 'The Concept of Property and the Takings Clause' (1997) 97 Colum. L. Rev. 1923, 1926 ("According to Hohfeld, property cannot be things, like land or breweries; property can only be property rights-the rights over things")

<sup>90</sup> See J.E. Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L. Rev. 711, 713 ("The prevalence of the [bundle-of-rights] paradigm is undeniable")

<sup>91</sup> Ibid 712-713

<sup>92</sup> John Lewis, *A Treatise On The Law Of Eminent Domain In The United States* (Vol. 1 Callaghan & company, Chicago 1888) § 55, 44

<sup>93</sup> *Phillips v Wash. Legal Found.* 524 US 156 (1998)

banks and private attorneys rather than the state.<sup>94</sup> Under the rule in *Phillips*, the Murrs' lands are private property because they typically have the right of possession, control, and disposition in their lands and the lands' value created by the Murr's development and money.

To define the scope of private property, the courts, typically, look to state law. The state law defines the boundaries of detached parcels of land, and those boundaries should determine the scope of private property.<sup>95</sup> However, the majority in *Murr* departed from the traditional approach<sup>96</sup> of looking only to state and local law to define the "private property rights" at issue in a takings case. Instead, the majority stated that the courts must consider a number of factors, including the physical characteristics of the land; the prospective value of the regulated land; and whether reasonable expectations would lead the land owner to expect that his holdings would be treated as one parcel.<sup>97</sup> The majority's decision did not define the phrase "parcel as a whole" for determining the economic impact of the regulation, a factor set forth in *Penn Cent. Transp. Co.* Instead, the majority defined such term as another factor, besides the three factors set forth in *Penn Cent. Transp. Co.*, for determining whether a regulation affects a taking to the property, which is a separate question and makes it look like the Court lost its way. In other words, "parcel as a whole" should be determined as a part of the economic impact of regulation, not as a factor for regulatory taking.

The majority in this case mentioned that the test for regulatory taking requires the courts to compare the value of property that has been

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<sup>94</sup> *Ibid* 159

<sup>95</sup> *Murr* (n 1) 1950 (Roberts, C.J., dissenting)

<sup>96</sup> To determine property boundaries, the traditional approach is found under the state law. See 46 U.S.C. § 103 (2006) stated "In this title, the term "Boundary Line" means a line established under section 2(b) of the Act of February 19, 1895 (33 U.S.C. 151(b))." An example for public land is *State of Arkansas v State of Mississippi* 250 US 39 (1919) An example for private property is *Littlejohn v Fink* 190 N.W. 1020 (1922)

<sup>97</sup> *Murr* (n 1) 1945

taken with the value that remains in the property.<sup>98</sup> It also stated that a further related question is how to define the unit of property whose value is to furnish the denominator of the fraction, which leads to another question whether the property taken is all, or only a portion of, the parcel in question.<sup>99</sup>

Moreover, the transferring of Lot E to the Murrs individually did nothing to change the physically boundaries under state and local law. The Murrs have two parcels, lot E and lot F, each parcel described by a deed or other document separately. Under the traditional approach of looking at state law, these two parcels are treated separately in law, for example, there are two deeds and separate title records, and each parcel owner has to pay estate tax separately. Hence, to determine the scope of the Murrs' property, for identifying the relevant parcel, the court should consider only Wisconsin state law, which in other legal ways treated and determined Lot E and F separately as separate parcels, albeit defining the parcel by reference to state law could be altered by state related authorities according to the majority. The majority explained that State may impose development limits on the aggregate area of nonadjacent property owned by a single person.<sup>100</sup> But if the state enacts the law and imposes development limits, the adjacent lots of single owner would be treated as one parcel under such state law and other local laws. For instance, the owner of adjacent lots should pay for estate taxes or fees as one parcel or the estate deeds of parcels should be combined as one deed.

The Court defined "private property" contrary to other laws. Lots E and F were treated separately under other branches of state law. But the

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<sup>98</sup> Ibid 1936

<sup>99</sup> Ibid 1944. In addressing this question, the Court articulated a new standard that moves beyond the limitations of state and local law. The Court explained that: "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property from the value that remains in the property", it is essential to determine "how to define the unit of property whose value is to furnish the denominator of the fraction." Ibid 1944

<sup>100</sup> Ibid 1945

majority in *Murr* treated Lot E and F as one parcel, with the result that there was no regulatory taking under the factors of *Penn Cent. Transp. Co.* As Chief Justice Roberts, in dissent, explains:

*Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such established property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property" – adopted solely "for purposes of th[e] takings inquiry," – undermines that protection.<sup>101</sup>*

Additionally, if the title to Lot E referenced one person who is not the same person on the title to Lot F, does the judgment overlap? If the facts changed and instead of transferring the lots to the Murrs, the transfer was to another individual, the lot would not subject to the Wisconsin law and the owner could dispose or develop the land. That would lead to the weird outcome if the state enacted the law to protect the environment. In *Murr*, where both Lot E and F, which belonged to the Murrs, are considered as a single parcel and no taking occurred, instead, the facts change to Lot E and F were belonged to separated owners and were considered as separated parcels, it might be a taking for which just compensation can be received. So, under the same standard, it is perplexing if the court treats the two adjacent lots of a single owner at one time as a parcel, but there are still two separately deeds that the owner could sell one of parcel with deed of title to the others later, which not subject to the Wisconsin regulation.

### **3.2 Whether regulatory taking occurred under *Penn Cent. Transp. Co.* factors**

In *Murr*, the court mentioned that the state and local regulations effectively merged Lots E and F because a substandard lot, lot E, is a residential

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<sup>101</sup> *Murr* Ibid 1950 (Roberts, C.J., dissenting)

lot which does not meet the lot size requirements for the district in which it is located as set forth in the law and thus should be evaluated as a single parcel consisting of Lots E and F together due to the Murrs' voluntary act in bringing the lots under common ownership after the regulations were enacted. In other words, the conveyances were made even though the Murrs were notified that the property in question was "subject to easements, covenants, restrictions and declarations of record," including the merger restrictions created under the Wisconsin ordinance.<sup>102</sup> This reasoning implies that if the Murrs had transferred title to Lot E to a wholly owned corporation the merger doctrine would not have applied. Indeed, the Murrs could have avoided the application of the parcel-as-a-whole doctrine in regulatory taking by following the simple maneuver of keeping the title to the two parcels in separate legal entities at all relevant times. There is nothing that the government could have done to stop them from doing so.

