Dueling Denominators and the Demise of *Lucas*

Stewart E. Sterk*

The so-called "denominator problem" has long played a central role in scholarship[1] and doctrine[2] focused on the federal constitution's takings clause. The problem arises in two related, but different contexts.

First, to the extent the takings clause protects a landowner's investment backed expectations, judicial inquiry must ascertain the baseline property against which to measure those expectations. For instance, if the City of New York precludes all but nominal construction atop Grand Central Terminal, is the relevant baseline "air rights above the terminal," in which case the city has confiscated nearly 100% of the relevant rights, or is it the surface and air rights together, in which event the loss to the landowner is a much smaller percentage of total value?[3]

Second, ascertaining the relevant denominator is absolutely critical in applying the Supreme Court's *per se* rule prohibiting government regulation that denies a landowner "all economically beneficial or productive use of its land."[4] For instance, if a state prohibits all development on several acres of waterfront land it has declared to be wetlands, can the landowner claim a per se taking if landowner also owns adjacent land on which state and local law still permits development?[5]

Although the Supreme Court has recognized the denominator problem on a number of occasions, not until *Murr v. Wisconsin,*[6] decided last term, has the Court outlined a process for ascertaining the relevant denominator. In *Murr,* the Court

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* Mack Professor of Law, Benjamin N. Cardozo School of Law. Mikael Andres provided valuable research assistance.

[1] Frank Michelman coined the phrase in his landmark 1967 article, Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967). Margaret Radin has applied the label "conceptual severance" to the attempt to define the denominator narrowly. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-78 (1988).

[2] *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987); Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

[3] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978) (holding that the entire city block serves as the denominator).

[4] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-16 (1992).

[5] Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) (declining to resolve the issue because issue was not presented in state courts or on petition for certiorari).

[6] 582 U.S. ___ (2017).

sustained a Wisconsin regulation providing that a substandard parcel loses its grandfathered status when it comes into common ownership with an adjacent parcel.[7] The result itself was uncontroversial; Chief Justice Roberts, dissenting for himself and Justices Thomas and Alito, started with the concession that the Court's "bottom-line conclusion does not trouble me."[8] Disagreement arose, however, about the appropriate method for determining the denominator.

Following Part I's exploration of the *Murr* case itself, Part II of this article explores competing approaches to the denominator problem. After explaining that the appropriate solution to the denominator may depend on which takings question a court is trying to answer, Part II examines the theoretical shortcomings of both the majority opinion and the dissent, focusing particularly on inadequate attention to the interplay between state and federal law. Part III turns to the practical import of the *Murr* opinion, and argues that, as a practical matter, *Murr* may signal the beginning of the end for the *per se* rule invalidating regulations that deny landowners all economically productive use of their land.

I. Background

A. The Takings Framework

For the last 25 years, implicit takings doctrine has been marked by a combination of an ad hoc balancing test and two per se rules.[9] The Supreme Court first articulated the balancing test in *Penn Central Transportation Co. v. City of New York*[10], a case sustaining landmark regulation of New York's Grand Central Terminal. In the course of rejecting the argument that the city had taken property by precluding use of the airspace above the terminal, the Court, in an opinion by Justice Brennan, concluded that takings cases should turn on "essentially ad hoc, factual inquiries."[11] Among the factors to be balanced is "the extent to which the regulation has interfered with distinct investment-backed expectations."[12] Determining how much interference there has been requires some sense of the appropriate denominator: measured against *Penn Central's* real estate

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[7] *Id.* at ___.
[8] *Id.* at __.
[9] *See generally* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 42-45 (2016).
[10] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)
[11] *Id.* at 124.
[12] *Id.*

holdings in midtown Manhattan, the interference was relatively small;[13] measured against the air rights above the terminal, the interference was arguably close to 100%.

After *Penn Central*, the Court removed two classes of cases from the ad hoc balancing test. First, the Court held, in *Loretto v. Teleprompter Manhattan CATV Corp.*[14], that a permanent physical occupation always constitutes a taking and requires compensation. Because few regulations involve physical occupations, *Loretto* has limited significance in the regulatory context.[15] *Lucas v. South Carolina Coastal Council*,[16] decided a decade later, threatened to make a more significant impact on land use regulation. In *Lucas*, the Court held that a South Carolina statute that barred habitable structures on landowner's beachfront land constituted a taking. Writing for the majority, Justice Scalia concluded that whenever a regulation denies a landowner all economically beneficial or productive use of land, the landowner is entitled to compensation.[17] As with *Penn Central*, the denominator is critical to the *Lucas* approach: whether the owner has been deprived of all economically beneficial use will often depend on what constitutes the applicable unit of land.

In both *Penn Central* and *Lucas,* the Court recognized the importance of the denominator problem. In *Penn Central*, the Court rejected the argument that the air rights over the terminal should constitute the relevant denominator, indicating that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[18] Instead, the focus is on the "parcel as a whole," which, in the context of Penn Central, the Court concluded was "the city tax block designated as the 'landmark site.'"[19] In *Lucas*, Justice Scalia characterized the denominator issue as a "difficult

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[13] The New York Court of Appeals, in the opinion below, concluded that some of the income from Penn Central's real estate holdings in the Grand Central area should be imputed to the terminal. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276 (N.Y. 1977). The Supreme Court later concluded that this approach was "unsupportable." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017, n.7 (1992).

[14] 458 U.S. 419 (1982).

[15] Occasionally, however, courts have concluded that a regulation operates as the equivalent of a permanent physical occupation. For instance, in Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1065 (N.Y. 1989), the New York Court of Appeals concluded that a New York City local law requiring owners of single room occupancy properties to refurbish existing structures and keep them fully rented constituted a permanent physical occupation, and therefore a *per se* violation of the takings clause.

[16] 505 U.S. 1003 (1992).

[17] *Id.* at 1015-16.

[18] *Id.* at 130.