Before the transfer, the Murrs had a right to transfer their property to their descendants and also had a right to claim a regulatory taking. The individual's right to retain the interests and exercise the freedoms of managing a bundle of rights are the core of private property ownership. And not only the landowner, who acquired the property before the regulation, but also the landowner who bought or obtained the regulated property with notice of the regulation may challenge such regulation and claim a regulatory taking. The U.S. Supreme Court court in *Palazzolo v Rhode Island*<sup>103</sup> ruled that landowner who obtained the property with notice of the regulation, which may be called "coming to taking," may still challenge such regulation as a taking, requiring payment of just compensation under the Taking Clause when the property was affected by that regulation. Following *Palazzolo*, even though the Murrs acknowledged the merger clause, they still had right to claim a regulatory taking occurred under principles outlined in *Penn Cent. Transp. Co.*

### 3.2.1 The economic impact of the regulation analysis, including conceptual severance

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<sup>102</sup> Richard A. Epstein (n 4) 160

<sup>103</sup> *Palazzolo* (n 76)

Private owners of property care about regulatory risks that impact property values. Some might think that economic impact is the least problematic of the *Penn Cent. Transp. Co.* factors because it apparently showed the greater the economic impact of a government action the greater the likelihood of a taking, and in the absence of a very significant economic impact, a regulatory taking claim will generally fail.<sup>104</sup> Admittedly, a high level of economic impact should be necessary to establish a regulatory taking. However, the actual economic effects of regulations are often difficult to measure, and it indeed may be impossible to determine whether the net economic effect of a regulation is positive or negative.<sup>105</sup> Taking the economic impact into account, if treating two adjacent lots owned by single owner separately would result in one of the properties becoming completely worthless, it should be a regulatory taking that is compensable.

The Court in *Murr* used multiple factors to define the property boundary. For considering the question how to define the unit of property that is the subject of the alleged taking, the majority in *Murr* stated that courts must consider other factors, such as the land's treatment, the land's physical characteristics and land's prospective value, as well as reasonable expectations. However, considering the substantial net reduction in the value of a piece of their property, the Murrs lost their economic expectations in the property.<sup>106</sup>

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<sup>104</sup> John D. Echeverria, 'Making Sense of Penn Central' (2005) 23 UCLA J. Envtl. L. & Pol'y 171, 178

<sup>105</sup> As the Supreme Court observed in *Tahoe-Sierra*, "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way— often in completely unanticipated ways." *Tahoe-Sierra Pres. Council* (n 66) 302, 324

<sup>106</sup> The court explained that because the test for regulatory taking requires courts 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. *Murr* (n 1) 1936

There is not a single undivided property right inhering in an item of property, but, rather multiple property interests, often metaphorically called a “bundle of sticks” or “bundle of rights” that can be taken in whole or in part.

After defining property as a bundle of rights, one must determine what rights are essential to that bundle, what minimum rights combined constitute property, and what rights the government can rescind without such action constituting a taking of property<sup>107</sup> and whether the challenged regulation destroys one or more of the fundamental attributes of property ownership – the right to possess, to exclude others, or to dispose of property. Chief Justice Roberts insisted, in *Murr*, that the three factors balancing test of *Penn Cent. Transp. Co.* was developed in “response to the risk that owners will strategically pluck one strand from their bundle of property rights —such as the air rights at issue in *Penn Cent. Transp. Co.* — and claim a complete taking based on that strand alone.”<sup>108</sup>

However, similar to *Keystone*, which concluded that a regulation that merely affects one stick of the bundle of property rights is not a taking,<sup>109</sup> in *Murr*, the court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation by citing *Penn Cent. Transp. Co.*, which rejected a challenge to the denial of a permit to build an office tower above the Grand Central Terminal. The Court refused to measure the effect of the denial only against the “air rights” above the terminal, cautioning that “[t]aking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular

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<sup>107</sup> Courtney C. Tedrowe (n 55) 592

<sup>108</sup> *Murr* (n 1) 1953

<sup>109</sup> *Keystone Bituminous Coal Ass'n* (n 35) 470, 473 See also *Andrus v Allard* 444 U. S. 51 (1979) a case dealing with personal property, the Court held that “the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”

segment have been entirely abrogated.<sup>110</sup> Instead, the property right that was affected in *Murr* is the right of property on horizontal severance, which differs from the air rights that is vertical severance in *Penn Cent. Transp. Co.*, because the loss of air rights above the Grand Central Station, could not be treated as a complete wipeout when the owner retained the ability to operate at ground level. Unlike denying development rights above the Grand Central Terminal in *Penn Cent. Transp. Co.*, denying development and selling rights means that the Murrs have lost 100 percent of their surface right in development and disposition of Lot E. Although the Murrs still have the right of use, denying development and selling rights have a large economic impact on Lot E because, as analyzed above, treating Lots E and F separately would result in one of the properties, Lot E, becoming worthless due to the limited ability to build and develop.

Albeit the Murrs still have property right on Lot E, which means the land has some value, the rights to dispose and develop were forfeited as long as the law is enforced. By considering physical taking analysis in *Loretto*, the limitation of the development and selling rights by land-use regulations of St. Croix County might seem to be a temporary taking of property, even if having no physical action by government, because Lot E can still be developed or disposed once the prohibition is lifted. Even if the language in *Loretto* stressed the word “permanent,”<sup>111</sup> nothing in the Just Compensation Clause suggests that ‘takings’ must be permanent and irrevocable.”<sup>112</sup> Also in *Hearts Bluff Game Ranch, Inc. v State of Texas*,<sup>113</sup> the Supreme Court of Texas, affirming the decision of the intermediate appellate court, held “in order for an inverse condemnation claim to be valid, there must be a current, direct restriction on the use of the land, referring to a physical act or legal restriction on the

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<sup>110</sup> *Murr* (n 1) 1944

<sup>111</sup> *Loretto* (n 15) 421

<sup>112</sup> *San Diego Gas and Elec. Co. v City of San Diego* 450 US 621, 657 (1981)

<sup>113</sup> 381 S.W.3d 468 (Tex. 2012)

property's use, such as a blocking of access or denial of a permit for development.”<sup>114</sup>

The analysis of economic impact should consider not only whether there is some value, but also the level of value of the regulated property at the time it was impacted. The most familiar and widely used approach for measuring economic impact is to estimate the difference, as of the date of the alleged taking, between the “fair market value” of the property; (1) subject to the regulatory constraint being challenged, and; (2) under the assumption that the regulation being challenged did not apply.<sup>115</sup> By applying this approach, the Supreme Court has indicated that reductions in value of over 90 percent are not necessarily sufficiently onerous to constitute a taking.<sup>116</sup>

The Court in *Murr* stated that the value of property, by combining two lots together, will increase. The Court described that if the two regulated lots are combined together, the value of property will increase to \$698,300 and \$771,000 for the lots as two distinct build-able properties, which is far greater than the total value of the separately regulated lots, which are at \$373,000 for Lot F with its cabin and at \$40,000 for Lot E as an undevelopable lot.<sup>117</sup> However, if considering the boundaries of Lot E and Lot F separately under state and local law, Lot E is worthless, since the Murrs cannot improve or sell solely Lot E.<sup>118</sup> Similar to *Pennsylvania Coal Co.*, because of preventing coal mining by the Kohler Act, the landowner has lost 100 percent of his support rights and the court decided that a taking occurred. Furthermore, the court in *Tahoe* reasoned