[19] *Id.* at 130-31.

question," and noted that the difficulty was avoidable in *Lucas* itself because the trial court had found that the statute left each of *Lucas*'s lots without economic value.[20]

Penn Central and *Lucas* have remained the twin pillars of the Supreme Court's takings jurisprudence. In subsequent cases, the Court has acknowledged the denominator problem without endorsing any particular solution.[21]

B. The *Murr* Case

1. The Facts

In 1960, the Murr parents bought a parcel along the St. Croix River and built a recreational cabin on the parcel, known as Lot F, which has 100 feet of river frontage.[22] The following year, they transferred title to the family plumbing company.[23] Two years later, in 1963, they purchased an adjacent parcel, Lot E, which has 60 feet of river frontage.[24] A bluff runs through both parcels with level land above the bluff, and level land along the river.[25] Lot E was, and remains, vacant.[26]

After Congress designated the river for federal protection and required Wisconsin and Minnesota to designate a management plan for the area, the Wisconsin legislature, in 1973, authorized the State Department of Natural Resources to develop regulations limiting development.[27] The Department enacted a regulation precluding use of lots as separate building sites unless they have at least one acre of land suitable for development.[28] Although Lots E and F each comprise more than one acre, the steep

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[20] 505 U.S. 1003, 1016, n.7 (1992). Without resolving the issue, Justice Scalia suggested that the "answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property." *Id*.

[21] See, e.g. Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001)(noting use of "parcel as a whole" rule, and also "discomfort with the logic of this rule.").

[22] 582 U.S. at ___.

[23] *Id*. at ___.

[24] *Id*. at ___.

[25] *Id*. at ___.

[26] *Id*. at ___.

[27] WIS. STAT. ANN. § 30.27(2) (West, Westlaw through 2017 Act 36).

[28] WIS. ADMIN. CODE NR § 118.06(1)(2)(a) (2017) required a minimum lot size of "at least one acre of net project area." WIS. ADMIN. CODE NR § 118.03(27) (2017) defined net project area to mean "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands."

terrain limits the combined buildable area of the lots to just under one acre.[29] Neither lot, on its own, approaches the one acre minimum.[30]

The Wisconsin regulations, however, exempted substandard lots "in separate ownership from abutting lands" on January 1, 1976.[31] As a result, Lot E remained a permissible building lot. The regulations, however, also included a merger provision, providing that adjacent lots under common ownership may not be "sold or developed as separate lots" if they don't meet the minimum lot size requirement.[32] The regulations, like many land use ordinances, authorize the grant of variances where enforcement would cause unnecessary hardship.[33]

Nearly two decades later, in 1994, the parents' plumbing company transferred title to Lot F to the four Murr children.[34] The following year, the children acquired title to Lot E.[35]

A decade later, when the children sought to sell Lot E to fund changes to the cabin on Lot F, they faced a difficulty: their acquisition of the two lots had brought them under common ownership, and had triggered the merger provision in the regulations. They sought a variance, which the county Board of Adjustment denied.[36] When the Wisconsin courts upheld the variance denial, the Murr children brought a state court action challenging the regulations as a taking. They alleged that the regulations had deprived them of "all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot."[37]

2. The Fundamental Question: What Action Constituted the Alleged Taking?

Before turning to the denominator problem, consider what actions might have constituted a taking of the Murrs' property. The first candidate is the state's imposition of a requirement that each building site have one acre of land suitable for development. That action did not constitute a complete prohibition on development of Lot E. The Murrs could certainly have built a larger cabin that straddled the border between Lots E and F, or could have demolished the cabin on Lot F in favor of a more modern cabin on Lot E.

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[29] 582 U.S. at ___.
[30] *Id*. at ___.
[31] WIS. ADMIN. CODE NR § 118.08(4) (2017).
[32] WIS. ADMIN. CODE NR § 118.08(4)(a)(2) (2017). On variances generally, *see* STEWART E. STERK, EDUARDO N. PENALVER, & SARA C. BRONIN, LAND USE REGULATION 28-39 (2d ed. 2016).
[33] WIS. ADMIN. CODE NR § 118.09(4)(b) (2017).
[34] 582 U.S. at __ .
[35] *Id.*
[36] *Id.* at ___ .
[37] *Id.* at ___.

But even if the one acre requirement would otherwise have constituted a complete prohibition on development of Lot E, the statute expressly grandfathered lots created before January 1, 1976.[38] So, in fact, the one acre requirement allowed the then-landowners -- the Murr parents -- to use the land for all purposes that would have been permissible before the restriction was imposed. Even using Lot E as the denominator, that restriction could not have constituted a taking under either *Lucas* or *Penn Central.*

Next, consider the statute's merger provision, which would cause forfeiture of Lot E's grandfathered status if Lot E were to come under common ownership with an adjacent lot.[39] The merger provision permitted the owners of Lot E, the Murr parents, to exercise every attribute of ownership they enjoyed before the regulations were imposed, save for one: they could not sell Lot E to a person or entity who owned abutting land without losing the right to build. But the Murrs could have built on Lot E, or they could have sold Lot E to a prospective purchaser who wanted to develop the lot. In light of the alternatives available to the Murrs, they had no plausible claim that the merger provision effected a *Lucas* taking, and no serious claim that the merger provision significantly interfered with investment-backed expectations in violation of the *Penn Central* balancing test.

Finally, consider the Board of Adjustment's variance denial. Variances have long been conceptualized as constitutional safety valves, enabling a local body to rescue a landowner who would otherwise be subject to an unconstitutional taking.[40] But the two preceding paragraphs establish that in the *Murr* case, Wisconsin's actions could not have constituted an unconstitutional taking, even if Lot E were treated as the relevant denominator. If that is true, then the Board of Adjustment could not have been acting unconstitutionally in denying the variance application.

The basic point, then, is that the denominator problem should have been irrelevant on the facts of the *Murr* case. Regardless of denominator, the Murrs' takings claim had no merit. Moreover, the merger doctrine embodied in the Wisconsin statute is a longstanding and well-established zoning tool,[41] and if the Court had sustained the takings claim, it would have jeopardized the merger doctrine nationwide. The Court, however, granted certiorari, and both Justice Kennedy's majority opinion and Chief

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[38] WIS. ADMIN CODE NR § 118.08(4) (2017).
[39] WIS. ADMIN. CODE NR § 118.08(4)(a)(2) (2017).
[40] *See, e.g.*, JULIAN CONRAD JUERGENSMEYER, THOMAS E. ROBERTS, PATRICIA E. SALKIN & RYAN ROWBERRY, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 5.14 (3d ed. 2013).
[41] *See, e.g.,* ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING §49.13 (4th ed. 2011).

Justice Roberts' dissent focused on the denominator issue. The next section explores their respective treatments of the issue.

3. The Court's Approach to the Denominator Problem

In his treatment of the denominator problem, Justice Kennedy started by reviewing the Court's precedents, which made it clear that the denominator should not be limited to the property interests targeted by the regulation, but should instead include "the parcel as a whole."[42] He relied first on *Penn Central*, in which the Court declined to segment property vertically, refusing to focus on air rights alone, and instead concluding that the parcel as a whole included the entire city block on which Grand Central Terminal was located.[43] He then cited *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[44], in which the Court rejected an attempt to segment property temporally.[45] In *Tahoe-Sierra*, the Court rejected landowners' challenge to a "temporary" moratorium that had lasted 32 months, concluding that disaggregation of the property into temporal segments was an improper approach to the denominator problem.[46]

Justice Kennedy then purported to derive another principle from prior cases: property rights under the takings clause should not be coextensive with state law property rights.[47] As an example, he indicated that a state could not insulate itself from a takings claim by enacting a law consolidating all nonadjacent property owned by a single person anywhere in the state, and then imposing development limits on the aggregate set.[48]

After his survey of the Court's past precedents, Justice Kennedy turned to the heart of his opinion: the conclusion that courts must consider multiple factors in determining the denominator for taking purposes. Without indicating that the factors are exclusive, he identified three factors courts should consider to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."[49] The three factors he named are (1) treatment of the land under state and local law, (2) the

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[42] 582 U.S. at ___.
[43] 438 U.S. at 130-31.
[44] 535 U.S. 302 (2002).
[45] *Id.* at 332 ("[A] permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not.").
[46] *Id.* at 1331.
[47] 582 U.S. at __.
[48] *Id.* at ___.
[49] *Id.* at ___.

physical characteristics of the land, and (3) the prospective value of the regulated land.[50] Treatment under state and local law is perhaps, the easiest of the three to understand, but Justice Kennedy elaborated on the other two factors. Physical characteristics of the land might be relevant if topography or other factors make it likely that the land would become subject to regulation.[51] In discussing the prospective value of the regulated land, Justice Kennedy noted that in some cases, regulation of one parcel of land might increase the value of remaining land "by increasing privacy, expanding recreational space, or preserving surrounding natural beauty."[52] In those instances, he suggested, it might be appropriate to treat the land together as a single parcel.

Applying the multi-factor approach to the *Murr* case, the Court concluded that the Wisconsin Court of Appeals had been correct in treating the merged parcel – Lots E and F together – as the denominator for takings purposes.[53] First, under state law, the lots were merged for a legitimate purpose and as a result of the Murrs' voluntary conduct.[54] Second, the physical characteristics of the land along a regulated river should have led the Murrs to anticipate public regulation.[55] Third, treating the lots as a whole allows increased privacy and recreational activity on the combined parcel.[56] Once the Court established the combined lot as the appropriate denominator, the Court had no difficult in rejecting the Murrs' takings claim.

Chief Justice Roberts, dissenting, rejected the majority's multifactor approach to the denominator problem, arguing instead that state law boundary definitions "should, in all but the most exceptional circumstances, determine the parcel at issue."[57] He argued that the Court had never before relied on anything other than state property law principles in identifying the relevant private property against which government regulation is measured.[58] In his view, the *Murr* case should have been remanded to the Wisconsin courts for identification of the relevant property "using ordinary principles of Wisconsin property law."[59] He contended that the Wisconsin courts had erred by

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[50] *Id*. at ___.
[51] *Id*. at ___.
[52] *Id*. at ___.
[53] *Id*. at ___.
[54] *Id*. at ___.
[55] *Id*. at ___.
[56] *Id*. at ___.
[57] *Id*. at ___ (Roberts, C.J., dissenting).
[58] *Id*. at ___.
[59] *Id*. at ___.

applying a "takings specific definition of the property at issue" rather than asking whether "under general state law principles, Lots E and F are legally distinct parcels of land."[60]

II. The Elusive Denominator

A. Two Problems or One?

Much of the confusion over the denominator problem arises because the Court uses the same term to solve two separate, albeit related, problems. The denominator is relevant in evaluating *Penn Central* taking claims because the objective with respect to those claims is to determine whether an otherwise valid regulation has deprived landowner of a reasonable return on its investment.[61] Developers operate in an environment marked by a variety of risks, including regulatory risks.[62] Those risks are priced into the land they purchase.[63] Some of those risks will eventuate and others will not. If the goal of *Penn Central* taking analysis is to determine whether a landowner's justified expectations have been disappointed, a broad-based denominator is most consistent with that goal.[64] Focusing on a narrow slice of the developer's investments would blind courts to the fact that the developer may have profited significantly on its overall development portfolio.

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[60] *Id.* at ___.

[61] In *Penn Central* itself, the landowner conceded for purposes of its takings challenge that the Terminal was capable of earning a reasonable return. 438 U.S. 104, 129. The Court considered it important that the city's landmarks regulation enabled landowner to obtain a reasonable return on its investment. *Id.* at 136.

Reasonable return need not be measured against the landowner's initial investment because, as courts have noted, such a standard would reward landowners who paid more for their investment over those who paid less. *See, e.g.*, Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135, 140 (2d Cir. 1984).

[62] *See* Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 901-02 (2007) (detailing regulatory risks facing developers).

[63] *See generally* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 232-35 (1995) (noting elements of speculation in purchase of land in light of regulatory risk).

[64] How to determine what expectations are reasonable or justified remains a disputed question. To the extent courts decide what expectations are justified, there is an element of circularity in the formulation. As Justice Kennedy put it in his *Lucas* concurrence, "[t]here is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." Lucas v. South Carolina Coastal Council, 505 U.S. 1003 at 1034 (Kennedy, J., concurring in judgment). *See generally* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV 899, 915 (2007).

By contrast, *Lucas* takings claims have far less to do with ensuring landowners a reasonable return. In *Lucas,* the Court justified its categorical rule by noting that total deprivation of beneficial use is equivalent of physical appropriation, for which compensation is invariably due.[65] In effect, the Court expressed concern that if government could totally deprive landowner of beneficial use without paying compensation, government would use regulation to bypass its condemnation power. Defining the denominator broadly would frustrate efforts to prevent condemnation bypass; so long as the landowner owned enough land, government could preclude all development on some of it without falling afoul of the *Lucas* prohibition.