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<sup>114</sup> *Ibid* at 472

<sup>115</sup> John D. Echeverria (n104) 180

<sup>116</sup> See (n 83)

<sup>117</sup> *Murr* (n 1) 1949

<sup>118</sup> Cf. *Res. Invs., Inc. v United States*, the court distinguished between the elimination of the value of the property versus the elimination of economically viable use. Specifically, the court noted that: “The complete elimination of a property's value may be *sufficient* to establish a categorical taking under many circumstances... Yet the lack of value is not *necessary* to effect a taking, as a parcel will typically retain some quantum of value even without economically viable use.” *Res. Invs., Inc. v United States* 85 Fed. Cl. 447, 487-88 (2009)

that if the loss of economic value is total but temporary, it is not a taking. The decision implies that if the loss of economic value is total and not temporary, it may be a taking.

Additionally, viewing through the history, in 1995 the United States Senate considered the passage of a bill that would have, among other things, partially codified a conceptual severance view of property.<sup>119</sup> The objective of the bill was to afford greater protection to property owners in the face of expanding federal regulations.<sup>120</sup> Title V of the bill required compensation for statutory use restrictions on land or interests in land arising by specified regulations and Title II required compensation for reductions caused by a federal act of one-third or more of the market value of “any interest defined as property under State law; or ... understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest.”<sup>121</sup> Although Title V applied to only two acts, the Endangered Species Act<sup>122</sup> and section 404 of the Federal Water Pollution Control Act,<sup>123</sup> and Title II applied to many laws, both potentially could be interpreted as voicing the doctrine of conceptual severance. Under Title V, “any interest in land” could include easements, servitudes, air rights, and so forth, but the terms of the bill did not limit the provision to these traditional categories of property interests.<sup>124</sup>

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<sup>119</sup> Courtney C. Tedrowe (n 55) 594 (citing “Omnibus Property Rights Act of 1995, S. 605, 104th Cong. § 204(a) (1995). The bill was reported to the Senate by Senator Orrin Hatch on December 22, 1995. The Senate Judiciary Committee filed a floor report on March 11, 1996. S. Rept. 104-239. The bill was not called for a vote”)

<sup>120</sup> See Frank I. Michelman, ‘Testimony Before the Senate Committee on Environment and Public Works’ (1996) 49 Wash. U. J. Urb. & Contemp. L. 1, 5

<sup>121</sup> 33 U.S.C. § 203(5)(E)-(F) (1994)

<sup>122</sup> 16 U.S.C. §§ 1531-1544 (1994)

<sup>123</sup> 33 U.S.C. §§ 1251-1387 (1994)

<sup>124</sup> See Frank I. Michelman (n 120)

In fact, any aspect of land ownership that one could conceivably sell is potentially a land interest and thus potentially compensable.<sup>125</sup>

### 3.2.2 The extent to which the regulation has interfered with distinct investment-backed expectations analysis

The second factor in *Penn Cent. Transp. Co.* test that has particular significance in evaluating regulatory takings claims is the extent to which regulation has interfered with distinct investment-backed expectations of the property owner. According to the facts in *Murr*, Lot E was purchased for investment. The Murrs' parents first purchased Lot F in their own names in 1960. Consistent with the laws at that time, they built themselves a cabin close to the river, and subsequently transferred the title to that lot and cabin to a plumbing company of which they were sole owners. Three years later in 1963, the Murrs' parents purchased Lot E, which they kept in their own name. They did not build anything on the property, but instead they held it for investment purposes.<sup>126</sup>

In its ruling, the U.S. Supreme Court agreed with the Wisconsin courts that the state and local regulations effectively merged Lots E and F and the property was subject to the regulations because of the Murrs' voluntary act in bringing the lots under common ownership, after the regulations were enacted.<sup>127</sup> As a result, the Court held, "the valid merger of the lots under state law informs the reasonable expectation they will be treated as a single property."<sup>128</sup> If we took the investment-backed-expectations test seriously, the point should count strongly in favor of the Murrs, given that Lot E was acquired in 1963 solely for investment purposes. However, the court did not consider the Murrs' investment-backed-expectations.

Under the investment-backed-expectations factor, the courts should consider whether the owner has been able to carry out his original

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<sup>125</sup> Courtney C. Tedrowe (n 55) 594

<sup>126</sup> *Murr* (n 1) 1936

<sup>127</sup> *Ibid* 1948

<sup>128</sup> *Ibid* 1938

intentions in acquiring the property and whether the owner purchased the property with notice of the regulatory limitation at the time the owner purchased the property. The Murrs at all times had the primary expectation that Lot E was held for investment, which could only be achieved if its development were possible by a potential buyer of the property. Their expectations were based on the state of the law for real estate at the time of the initial purchase, and the expectations were constant over the entire period in which title was held in various forms by various members of the Murr family. If determining under this factor, it is clear that the Murr family's expectation was completely shattered after the merger took place under Wisconsin law; their investment-backed-expectations were dashed, supporting a finding of regulatory taking. Additionally, a large component of property, and of its value, is the right to receive streams of income in the future. As Justice Brennan has suggested, the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."<sup>129</sup> It would seem, then, that the taking of a stream of income is a taking of property.

### 3.2.3 The character of the governmental action analysis

The character of the government action, the third *Penn Cent. Transp. Co.* factor, is used to determine whether a taking may have occurred where a regulation places limitation on land but does not eliminate all economically beneficial use. Under the character factor, the initial questions are: (1) whether the regulation applies broadly across the community and creates a reciprocity of advantage, the magnitude of the benefits conferred by the regulatory program, and; (2) whether the degree to which the regulatory program is designed to protect the community or individual citizens from harm.

For the first question, the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation is

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<sup>129</sup> *Lucas* (n 29) 1017 (citing *San Diego Gas & Electric Co.* (n 112) 652) (Brennan, J., dissenting)

intended to bar government from forcing some people singlehandedly to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.<sup>130</sup> Hence, a regulatory takings claim should not properly be rejected on the ground that the public value of what the government is trying to perform outweighs the burden on a private property owner. The second question considers the harm-preventing and benefit-conferring nature of a regulation,<sup>131</sup> both of which should be relevant considerations in the *Penn Cent. Transp. Co.* analysis. The distinction between harm-preventing and benefit-conferring regulations reflects a difference in the fundamental nature of governmental actions that should properly inform the outcome of regulatory takings cases.

In *Murr*, neither the majority by Justice Kennedy nor dissent by Chief Justice Roberts analyzed the strength of Wisconsin's interest. Also, they did not examine whether the regulation outweighs the Murrs' burden. One application of the character factor focuses on whether government action interferes with the right to devise private property.<sup>132</sup> The Court in *Hodel v Irving*<sup>133</sup> struck down federal legislation designed to deal with the fractionation of Indian lands through inheritance as an unconstitutional impairment of Indians' right to devise their property and held that the legislation effected a taking on the ground that the "character of the Government regulation here is extraordinary."<sup>134</sup> In *Penn Cent. Transp. Co.*, the Court agreed that the right to develop and dispose were property rights, but held that no taking had occurred because historical preservation restrictions were permissible under the police power.<sup>135</sup> In the same *Penn Cent. Transp. Co.* vein, assuming that Wisconsin regulation had taken private property, the key question here would be whether this regulation is necessary to protect the health and safety of the community.

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<sup>130</sup> *Armstrong v United States* 364 US 40, 41 (1960)

<sup>131</sup> *Lucas* (n 29) at 1003, 1024

<sup>132</sup> John D. Echeverria (n 104) 195

<sup>133</sup> *Hodel* (n 31) 704

<sup>134</sup> *Ibid* 716

<sup>135</sup> *Penn Cent. Transp. Co.* (n 3) 138

In other words, if that taking is justified under the police power, no compensation need be paid. Contrarily, if that taking is claiming eminent domain for public use, then just compensation will be paid.

For the issue as to whether Wisconsin enacted the regulation by exercise its police power or not, a treatise on the Law of Eminent Domain explained:

*Everyone is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this last duty which pertains to the police power of the State so far as the exercise of that power affects private property. Whatever restraints **the legislature imposes upon the use and enjoyment of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a regulation, and not a taking, an exercise of police power, and not of eminent domain. But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power....** It is sufficient for the present purpose to point out the distinction between the two powers. Under the one, the public welfare is prompted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is*

*promoted by taking the property from the owner and appropriating it to some particular public use.*<sup>136</sup>

Efforts to preserve the St. Croix river and surrounding land along the Lower St. Croix River are a legitimate exercise of the government's police power. Yet, when the government tries to deprive the Murrs of their property rights, then the act becomes one of eminent domain. If the Wisconsin's regulation is enacted for the benefit of the whole community, which is the equivalent of "public use," then any loss in property value as a result of governmental activity should be compensated. The policy underlying the eminent domain provision of the Constitution is to distribute the cost of public improvements throughout the community rather than to impose that cost on individuals by chance of the location of their land.<sup>137</sup>

Once the government action is a regulatory taking for public use, the hard question is the measure of compensation for the loss of these development rights, which should be fully compensable for the duration of the restriction. The right to compensation accrues from the date of substantial interference with the landowner's property rights, although the date of the constitutional violation, as a matter of law, occurs when the government refuses to pay compensation.<sup>138</sup> In most circumstances, this will be the date the landowner is denied a development permit or variance.

Therefore, considering under *Penn Cent. Transp. Co.* factors and traditional lot lines, it seems that the Murrs were taken their property and they were eligible to receive just compensation.

### 3.3 How much in compensation the Murrs should receive

The Just Compensation Clause in the Fifth Amendment, like other constitutional rights, is intended to define an area where the majority must

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<sup>136</sup> John Lewis, *A Treatise On The Law Of Eminent Domain In The United States* (Vol. 1 3<sup>rd</sup> edn, Callaghan & company, Chicago 1909) § 6, 13

<sup>137</sup> *Yee v City of Escondido* 503 US 519, 523 (1992)

<sup>138</sup> *First English Evangelical Lutheran Church (n 70) 320 fn.10* (citing *Kirby Forest Indus., Inc. v United States* 467 US 1, 5 (1984))

respect the freedom of the individual. The Just Compensation Clause protects individual freedom by compensating the individual for costs incurred by a government action that promotes the common good.<sup>139</sup> Protecting individuals' security of possession is an essential component in the development of society.<sup>140</sup> There are two aspects of property's protection of individual liberty.<sup>141</sup> First, property creates a zone within which the individual can act in ways frowned on by the majority. Second, property assures that political minorities have the material means to act independently of political majorities. This second aspect is protected by the Just Compensation Clause. The Just Compensation Clause does not give property absolute protection. Rather, the government can take property, but if it does, it must pay compensation.<sup>142</sup> Maintaining the individual's material autonomy requires compensation even where the government action does not take all of a property owner's estate.<sup>143</sup> Such rule also raises the possibility that the government, by successive takings of half of the individual's property, could reduce the individual's estate to essentially nothing.<sup>144</sup>

On the flip side, to utilitarians, an individual's property should be protected due to its importance in the effective functioning of capitalist society.<sup>145</sup> Government interference with private property is discouraged because of its negative effect on private labor and investment.<sup>146</sup> However, the primary goal pursued by utilitarians is the maximization of utility, not of individuals, but of

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<sup>139</sup> Charles A. Reich, 'The New Property' (1964) 73 Yale L. J. 733, 771-772

<sup>140</sup> David Hume 'A Treatise of Human Nature' (1888) bk. III, pt. II, § II 491-493 (Selby-Bigge ed)

<sup>141</sup> D. Benjamin Barros 'Defining "Property" in the Just Compensation Clause' (1995) 63 Fordham L. Rev. 1853, 1858

<sup>142</sup> Ibid

<sup>143</sup> Ibid

<sup>144</sup> Ibid 1872

<sup>145</sup> Ibid 1859

<sup>146</sup> See *Lucas* (n 29) 1035 ("The Takings Clause ... protects private expectations to ensure private investment") (Kennedy, J., concurring). See also Susan Rose-Ackerman, 'Against Ad Hocery: A Comment on Michelman' (1988) 88 Colum. L. Rev. 1697, 1701-1702

society as a whole.<sup>147</sup> Thus, if taking private property is necessary for whole society, the government can do so, but must pay just compensation. Professor Frank I. Michelman set forth the classic utilitarian test for compensability, consisted of three elements.