Consider, for instance, a landowner who acquires 20 acres of land with plans to develop the land residentially. The state then creates a preserve designed to protect the habitat of the Karner Blue butterfly, a rare species in the area.[66] Two of the landowner's 20 acres fall within the preserve, in which the state has prohibited all development. Residential development remains permissible on the other 18 acres. Using the 20 acres as a denominator is fully consistent with the *Penn Central* objective of protecting landowner's justified expectations by ensuring landowner a reasonable return. But using 20 acres as a denominator enables the state to bypass condemnation of the two acres, which is inconsistent with the concerns expressed in *Lucas.*

Which of these objectives – protecting justified expectations or avoiding condemnation bypass – lies at the heart of takings doctrine remains an issue of considerable controversy. A focus on protection of justified expectations leads to greater protection for homeowners and others for whom real property has subjective value, and less for developers who invest with knowledge of regulatory and other risks.[67] By contrast, those who focus on condemnation bypass see no reason why government should be able to avoid compensating large landowners more easily than small ones.[68] Differences in perspective on the constitutional objective has substantial implications for the choice of denominator.

B. Alternative Approaches and Their Limits

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[65] 505 U.S. 1003 at 1017. *See generally* David A. Dana, *Why Do We Have the Parcel-As-A-Whole Rule?*, 39 VT. L. REV. 617, 634 (2015) (noting that once one concludes that property has lost all value, the regulation appears to be the functional equivalent of outright condemnation).

[66] *Cf.* Save the Pine Bush v. Common Council of City of Albany, 918 N.E.2d 917, 919 (N.Y. 2009) (discussing acreage set aside for preservation of Karner Blues)

[67] *See, e.g.*, Eduardo Penalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2213-15 (2004); *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).

[68] *See, e.g.*, John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1032 (2003).

Courts and scholars have proposed a variety of alternative approaches to the denominator problem. Each of them is generally consistent with either *Penn Central* concerns or with *Lucas* concerns, but not both.

1. All Contiguous Land in Common Ownership.

One approach is to treat all contiguous land owned by the regulated landowner as the denominator for any takings claim.[69] If the takings goal is to ensure that a legislative change in state law does not deprive the affected landowner of the ability to realize a reasonable return on investment, a focus on all contiguous land advances that objective. [70] Suppose, for instance, a developer proposes a 100-unit residential subdivision on a 30-acre tract, and as a condition of approval, the municipality requires the developer to set aside two of the 30 acres for parkland to service the subdivision. If the developer had purchased the 30 acres from a single owner, using the whole 30 acres as the denominator would enable a court to evaluate whether the parkland restriction left the developer with a reasonable return. But even if the developer had bought 28 acres from one seller and the other 2 from a different owner, the developer presumably expected a return on the total proposed development; from the developer's perspective, land is a fungible commodity and the fact that the purchase came from two sellers did not significantly alter the character of the investment.[71]

Opposition to all contiguous land as the denominator has generally focused on the opportunity for manipulation by landowners. If a landowner who owns 30 acres is stuck with the entire 30 acres as a denominator, why not subdivide the land into 30 separate one acre parcels held in separate ownership, so that significant limitations on any of the parcels would be evaluated against a much smaller denominator?[72] In fact,

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[69] *See, e.g.*, K & K Constr., Inc., v. Dep't of Natural Res., 575 N.W.2d 531 (Mich. 1998) (aggregating contiguous parcels owned by same owner); *see generally* Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV 899, 939 (2007).

[70] A number of courts have suggested that contiguous land previously owned by the landowner, and later sold, should be counted as part of the denominator if the land already sold was "sufficiently connected" to the land retained. See K & K Constr., Inc., v. Dep't of Natural Res., 575 N.W.2d 531, 538 (Mich. 1998) (remanding to determine whether already developed and sold parcel had been held in common ownership and was sufficiently connected to parcel retained).

[71] For the argument that takings doctrine generally should provide less protection to fungible property than to non-fungible property, *see* Eduardo Penalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2213-15 (2004); *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).

[72] *See, e.g.*, David A. Dana, *Why Do We Have the Parcel-As-A-Whole Rule?*, 39 VT. L. REV. 617, 633 (2015) (noting that developers could respond "by simply holding their parcels as collections of smaller, separately titled interests"); John E. Fee, *The Takings Clause as a Comparative Right*, 76

however, restrictions on subdivision limit the opportunity for that kind of manipulation. If a developer wants to subdivide a large parcel into smaller ones, the developer typically needs approval from a government body.[73] The cost and delay associated with subdivision will make that unattractive unless and until the developer has a development project in mind.

Nevertheless, from a *Lucas* perspective, using all contiguous land as the denominator remains problematic. If the goal of *Lucas* doctrine is to prevent municipalities from using regulation as a means of bypassing condemnation, using contiguous land as a common denominator makes it easier for a municipality to acquire land for public use, especially from large landowners. If 30 acres were owned by 30 separate owners, and the municipality wanted to ensure that 2 acres remained open space, the municipality would not be entitled to preclude two of the landowners from developing their sites unless the municipality used its condemnation power.[74] If, however, the 30 acres are owned by the same owner, and the entire 30 acres are used as the denominator, the municipality would find it easier to avoid using its condemnation power.

2. Any Segment on Which an Independently Viable Use Was Previously Permitted.

In his student note, Professor John Fee argued that a landowner should be entitled to select as a denominator any segment of land that, before enactment of the challenged regulation, had a viable economic use independent of any surrounding land segments.[75] Fee argued that there was no single "correct" denominator, but that the

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S. CAL. L. REV. 1003, 1031 (2003) (noting that treating all contiguous land as the denominator "encourages one to increase the rights inherent in a bundle of private property by subdividing it among owners.").

[73] *See, e.g.*, WIS. STAT. ANN. § 236.10 (West, Westlaw through 2017 Act 36) (detailing approvals necessary for a subdivision). The Wisconsin statute applies to division of a lot into 5 or more parcels. WIS. STAT. ANN. § 236.02(12) (West, Westlaw through 2017 Act 36). Other states have a more expansion definition of subdivision that does not include a numerical minimum threshold. *See, e.g.*, CAL. GOV'T CODE § 66424 (West, Westlaw through Chapter 164 of 2017 Reg. Sess.).

[74] This point underlies Chief Justice Roberts' dissent. He complains that if an owner buys contiguous two lots from different sellers, and the state then prohibits all development on one of the lots, treating the two lots as the relevant denominator means that "the owner's per se takings claim is gone, and he is left to roll the dice under the Penn Central balancing framework." 582 U.S. at __ (Roberts, C.J., dissenting).