First, positive “[e]fficiency gains’ [are] the excess of benefits produced by a [government action] over losses inflicted by it.”<sup>148</sup>

Second, negative “demoralization costs” take into account the effect a transaction will have on the affected individuals and society generally. “Demoralization costs” are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers, specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.<sup>149</sup>

Third, “settlement costs” are the costs of compensation needed to make the affected property owner whole.<sup>150</sup> If the positive efficiency gains of a government action are less than both demoralization and settlement costs, then the government action is improper because it results in a net loss of utility.<sup>151</sup>

In other circumstances, the government should only pay compensation when “demoralization costs exceed settlement [compensation] costs.”<sup>152</sup> Thus, the utilitarian test does not simply weigh the benefit of a regulation against its immediate cost.<sup>153</sup> It also takes into account the effect denying compensation

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<sup>147</sup> Frank I. Michelman (n 44) 1192–1193

<sup>148</sup> *Ibid* 1214

<sup>149</sup> *Ibid*

<sup>150</sup> *Ibid*

<sup>151</sup> *Ibid* 1215

<sup>152</sup> *Ibid*

<sup>153</sup> *Ibid*

would have on society as a whole.<sup>154</sup> Using state law as the source of property, the libertarian approach to the Just Compensation Clause thus requires compensation for any government action that renders valueless any property interest that is defined by state law.<sup>155</sup>

The Fifth Amendment, written by James Madison, was part of a liberal repudiation of republicanism that was concerned with protecting the individual against the legislature and the majority it represented.<sup>156</sup> Madison apparently intended the Just Compensation Clause to apply only to physical appropriations of property by the federal government.<sup>157</sup> However, that did not mean that the Just Compensation Clause should not be applied to regulations because, as the Court has noted, “one of the principle purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>158</sup>

Whether a regulation constitutes a taking depends in large part upon the degree to which the regulation burdens private property. Generally, the more severe the burden that the regulation imposes upon private property, the more likely it is that the regulation constitutes a compensable taking.<sup>159</sup> Just compensation for regulatory taking is calculated by the difference between the property’s values immediately before the regulation became effective and the property’s values immediately following the regulation.<sup>160</sup>

Nonetheless, whether the government has taken that property, and whether the plaintiff has been denied just compensation for the taking, are separate questions. Under the *Penn Cent. Transp. Co.* test, the court in *Murr*

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<sup>154</sup> David Hume (n 140) 498

<sup>155</sup> D. Benjamin Barros (n 141) 1858

<sup>156</sup> William Michael Treanor (n 17) 709-711

<sup>157</sup> *Ibid* 711

<sup>158</sup> *Dolan v City of Tigard* 512 US 374, 384 (1994) (quoting *Armstrong* (n 130) 49)

<sup>159</sup> *Clifton v Blanchester* 964 N.E.2d 414, 415 (Ohio 2012)

<sup>160</sup> William J. Patton, Comment, ‘Affirmative Relief for Temporary Regulatory Takings’ (1987) 48 U. Pitt. L. Rev. 1215, 1224

should have found there is regulatory taking for Lot E. However, it does not follow the Murrs should receive full compensation for Lot E. In *Florida Rock Industries, Inc. v United States*,<sup>161</sup> Judge Plager discussed value as a separate element of takings law (although not as a separate element of property). He noted that “[a] speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market. \* \* \* The fact that many players in the market chose to disregard the immediate potential for development in favor of a long-term perspective—hardly unusual behavior in Florida’s history of real estate investment—does not make the market as a whole aberrational.”<sup>162</sup>

Although a taking requires just compensation, just compensation hardly ever is “full” compensation. A succinct explanation is offered by Judge Posner in the Seventh Circuit’s opinion in *Coniston Corp. v Village of Hoffman Estates*<sup>163</sup> as follows;

*Compensation in the constitutional sense is ... not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners are intramarginal, meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not for sale). Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it personal) value that they obtain from the property, but this limited confiscation is permitted provided the taking is for a public use.*<sup>164</sup>

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<sup>161</sup> 18 F.3d 1560 (Fed. Cir. 1994)

<sup>162</sup> *Ibid* 1567

<sup>163</sup> 844 F.2d 461 (7th Cir. 1988)

<sup>164</sup> *Ibid* 464

Moreover, the purpose of just compensation is to ensure that the individual's ability to function independently of the government will not be impaired by a loss of property. In *Bassett v United States*,<sup>165</sup> the Court stated that just compensation principle requires the government to remunerate a deprived property owner so as to place the property owner in as good a position pecuniarily as if the government had not taken his property.<sup>166</sup> Restoring the deprived property owner's pre-taking financial position involves compensating the property owner for the fair market value of the property lost as a result of the taking.<sup>167</sup> Fair market value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having a reasonable knowledge of relevant facts."<sup>168</sup> A property owner is entitled to have the fair market value of his property determined by his property's highest and best use before the taking.<sup>169</sup> Highest and best use is the reasonably probable and legal use of property which is physically possible, appropriately supported, financially feasible, and that results in the highest value. Valuation of highest and best use may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted.<sup>170</sup>

Furthermore, in *City of Norwich v Styx Inv'rs in Norwich*,<sup>171</sup> the Connecticut appellate court mentioned that it is well settled that the amount that constitutes just compensation is the market value of the condemned property when put to its highest and best use at the time of the taking. In determining market value, it is proper to consider all those elements which an

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<sup>165</sup> *Bassett* (n 12) 63

<sup>166</sup> *Ibid* 69 (citing *Phillips* (n 93) 156, 176-77)

<sup>167</sup> *Bassett* (n 12) 69 (citing *Almota Farmers Elevator & Warehouse Co. v United States* 409 US 470, 473 (1973))

<sup>168</sup> *Ibid* (citing *United States v Cartwright* 411 US 546, 551 (1973) and *Yancey v United States* 915 F.2d 1534, 1542 (Fed. Cir. 1990))

<sup>169</sup> *Stearns Co. v United States* 53 Fed. Cl. 446, 455 (2002) (citing *Olson v United States* 292 US 246 (1934))

<sup>170</sup> *Bassett* (n 12) 65

<sup>171</sup> 887 A.2d 910 (Conn. App. Ct. 2006)

owner or a prospective purchaser could reasonably urge as affecting the fair price of the land. In determining its highest and best use, the court must consider whether there was a reasonable probability that the subject property would be put to that use in the reasonably near future, and what effect such a prospective use may have had on the property's market value at the time of the taking.<sup>172</sup>

In *Murr*, determining whether there is regulatory taking under *Penn Cent. Transp. Co.* test, the court should determine only Lot E because Lot E, under the regulations, cannot be sold without Lot F, while, to determine how much should be just compensation, the court should determine the fair market value of Lot E and Lot F as a whole because of just compensation goal. At this point, the Court in *Murr*, stated that the State of Wisconsin's appraisal included values of \$698,300 for the lots together as regulated; \$771,000 for the lots as two distinct build-able properties; and \$373,000 for Lot F as a single lot with improvements. The Murrs' appraisal included an un rebutted, estimated value of \$40,000 for Lot E as an undevelopable lot, based on the counterfactual assumption that it could be sold as a separate property.<sup>173</sup>

The general rule is that the loss to the owner from the taking, and not its value to the condemnor, is the measure of the damages to be awarded in eminent domain proceedings."<sup>174</sup> Just compensation is calculated from the difference between the property's value before the regulation became effective and the property's value immediately following the regulation. Also, the purpose of just compensation is to place the property owner in as good a position pecuniarily as if the government had not taken his property. The monetary value of Lot E before the merger clause became effective was \$40,000 as an undevelopable lot, while the monetary value of Lot E immediately following the merger clause, supposing divided with Lot F equally, was \$349,150 for the lot as regulated and \$385,500 for the lot as build-able property. The fair market value of Lot E, combined with lot F, after the regulation became effective is far greater

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<sup>172</sup> Ibid 911

<sup>173</sup> *Murr* (n 1) 1941

<sup>174</sup> *City of Norwich* (n 171) at 910, 911

than the fair market value of the separate regulated lot.<sup>175</sup> The value added by the lots' combination supports their treatment as one parcel for calculating the just compensation.

In *Fla. Rock Indus., Inc. v United States*,<sup>176</sup> the court stated "the record reveals a substantial possibility that a taking should be held to have occurred... so a remand is necessary. On remand, the court should consider, along with other relevant matters, the relationship of the owner's basis or investment, and the fair market value before the alleged taking, to the fair market value after the alleged taking."<sup>177</sup> The Court also stated, "in determining the severity of economic impact, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored."<sup>178</sup> Also, the Massachusetts Supreme Judicial Court in *Sorenti Bros. v Commonwealth*,<sup>179</sup> reasoned that when a partial taking of property has been made, the

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<sup>175</sup> Lot F with its cabin at \$373,000, according to the State's appraiser, and Lot E as an undevelopable plot at \$40,000, according to the Murrs' appraiser. *Murr* (n 1) 1941

<sup>176</sup> 791 F.2d 893 (Fed. Cir. 1986).

<sup>177</sup> *Ibid* 905

<sup>178</sup> *Fla. Rock Indus., Inc.* (n 176) 893, 905

<sup>179</sup> 9 N.E.3d 779 (Mass. 2014) (In this case Plaintiff, a property owner, brought the eminent domain action seeking damages from the Commonwealth on account of land takings that the Commonwealth made in connection with the Sagamore Bridge Flyover Project in Bourne that eliminated a traffic rotary north of the bridge. Plaintiff owned parcels of land near the former rotary and operated a gas station on one of the parcels. After a jury trial, Plaintiff was awarded almost \$3 million in damages. The Appeals Court affirmed. The Supreme Judicial court vacated the judgment of the superior court and remanded for a new trial, holding (1) under Mass. Gen. Laws ch. 81, § 7C (§ 7C), for a property owner to be entitled to damages on account of the construction of a limited access highway, since the flyover project was not laid over a public way that directly abutted Plaintiff's property, Plaintiff was not entitled to damages under § 7C as a matter of law; and (2) under Mass. Gen. Laws ch. 79, § 12 (§ 12), when a partial taking of property has been made, the property owner is entitled to recover damages for loss of access to the remainder of the property only where that loss or impairment is severe. Since Plaintiff retained reasonable and appropriate access to and from the gas station parcel, Plaintiff was not entitled to impairment of access damages under § 12.)

property owner is entitled to recover damages for loss of access to the remainder of the property only where that loss or impairment is severe.<sup>180</sup>

The appellate court in *City of Norwich v Styx Inv'rs in Norwich* stated that if a prospective, integrated use is the highest and best use of the land and can be achieved only through combination with other parcels of land, and combination of the parcels is reasonably probable, then evidence concerning assemblage, and, ultimately, a finding that the land is specially adaptable for that highest and best use, may be appropriate. The Court further stated that the consideration of a future change in the use of the parcel taken, and the effect that such a change may have on the market value at the time of the taking, has long been recognized in Connecticut, and the use of property in conjunction with other parcels may affect value if it is shown that such an integrated use reasonably would have occurred in the absence of the condemnation.<sup>181</sup>

Moreover, the Minnesota Supreme Court in *State by Humphrey v Strom*<sup>182</sup> held that when part of a parcel is taken, the award must include all damages to the part retained by the landowner. In the case, the State began eminent domain proceedings to acquire property necessary for the construction and conversion of a highway. The condemnation included a partial taking from an office site owned by the property owner. Court-appointed commissioners had filed an award of damages for the land taken and for damage to the remainder. The questions certified in the appeal asked the court to determine whether evidence of construction-related interferences and loss of visibility may be taken into account to the extent they affect the market value of the property in determining just compensation in an eminent domain proceeding. The court found that in a partial taking condemnation action, evidence of construction-related interferences and evidence of loss of visibility to the public traveling on a redesigned highway were admissible, not as separate items of damages, but as

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<sup>180</sup> *Ibid* 779

<sup>181</sup> *City of Norwich* (n 171) 910, 911

<sup>182</sup> 493 N.W.2d 554 (Minn. 1992)

factors to be considered by the finder of fact in determining the diminution in market value of the remaining property.<sup>183</sup> Also, the Supreme Court of New Jersey in *Borough of Harvey Cedars v Karan*<sup>184</sup> ruled that in case of the partial taking of property, just compensation to the owner must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property. In a partial-takings case, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home's enhanced value resulting from a public project. To calculate that loss, courts must look to the difference between the fair market value of the property before the partial taking and after the taking.<sup>185</sup>

When there are damages, the court has to determine such damages for calculating compensation, and, on the flip side, when there are benefits, the court should determine such benefits for calculating compensation as well. There may possibly be items of special damages which may not be accurately reflected in the difference between the market value before and the market value after, but everything which affects the market value of the land itself, having due regard for past and probable future injuries, may be accurately reflected by ascertaining the difference in value.<sup>186</sup> Additionally, when only part of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered.<sup>187</sup> Special benefits may be setoff from the value of the land taken and severance damages.<sup>188</sup>

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<sup>183</sup> Ibid 556

<sup>184</sup> 70 A.3d 524 (N.J. 2013)

<sup>185</sup> Ibid 526

<sup>186</sup> *State v Schmidt* 867 S.W.2d 769, 770 (Tex. 1993)

<sup>187</sup> Howard Strickland Abbott, 'A Treatise on the Law of Municipal Corporations' Vol. 2, (Keefe-Davidson Company 1906) § 793, 1889

<sup>188</sup> See Julius L. Sackman, *Nichols on Eminent Domain* (3<sup>rd</sup> edn. rev. 1998) § 8A.03 See also *Collins v State Highway Com.* 145 Kan. 598 (1937); *Beard v Kan. City* 154, 230 (Kan.