[75] John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1537 (1994). For application of the independent viable use test as a factor in denominator analysis, *see* Cour d'Alene v. Simpson, 136 P.3d 310, 323 (Idaho 2006). Steven Eagle has

landowner would have to select a denominator broad enough that landowner could show that the selected land had an independently viable economic use;[76] as a result, landowner could not select a small denominator to challenge setback restrictions or other prohibitions on development of relatively small areas.[77]

The independent viable use approach to the denominator problem is entirely consistent with the *Lucas* effort to prevent bypass of the condemnation process. If a government entity seeks to preclude all development on a segment of land on which development previously would have been permitted, the government's action looks functionally equivalent to condemning the segment for public use. Moreover, permitting the landowner to define the denominator in this way ensures that owners of large tracts are not disadvantaged simply because they own multiple segments, each of which had an independently viable use before the regulation.[78]

On the other hand, the independently viable use denominator is a problematic basis for evaluating whether a large developer's justified expectations have been frustrated. Suppose, for example, a developer sought to take advantage of a statute or ordinance authorizing the developer to cluster residential development on a portion of a tract, but requiring that the developer leave the remainder of the tract as open space.[79] Development of the open space would have been permitted until developer built the cluster subdivision. Would the developer then be able to define segments of the open space as the denominator for a potential takings claim? Even though the regulation would leave the developer with a reasonable return on the development as a whole – perhaps

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proposed a similar test, focusing on what property constitutes a "commercial unit." Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. REV 899, 942 (2007).

[76] 61 U. CHI. L. REV at 1557.

[77] *Id.* at 1559.

[78] Critics of a denominator that focuses on the quantity of land owner have expressed concern about disadvantaging large landowners. In Professor Fee's view:

> Unless some reason exists why the Takings Clause should be concerned with deterring citizens from owning too much property at once, the quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part.

John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1032 (2003).

[79] *See, e.g.*, N.Y. VILLAGE LAW § 7-738 (McKinney 2017) (authorizing cluster developments). *See generally* STEWART E. STERK, EDUARDO M. PENALVER, & SARA C. BRONIN, LAND USE REGULATION 110-11 (2d ed. 2015).

a larger return than if developer had built a conventional subdivision[80] – developer might have a plausible claim that it was not receiving a reasonable return on the open space.[81]

3. Land Treated by Owner as a Distinct Economic Unit.

In a number of cases, the Federal Circuit has concluded that when a landowner owns a large tract of land, but treats some subset of that land as a distinct economic unit, the subset, and not the large tract, should serve as the denominator for a takings claim. Lost Tree Village Corp. v. United States[82] is illustrative. In that case, developer, who, over a five year period, purchased nearly all of a 2,750 acre tract of land on the Florida Coast, challenged denial of a wetlands permit on a 4.99 acre parcel within the tract. Although developer had already developed about 1,300 acres of the tract by the mid-1990s, developer had ignored the 4.99 acre parcel until 2002, years after most knowledgeable people considered the development complete.[83] When the Army Corps of Engineers denied a fill permit for the parcel (1.41 acres of which consisted of submerged lands), developer brought a taking challenge. The Federal Circuit held that the 4.99 acre parcel, not the development as a whole constituted the relevant denominator because the developer had not treated the 4.99 acre parcel as part of the same economic unit as other land it had developed.[84]

The distinct economic unit standard does not require the developer to prove that the segment at issue had an independently viable use, but does apparently require developer to show that it had treated the parcel separate and apart from neighboring land.[85] Like the independent viable use standard, the distinct economic unit standard identifies cases in which regulation appears to be a substitute for condemnation, and

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[80] Development of the cluster subdivision might reduce the costs of roads and utilities. *See* STERK, PENALVER & BRONIN, *supra* note , at 111.

[81] If the developer elected the cluster subdivision rather than a conventional subdivision, one might argue that developer had received a return in the form of approval of the cluster subdivision. But if the municipality indicated that it would not approve a traditional subdivision, or would do so only on onerous terms, the developer's claim, however weak as a matter of fairness, would become more plausible if the court were required to treat all or part of the open space as a denominator.

[82] 707 F.3d 1286 (Fed Cir. 2013).

[83] *Id.* at 1290.

[84] *Id.* at 1293.

[85] For instance, the court in Lost Tree Village cited, with apparent approval, Forest Props., Inc. v. United States, 177 F.3d 1360 (Fed. Cir. 1999), in which the Federal Circuit held that the relevant denominator included all 62 acres owned by a single landowner, even though the landowner had acquired the property from two separate prior owners, because the developer treated the two tracts as a single economic unit. 177 F.3d at 1365-66.

provides large landowners with the same protection as small ones. Hence, the test comports with the reasons that underlie the Court's opinion in *Lucas*. But, also like the independent viable use standard, the distinct economic use standard holds out hope for compensation even when landowner has realized a reasonable return on investment.[86] In that sense, the independent viable use standard is inconsistent with the *Penn Central* premise that the takings clause is designed primarily to protect justified expectations.

4. Summary.

Penn Central and *Lucas* reflect fundamentally different concerns about land use regulation. *Penn Central* rests on the premise that regulation is an appropriate tool for achieving public objectives, subject to review to protect justified expectations of landowners. *Lucas*, by contrast, evinces concern that government not use regulation as a wealth transfer device.

The denominator a court uses in evaluating taking claims is likely to reflect the concern the court deems paramount. Although ideology undoubtedly plays a role in that inquiry, other factors are also at play. Consider, for instance, two variations on the *Lost Tree Village* case.

First, assume developer owns 2750 acres, assembled from a variety of sellers, and the relevant local government entity authorizes extensive development, but requires 100 acres of open space along the waterfront to provide water access to residents of the new development. In that instance, if the regulation might appear to be primarily designed to make the development more attractive as a whole, and might increase value to prospective purchasers. A court would be unlikely to allow the developer to reap the increased prices from purchasers, and also to compel the local government to pay it for the 100 acres that increased the value of the remaining land. Treating the entire 2750 acres as the denominator ensures the developer a reasonable return.

Second, assume the same local government has approved the same development in six separate stages, never voicing any concern about open space or water access. When developer applies to complete the final stage – development of 100 acres of waterfront – the local government objects and requires that the 100 acres be maintained as open space. Although the developer may already have received a reasonable return on the developer's initial investment, the same prohibition on development of the final 100 acres now looks more like a wealth transfer from the developer to the neighboring

[86] In Lost Tree Village itself, after the Federal Circuit determined the denominator, the Court of Federal Claims concluded that the regulation constituted a taking. Lost Tree Vill. Corp. v. United States, 115 Fed. Cl. 219 (2014). The Federal Circuit affirmed. 787 F.3d 1111 (Fed. Cir. 2015).

landowners.[87] As a result, *Lucas* concerns might predominate and the court might treat only the 100 acres as the denominator.[88]

C. The *Murr* Dissent and the Role of State Law

Against this tension about the premises that lie behind takings doctrine, and the resulting confusion about the appropriate denominator, the Court took certiorari in the *Murr* case. As already noted, the facts made the Murrs' takings claim implausible on any theory.[89] As a result, it is not surprising that the dispute between the majority and the dissenters was rooted in disagreement about theory, not about ultimate result. Indeed, Chief Justice Roberts conceded that the majority's "bottom-line conclusion does not trouble me."[90] Among the areas of theory that provoked the sharpest disagreement is the role of state law in determination of the appropriate takings denominator. For the Chief Justice, state law was dispositive;[91] for the majority, it was a factor to be weighed among others in the denominator inquiry.[92]

Except as constrained by the constitution or federal statutes, American property law is state law. [93] The Court's takings cases have consistently recognized that the taking

[87] Many regulations have the effect, and even the objective, of transferring wealth from one class of persons to another. In this respect, they resemble taxes. *See generally* Eduardo M. Penalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2185-87 (2004). The Court, and particularly Justice Kennedy, has expressed concern about government measures that transfer property from one private party to another, even in cases where the government action is accompanied by compensation. *See* Kelo v. City of New London, 545 U.S. 469, 487 (2005) (noting that a one-to-one transfer of property "would certainly raise a suspicion that a private purpose was afoot."). *See also id.* at 491 (Kennedy, J., concurring) (" A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.").

[88] On the other hand, as Danaya Wright has argued, a court might conclude that the developer's own development actions on the earlier stages created a greater need for restrictions on the last 100 acres. Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 212-13 (2004).

[89] *See* Section I(B)(2), *supra*.

[90] 592 U.S. at .

[91] *Id.* at (Roberts, C.J., dissenting).

[92] *Id.* at .

[93] *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."). *See also* Melvyn Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD L. REV. 464, 494 (2000) ("Property … owes both its existence and its contours to positive law, local positive law.").

clause operates not by specifying the content of property law but by protecting owners against precipitous changes in state property law.[94] The distinct investment-backed expectations that played a central role in the *Penn Central* opinion could only have been formulated against a background of state law. The *Lucas* opinion recognized that if background state law gave a landowner no right to develop, even a regulation completely prohibiting development would not constitute a taking of property. The premises behind these decisions and others is clear: states define property rights; the takings clause protections against abrupt changes in those rights.

What implications does this framework have for the denominator problem? For Chief Justice Roberts, the answer was self-evident: the denominator should be resolved by reference to state law. In fact, however, the issue is more complicated.

As Tom Merrill has established, defining property for takings purposes involves an amalgam of federal and state law.[95] Although state law defines the content of property rights, states are not free to define rights as property and therefore to confer constitutional protection on those rights. Which state-created rights fall within the category of property protected by the takings clause is a matter for federal determination.[96] For instance, if Nevada were to confer on its citizens broad rights to engage in gambling or prostitution, Nevada's efforts to classify those rights as property rights would not make them property for purposes of the federal constitution's takings clause. The Supreme Court might, or might not, determine that those rights constituted property rights, but the classification issue would be a matter of federal constitutional law, not Nevada state law.

Within the category of constitutionally protected property rights, states may differ significantly in what rights they protect, and in how much protection they provide.[97] The federal constitution does not mandate that states recognize any particular property rights. States might even differ in how extensively they protect the right to exclude; in some states, for instance, the public trust doctrine permits broad public rights to use waterfront land, while in other states, waterfront owners have a broader right to exclude

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[94] *See generally* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206, 210-11 (2004).

[95] Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 942-99 (2000).

[96] *Id.* at 952. In Merrill's words, courts "seek to discover from the Constitution's traditions general criteria that serve to differentiate property rights from other types of interests." Then, "state law is consulted not to discover the definition of property; it is reviewed to determine if interests have been created that correspond to the federal criteria for the identification of constitutional property."

[97] Sterk, *supra* note , at 223.

members of the public.[98] The focus of the takings clause is on limiting *change* in property rights, not on requiring the states to embrace any particular set of rights. How much change the takings clause authorizes is an issue of federal constitutional law, not state law.

Much as defining property for takings purposes involves an amalgam of state and federal law, determining the takings denominator combines elements of state and federal law. State law plays an obvious role. If state law has never recognized a particular property right, that right cannot constitute part of the takings denominator. To the extent that Justice Kennedy's majority opinion suggests that the denominator should reflect factors not derived from state law rights, Chief Justice Roberts' criticism of the majority opinion is on the mark.

By the same token, however, *which* state law rights should constitute the denominator is an issue of federal law. The need for a denominator was not pre-ordained. For instance, the Supreme Court could have determined that only permanent physical occupations constitute takings.[99] Had the Court taken that path, denominators would have been irrelevant.[100] But because the Court concluded both in *Penn Central* and in *Lucas* that the takings clause protects against some forms of economic loss, the Court had to develop a baseline against which to measure the loss. Because the denominator's significance is purely a construct of federal constitutional law, it makes little sense to choose a denominator independent of the federal constitutional purposes the denominator serves.[101]

The "parcel as a whole" formulation the Court has embraced is itself a choice dictated by federal constitutional concerns, not by state law. For instance, New York law permitted *Penn Central* to sell the right to develop above Grand Central Terminal, and

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[98] *Id.*

[99] In Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 at 322 (2002), Justice Stevens distinguished between jurisprudence involving physical takings which he concluded was "as old as the Republic," and regulatory takings jurisprudence, which "is of more recent vintage."

[100] *See* Justin R. Pidot, *Eroding the Parcel*, 39 VT. L. REV. 647, 656-57 (2015) (noting that denominator is irrelevant to permanent physical occupation claims under Loretto).

[101] *Cf.* Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 21, 25 (1997) ("When the Fifth Amendment states that private property cannot be taken for public use without just compensation, one can hardly suppose that a state is able to deflect the power of this constitutional command by defining property in ways that exclude some of its essential attributes."). *See also* Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 57-58 (1997).

UGP Properties bought that right.[102] The Court could have concluded that since those development rights were property rights under state law, and the city's landmarks ordinance interfered with those rights, the development rights constituted the denominator for takings purposes. In rejecting that denominator, the Court invoked concern about conceptual severance – a concern relevant to federal constitutional law, but not New York property law.