Furthermore, Wisconsin statutes and state case law provide that the owner is entitled to full compensation for the value of the land taken, but that special benefits may be setoff from the damage to the remaining land.<sup>189</sup> The Wisconsin Appellate Court in *Calaway v Brown County*<sup>190</sup> held that the measure of damages in a partial taking is to compare the fair market value of the property as a whole immediately before the taking and the fair market value of the remainder immediately after the taking.<sup>191</sup>

There have been cases where the court has determined that there has been taking, because of being complete deprivation of economically beneficial use, but that the owner is not entitled to compensation because of the “background principles” exception to *Lucas*. The South Carolina Supreme Court in *McQueen v South Carolina Coastal Council*,<sup>192</sup> accepted as uncontested that McQueen’s lots retain no value and therefore a total taking has occurred.”<sup>193</sup> However, citing the background principle of South Carolina’s public trust doctrine, which grants the state a property right in the land below the mean high-water line, the court found that no compensation was due to McQueen after reconsideration in light of *Palazzolo*. At the time of McQueen’s permit denial, the tideland had sufficiently encroached upon his property so as

1916); *Trosper v Saline County Comm’rs* 27 Kan. 391 (1882); *Roberts v Bd. of Cty. Comm’rs* 21 Kan. 247 (1878); *Tobie v Comm’rs of Brown Cty.* 20 Kan. 14 (1878); *Comm’rs of Pottawatomie Cty. v O’Sullivan* 17 Kan. 58 (1876)

<sup>189</sup> See Wis. Stat. Ann. §§ 32.09, 32.18, 32.57, 32.58, 32.61 (West). See also *Calaway v Brown Cty.* 553 N.W.2d 809 (Wis. Ct. App. 1996) (holding that the measure of damages in a partial taking is to compare the fair market value of the property as a whole immediately before the taking and the fair market value of the remainder immediately after the taking); *Red Top Farms v State Dep’t of Transp., Div. of Highways* 503 N.W.2d 354 (Wis. Ct. App. 1993) (holding that only special benefits can be setoff); *Molbreak v Shorewood Hills* 225 N.W.2d 894 (Wis. 1975); *Renk v State* 191 N.W.2d 4 (Wis. 1971); *Petkus v State Highway Com.* 130 N.W.2d 253 (Wis. 1964); *Hietpas v State* 130 N.W.2d 248 (Wis. 1964)

<sup>190</sup> *Calaway* *ibid* 809

<sup>191</sup> *ibid* 810

<sup>192</sup> 580 S.E.2d 116 (S.C. 2003)

<sup>193</sup> *ibid* 119

to prevent any ability to undergo the construction.<sup>194</sup> Thus, the South Carolina Supreme Court remanded the case to the lower courts with its instruction.

Therefore, considering the cases above, the Murrs should not have obtained compensation. Just compensation calculated from fair market value and fair market value of the Murrs' property, which was determined by their properties' highest and best use before the taking, is lower than fair market value of the Murrs' property, combined two lots together. In addition, if the court disregards the value of Lot E combined with Lot F as regulated lots to calculate compensation to the Murrs, by giving the Murrs \$40,000 for Lot E being taken, the Murrs will receive the benefit more than to place the Murrs in as good a position pecuniarily as if State of Wisconsin had not taken their property, which is contrary to the purpose of Just Compensation Clause.

## Conclusion

Defining property by using a state property law, considering the boundaries of Lot E and Lot F under the Wisconsin state and local laws, and applying the *Penn Cent. Transp. Co.* balancing factors, the Court should have found a regulatory taking. Taking the economic impact factor into account, defining the "the relevant unit of property" and "parcel as a whole" by merging Lot E and Lot F together as one parcel, the Wisconsin regulation renders Lot E worthless to the Murrs although Lot E still has some monetary value. While Wisconsin regulation allowed the Murrs to continue using Lot E as had been done in the past, which did not deny all the owner's economic beneficial use, the law did not permit the Murrs to profit from developing or disposing the land and obtain a reasonable return on its investment. The Murrs were deprived of their economic expectation in property Lot E when it became nearly worthless. And the economic impact from such regulation of lot E was severe. Therefore, the regulation

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<sup>194</sup> Ibid 120

could be enacted by Wisconsin only by using its power of eminent domain for public use, not its police power. The Court in *Murr*, by evaluating two adjacent lots as a single parcel consisting of Lots E and F together, went astray by failing to adhere to the State's historic lot lines in determining the "parcel" for application of the *Penn Cent. Transp. Co.* test, especially the first factor: economic impact. That error determined the result that no taking occurred.

Nonetheless, the Court in *Murr* reached the correct result on compensation issue by not providing the Murrs with compensation. Per the impact of the government action, the compensation should be measured by the reduction in value of the affected property. Although under the regulations, the Murrs have no ability to develop and dispose of Lot E without Lot F, the Murrs did not lose monetary value on Lot E. Because the purpose of Taking Clause is to protect private property and the policy underlying that provision is to distribute the cost of public improvements throughout the community rather than to impose that cost on individuals by chance of the location of their lands,<sup>195</sup> the Murrs should have not received compensation where the Murrs did not bear any cost from the taking of Lot E. On the contrary, the fair market value of the Murrs' properties is far greater than before they were taken. By disregarding the value of Lot E combined with Lot F as regulated lots to calculate compensation to the Murrs, and giving the Murrs \$40,000 for Lot E being taken, the Murrs will receive a benefit that places the Murrs in a better position pecuniarily than if the State of Wisconsin had not taken their property, and that is contrary to the purpose of Just Compensation Clause. Where there are damages, the court has to determine such damages for calculating compensation, on the flip side, where there are benefits, the court should determine such benefits for calculating compensation as well.

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<sup>195</sup> *Yee* (n 137) 522

## References

### Books

David A. Dana & Thomas W. Merrill, *Property: Takings* (Foundation Press New York 2002)

John Lewis, *A Treatise On The Law Of Eminent Domain In The United States* (Vol. 1 Callaghan & company, Chicago 1888)

Howard Strickland Abbott, 'A Treatise on the Law of Municipal Corporations' Vol. 2, (Keefe-Davidson Company 1906)

John Lewis, *A Treatise On The Law Of Eminent Domain In The United States* (Vol. 1 3<sup>rd</sup> edn, Callaghan & company, Chicago 1909)

Julius L. Sackman, *Nichols on Eminent Domain* (3<sup>rd</sup> edn. rev., M. Bender 1998)

Richard A. Epstein, *Takings: Private Property And The Power Of Eminent Domain* (Harvard University Press London 1985)

### Articles

Angela Chang, 'Demystifying Conceptual Severance: A Comparative Study of the United States, Canada, and the European Court of Human Rights' (2013) 98 Cornell L. Rev. 965

Charles A. Reich, 'The New Property' (1964) 73 Yale L. J. 733

Courtney C. Tedrowe, 'Conceptual Severance and Takings in the Federal Circuit' (2000) 85 Cornell L. Rev. 586

D. Benjamin Barros 'Defining "Property" in the Just Compensation Clause' (1995) 63 Fordham L. Rev. 1853

D. Benjamin Barros, 'The Police Power and the Takings Clause 58' (2004) U. Miami L. Rev. 471

Richard A. Epstein, 'Disappointed Expectations: How The Supreme Court Failed To Clean Up Taking Law In *Murr v Wisconsin*' (2017) 11 N.Y.U. J.L. & Liberty 151