Because the phrase "parcel as a whole" is imbued with federal constitutional significance, it would be peculiar to leave states free to influence the constitutional denominator by broadening or narrowing what constitutes a "parcel as a whole." Chief Justice Roberts anticipated this potential problem, and argued that what constitutes the "parcel as a whole" should not entail a "takings-specific definition," but should instead be determined using "ordinary principles of Wisconsin property law."[103]

The inquiry into ordinary principles of state property law is not as straightforward as the Chief Justice would have it. Chief Justice Roberts plucked a definition from a single Wisconsin statute dealing with how a developer must describe lots when the developer seeks subdivision approval from a municipal body. That statute provides that when a subdivision play has been recorded, "the lots in that plat shall be described by the name of the plat and the lot and block in the plat for all purposes, including those of assessment, taxation, devise, descent and conveyance…"[104] But other Wisconsin statutes provide a variety of mechanisms for describing parcels. For instance, the Wisconsin tax statute makes it explicit that an assessment is valid if contiguous lots are assessed and valued together as one parcel. [105] Moreover, Wisconsin law makes provision for division of ownership into parcels that are not always strictly horizontal. For instance, Wisconsin's condominium statute provides for condominium units, which "may include 2 or more noncontiguous areas,"[106]and provides that "[a] unit, together with its undivided interest

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[102] *See generally* Sara C. Bronin, *Solar Rights*, 89 B.U. L. REV. 1217, 1236 (2009) (noting that common law has long recognized airspace as property distinct from ground or mineral estates).
[103] 582 U.S. at . (Roberts, C.J., dissenting).
[104] WIS. STAT. ANN. § 236.28 (West, Westlaw through 2017 Act 36).
[105] *See*, *e.g.*, WIS. STAT. ANN. § 70.28 (West, Westlaw through 2017 Act 36) (providing that "[No assessment of real property which has been or shall be made shall be held invalid or irregular for the reason that several lots, tracts, or parcels of land have been assessed and valued together as one parcel and not separately, where the same are contiguous and owned by the same person at the time of such assessment."); *see also* Wis. Stat. Ann. § 706.02(1)(b) (West, Westlaw through 2017 Act 36) (providing that conveyances need identify the land, but not necessarily by lot and block); for a case sustaining a transfer made without reference to lot and block, *see, e.g.*, Zapuchlak v. Hucal, 262 N.W.2d 514 (Wis. 1978).
[106] WIS. STAT. ANN. § 703.02(16) (West, Westlaw through 2017 Act 36).

in the common elements, for all purposes constitutes real property."[107] It is not at all clear how a court would decide which of these provisions constitute "ordinary principles of Wisconsin property law" without considering the purpose of the inquiry: finding the denominator that best serves federal constitutional law objectives.

Of course, treating a parcel with a separate block and lot number as the takings denominator would be consistent with a takings jurisprudence concerned primarily with constraining condemnation bypass – but that consistency has little to do with principles of Wisconsin property law.

D. The Majority Opinion: Rejection of State Law?

In contrast with the Chief Justice, the Court's majority appears to inject factors independent of state law into the denominator inquiry. If that appearance were accurate, the Court's approach would be inconsistent with the foundation of the takings clause, which, as the Chief Justice noted in dissent, "protects private property rights as state law creates and defines them."[108] A more charitable reading of Justice Kennedy's opinion, however, reveals that the factors the majority cites are all rooted in state law; the Court's primary objective is to the notion that any single state law enactment should be treated as a dispositive exposition of state property law.

At points in the majority opinion, Justice Kennedy questions the centrality of state law in the takings inquiry.[109] His rejection of state law as the focus for the denominator inquiry, however, rests on the fear that states might define property interests in a way that eviscerates the takings clause. In particular, the majority opinion expresses concern that "defining the parcel by reference to state law could defeat a challenge even to a state enactment that alters permitted uses of property in ways inconsistent with reasonable investment-backed expectations."[110] That is, Justice Kennedy's expressed concern is about a state enactment that would significantly alter or change an owner's pre-existing property rights. That concern is the primary focus of the takings clause, which is not to dictate the way in which states shape and define property rights, but is instead designed to limit the way states may *re*shape or *re*define property

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[107] WIS. STAT. ANN. § 703.04 (West, Westlaw through 2017 Act 36).
[108] 582 U.S. at (Roberts, C.J. dissenting).
[109] The court expresses "caution" about "the view that property rights under the Takings Clause should be coextensive with state law." 582 U.S. at . The Court also indicates that its test "weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property." *Id.* at .
[110] *Id.* at .

rights. Thus, in Palazzolo, the case on whose dictum Justice Kennedy relies, the Court's concern was whether the "*by prospective legislation* the State can shape and define property rights and reasonable investment-backed expectations."[111] The Court's answer was that if a state's enactment otherwise constituted a taking, the passage of title to a subsequent owner would not insulate the state from liability for the taking.[112] But the Court had occasion to consider the issue only because the state had changed the development rights associated with the property. Nothing in Palazzolo suggests that federal law, or any other body of law, displaced state law as the source of property rights in land.

Ultimately, however, the factors the majority identifies as relevant to the denominator all have a state law foundation. The majority starts with treatment of the land under state law as its first factor. The Court's second factor – physical characteristics of the land – focuses on whether the landowner should have understood that its land was subject to regulatory risk.[113] But that regulatory risk is itself a byproduct of state law, which creates the mechanisms and political environment for regulation.[114] The final factor -- the value of the land under the challenged regulation – reflects landowner's options under the state's regulatory environment.

The Court could, of course, have endorsed other formulations of the denominator that would have been consistent with state law. For instance, if the Court's primary concern had been avoiding condemnation bypass, the Court might have endorsed a formulation that focused on whether a particular parcel had an independent use under pre-existing state law.[115] The formulation the Court chose privileged a view of the takings clause as protecting expectations rather than a view centered on avoiding condemnation bypass. That choice is one that reflects the majority's federal constitutional values. But in making that choice, the factors the Court incorporated into its denominator formulation are all closely tied to existing state law. Despite its cautions about state law, the Court has not removed the state law anchor from the denominator determination.

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[111] Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001) (emphasis added).
[112] *Id*. at 627-30.
[113] In identifying physical characteristics as a factor in determining the denominator, the Court emphasized that "[i]n particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation." 582 U.S. at .
[114] Indeed, Justice Kennedy himself has recognized that the expectations of landowners are shaped in considerable measure by existing law. *See* Lucas v. South Carolina Coastal Council, 505 U.S. at 1034 (Kennedy, J., concurring in judgment).
[115] *See* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1537 (1994).