Danaya C. Wright, 'A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis' (2004) 34 Env'tl. L. 175

Frank I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 Harv. L. Rev. 1165

Frank I. Michelman, 'Testimony Before the Senate Committee on Environment and Public Works' (1996) 49 Wash. U. J. Urb. & Contemp. L. 1  
 Holly Doremus, 'Takings and Transition' (2003) 19 J. Land Use & Envtl. L. 1  
 J.E. Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L. Rev. 711

Jeremy Waldron, 'What Is Private Property?' (1985) 5 Oxford Journal of Legal Studies 313

John D. Echeverria & Sharron Dennis, 'The Takings Issue And The Due Process Clause: A Way Out Of A Doctrinal Confusion' (1993) 17 VT. L. Rev. 695

John D. Echeverria, 'Making Sense of Penn Central' (2005) 23 UCLA J. Envtl. L. & Pol'y 171

Leif Wenar, 'The Concept of Property and the Takings Clause' (1997) 97 Colum. L. Rev. 1923

Margaret Jane Radin, 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 Colum. L. Rev. 1667

Susan Rose-Ackerman, 'Against Ad Hocery: A Comment on Michelman' (1988) 88 Colum. L. Rev. 1697

William J. Patton, Comment, 'Affirmative Relief for Temporary Regulatory Takings' (1987) 48 U. Pitt. L. Rev. 1215

William Michael Treanor, Note, 'The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment', (1985) 94 Yale L.J. 694

## Cases

*Agins v City of Tiburon*, 447 US 255 (1980)

*Andrus v Allard*, 444 US 51 (1979)

*Armstrong v United States*, 364 US 40 (1960)

*Bassett v United States*, 55 Fed. Cl. 63 (2002)

*Borough of Harvey Cedars v Karan*, 70 A.3d 524 (N.J. 2013).

*Brown v Maryland*, 25 US 419 (1827)

*Brothers v United States*, 594 F.2d 740 (9th Cir. 1979)

*Calaway v Brown Cty.*, 553 N.W.2d 809 (Wis. Ct. App. 1996)

*Chicago, B. & Q.R. Co. v City of Chicago*, 166 US 226 (1897)  
*City of Norwich v Styx Inv'rs in Norwich, LLC*, 887 A.2d 910 (Conn. App. Ct. 2006)  
*Clifton v Blanchester*, 964 N.E.2d 414 (Ohio 2012)  
*Collins v State Highway Com.*, 66 P.2d 409 (Kan. 1937)  
*Commonwealth v Alger*, 61 Mass. 53 (1851)  
*Coniston Corp. v Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988)  
*Crowley v Christensen*, 137 US 86 (1890)  
*Dolan v City of Tigard*, 512 US 374 (1994)  
*First English Evangelical Lutheran Church v Los Angeles County*, 482 US 304 (1987)  
*Fla. Rock Indus., Inc. v United States*, 791 F.2d 893 (Fed. Cir. 1986)  
*Fla. Rock Indus. v United States*, 18 F.3d 1560 (Fed. Cir. 1994)  
*Hadacheck v Sebastian*, 239 US 394 (1915)  
*Hearts Bluff Game Ranch v State*, 381 S.W.3d 468 (Tex. 2012)  
*Hodel v Irving*, 481 US 704 (1987)  
*Kaiser Aetna v United States*, 444 US 164 (1979)  
*Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470 (1987)  
*Klopping v City of Whittier*, 8 Cal. 3d 39 (1972)  
*Lingle v Chevron U.S.A., Inc.*, 544 US 528 (2005)  
*Littlejohn v Fink*, 190 N.W. 1020 (1922)  
*Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982)  
*Lucas v S.C. Coastal Council*, 505 US 1003 (1992)  
*Mayor of New York v Miln*, 36 US 102 (1837)  
*McCarran Int'l Airport v Sisolak*, 122 Nev. 645, (2006)  
*McQueen v S.C. Coastal Council*, 580 S.E.2d 116 (S.C. 2003)  
*Mugler v Kansas*, 123 US 623 (1887)  
*Murr v Wisconsin*, 137 S. Ct. 1933 (2017)  
*Palazzolo v Rhode Island*, 533 US 606 (2001)  
*Penn Cent. Transp. Co. v New York City*, 438 US 104 (1978)  
*Pennsylvania Coal Co. v Mahon*, 260 US 393 (1922)  
*Pete v United States*, 531 F.2d 1018 (1976)  
*Phillips v Wash. Legal Found.*, 524 US 156 (1998)  
*Res. Invs., Inc. v United States*, 85 Fed. Cl. 447 (2009)

*San Diego Gas and Elec. Co. v City of San Diego*, 450 US 621 (1981)  
*Sorenti Bros. v Commonwealth*, 9 N.E.3d 779 (Mass. 2014)  
*State v Schmidt*, 867 S.W.2d 769 (Tex. 1993)  
*State by Humphrey v Strom*, 493 N.W.2d 554 (Minn. 1992)  
*State of Arkansas v State of Mississippi*, 250 US 39 (1919)  
*Stearns Co. v United States*, 53 Fed. Cl. 446 (2002)  
*Tahoe-Sierra Pres. Council v Tahoe Reg'l Planning Agency*, 535 US 302 (2002)  
*United States v 50 Acres of Land*, 469 U.S. 24 (1984)  
*United States v 564.54 Acres of Land*, 441 US 506 (1979)  
*Village of Euclid v Ambler Realty Co.*, 272 US 365 (1926)  
*Walcek v United States*, 49 Fed. Cl. 248, 271 (2001)  
*Walcek v United States*, 303 F.3d 1349 (Fed. Cir. 2002)  
*Yee v City of Escondido*, 503 US 519, 523 (1992)  
*Zealy v City of Waukesha*, 548 N.W.2d 528 (Wis. 1996)

### Regulations

16 U.S.C. § 1274(a)(9) (2008)  
 16 U.S.C. §§ 1531-1544 (1994)  
 33 U.S.C. §§ 203(5)(E)-(F), 1251-1387 (1994)  
 46 U.S.C. § 103 (2006)  
 St. Croix County, Wis., Code of Ordinances ch. 17.36(l)(4)(a) (Jul. 2007)  
 U.S. Const. Amend. V and XIV

### Other Materials

Miriam Seifter, 'Argument preview: Defining the denominator in regulatory takings law' (SCOTUSblog, 14 March, 2017) <<http://www.scotusblog.com/2017/03/argument-preview-defining-denominator-regulatory-takings-law/>> accessed 1 August 2018  
 The Municipal Research and Services Center, 'Regulatory Takings' (Explore Topics) (Oct. 9, 2017) <<http://mrsc.org/Home/Explore-Topics/Legal/Planning/Regulatory-Takings.aspx>> accessed 1 August 2018