III. The Implications of *Murr*: The Death of *Lucas*?

Over the course of the last 25 years, the Court has compartmentalized implicit takings claims into two categories: *Penn Central* claims and *Lucas* claims. *Murr*'s treatment of the denominator problem signals no significant change for *Penn Central* claims but, taken in conjunction with Chief Justice Roberts' dissent, should make it exceedingly difficult for landowners to seek or obtain compensation on a *Lucas* claim.

A. *Penn Central* Claims.

Most *Penn* Central claims were doomed long before the *Murr* case. The Court has never found any state or local land use regulation to constitute a *Penn Central* taking. Moreover, fewer than ten percent of regulatory taking claims succeed in the lower courts when the landowner cannot allege a *Lucas*-type "wipeout."[116] The landowner's odds are even longer when the landowner's primary complaint is that the regulation involved a diminution of value. [117]

In light of these low success rates, *Murr*'s multifactor balancing test is unlikely to have a major impact. In the few *Penn Central*-type cases that have involved a dispute over the relevant denominator, landowner success rates are already small; lower than ten percent.[118] Moreover, a large percentage of cases in which the denominator is at issue are likely to be cases in which a developer (rather than a homeowner, commercial owner or landlord) challenges the regulation. On average, developers who bring takings claims are even less successful than other categories of landowners. [119]

When a court is unsympathetic to a landowner's takings claim, *Penn Central* already provides the court with the tools it needs to reject the claim. *Penn Central* does not mandate that a regulation preserve landowner's investment-backed expectations; instead, a court is directed to balance economic factors, pursuant to no "set formula," against other factors, including the regulation's purpose.[120] If a court finds the purpose sufficiently important, the regulation may stand despite significant losses to the landowner, regardless of the denominator the court uses in evaluating the regulation's interference with landowner's return.

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[116] *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 59 (Table 2)(2016).
[117] *Id*. at 67 (Table 4) (success rate of 5%).
[118] *Id*.
[119] *Id*. at 76 (Table 7).
[120] 438 U.S. at 124.

As the Chief Justice points out, the result of *Murr*'s resolution of the denominator issue "is that the government's regulatory interests will come into play not once, but twice": first in identifying the denominator and second in determining whether the regulation has placed too great a burden on the property. The structure the Court lays out may alter the structure of briefs filed on behalf of landowners and government regulators, but it is unlikely to make much difference in result, because counting the government's regulatory interests even once is more than sufficient to overcome almost all *Penn Central* claims.

B. *Lucas* Claims

Landowners who claim that regulation has eliminated all economic use of their land – the hallmark of a *Lucas* claim – have enjoyed considerably more litigation success than landowner who can only advance Penn Central claims. These "wipeout" claims are far less frequent because relatively landowners can plausibly claim that government regulations have left them with no economic use for their land.

The flexible denominator developed in *Murr* may well be the death knell for many of these wipeout claims. Suppose a developer acquires multiple parcels of land, on each of which development would have been permissible. Developer, however, assembled the parcels to complete a larger project. If the municipality then takes action to prohibit development of some of the parcels (for instance, those nearest a sea coast) or if the municipality changes permissible zoning density in a way that makes one or more the parcels too small to permit development, the approach outlined in the *Murr* opinion would authorize a court to use the combined parcels as a denominator (which would defeat any *Lucas* claim) if the assembly were reasonably foreseeable or if the restriction might increase the value of the remaining property (perhaps by insuring that there will be no development between the remaining property and the sea coast).

One might argue that combining parcels in this way would constitute an improper balancing of the factors articulated in *Murr*. But the Supreme Court has neither the resources, nor the inclination to review many takings cases.[121] Moreover, the Court has limited expertise on issues of state property law.[122] As a result, the Court's discussion of "flexibility" is, in effect, a delegation of authority to state courts.[123] The likely result, then, is that state courts can use *Murr*'s multi-factor test to broaden the scope of property included in the denominator, and consequently to reject many *Lucas* claims.

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[121] *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L. J. 203, 237 (2004).
[122] *Id.* at 226-28,
[123] *Id.* at 271.

There will remain, of course, some cases in which regulation precludes all use of landowner's property no matter how broadly the denominator is defined. *Murr*'s expansion of the denominator will have no impact on those cases. Paradoxically, however, it is Chief Justice Roberts' dissent that may signal the death of those claims. The Chief Justice conceded that the potential use of the Murrs' vacant lot as recreational space, or as a valuable addition to a neighboring lot, "could be relevant" to whether the regulation denied the landowner all economically beneficial or productive use under *Lucas*.[124] By concluding that those factors might be relevant in evaluating a *Lucas* claim, the Chief Justice is effectively deciding some of the issues that have divided lower courts,[125] and deciding those issues in a way that would make a *Lucas* claim virtually impossible to succeed; virtually every parcel of land would add some market value to a neighboring parcel. Of course, the Chief Justice was writing in dissent, but if the dissenters are willing to read *Lucas* so narrowly, the justices in the majority are even more likely to do so. Perhaps more important, the Chief Justice's dissent provides ammunition for state courts otherwise inclined to read *Lucas* narrowly.

Taken together, the majority's treatment of the denominator issue and the dissent's concessions about what constitutes economically beneficial or productive use, will make it very difficult for any owner to prevail on a *Lucas* claim.

Conclusion

When landowners level a takings challenge against state or local regulation, the Supreme Court's jurisprudence has been marked by opinions extolling the importance of property rights while upholding state and local regulation of those rights.[126] That jurisprudence reflects the Court's institutional competence, particularly its inability to supervise the land use regulatory process in light of the disparate property law rules that prevail in different states.

Murr is consistent with the Court's prevailing pattern. In particular, *Murr's* treatment of the denominator problem delegates to state courts the authority to balance

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[124] 582 U.S. at .

[125] *Compare, e.g.*, Wyer v. Bd. of Envtl. Prot., 747 A.2d 192, 193 (Me. 2000) (holding that denial of a variance was not a taking when landowner could use land for recreational use, and emphasizing "the value of the property to abutters as an additional factor in determining the value of the property") *with* Moroney v. Mayor & Council of Old Tappan, 633 A.2d 1045, 1048-49 (N.J. App. 1993) (rejecting the argument that combination with neighboring parcel could make land economically productive).

[126] James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 83-84 (2016).

a variety of factors more or less as they see fit. For the vast bulk of takings claims – those governed by the *Penn Central* framework, *Murr* will make very little difference. But for that small group of landowners who claim that regulation has denied them all economically productive use of their land, *Murr* makes their already steep uphill climb even steeper.