
*Fifth Amendment — Takings Clause — Regulatory Takings —
Murr v. Wisconsin*

To evaluate a regulatory takings claim, a court must measure the economic loss caused by a challenged regulation (the numerator) with respect to a particular unit of property (the denominator).¹ However, the test for *identifying* the correct denominator has proven elusive.² For decades, the Court’s guidance on the subject consisted of a few cryptic examples³ and the somewhat-circular requirement that courts look at “the parcel as a whole.”⁴ Last Term, in *Murr v. Wisconsin*,⁵ the Court announced an objective, three-factor balancing test for identifying the unit of property to serve as the focus of a court’s regulatory takings analysis. The test hinges on “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” and weighs the land’s (1) “treatment . . . under state and local law”; (2) “physical characteristics”; and (3) “value . . . under the challenged regulation, *with special attention to the effect of burdened land on the value of other holdings*.”⁶ The Court’s third factor presents a significant contribution to takings law by embracing the way in which restrictions on one property can produce offsetting benefits on other, economically

¹ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (“Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’” (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967))).

² See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (describing “the difficult, persisting question of what is the proper denominator in the takings fraction”); Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 632 (2014) (comparing the Court’s approach to “a soccer field that changes in size according to the strategy of the players, and where referees apply flexible rules that contract or expand the field”).

³ Compare *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 337 (2002) (declining to treat the right to develop during a particular time period as the denominator), *Keystone*, 480 U.S. at 499, 500–02 (declining to treat the “support estate” as the denominator even though it was a distinct property interest under state law), *Andrus v. Allard*, 444 U.S. 51, 64 (1979) (declining to treat the right to sell property as the denominator), and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978) (declining to treat “air rights” alone as the denominator), with *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987) (effectively treating the right to devise property as the denominator).

⁴ *Penn Central*, 438 U.S. at 130–31; see also *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting) (calling the parcel-as-a-whole rule an “enigmatic phrase” that has “created confusion”); *Palazzolo*, 533 U.S. at 631 (“[W]e have at times expressed discomfort with the logic of this [parcel-as-a-whole] rule”); cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (lamenting that “the rhetorical force” of the Court’s per se total-elimination-of-value 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”).

⁵ 137 S. Ct. 1933.

⁶ *Id.* at 1945–46 (emphasis added).

related properties. Courts applying *Murr*, however, should be wary of attempts to convert the concept of economic synergies into *either* a far-reaching defense for regulators *or* a powerful limiting principle for land owners. Instead, they should recognize it for what it is: one factor in an ad hoc, multifactor balancing test.

The Murr siblings own two adjacent lots, E and F, on the Wisconsin banks of a portion of the St. Croix River protected by the Wild and Scenic Rivers Act.⁷ These lots were separately owned by the Murr parents and the Murr family plumbing company until Lot F was conveyed to the Murr children in 1994 and Lot E was conveyed to them in 1995.⁸

A decade after the conveyances, the children decided to sell Lot E and use the proceeds to upgrade a cabin on Lot F.⁹ But state and local restrictions prevented the sale. Under state rules promulgated to bring Wisconsin into compliance with the federal Wild and Scenic Rivers Act, only lots with one or more acres of “land suitable for development” could be used as separate building sites.¹⁰ While a grandfather clause exempted lots that were substandard as of the regulation’s effective date,¹¹ a “merger provision” provided that neighboring lots under common ownership could not be sold or developed separately unless each independently met the minimum size requirement.¹² St. Croix County reflected these state provisions in its local zoning ordinance¹³ and retained the right to provide variances in cases of “unnecessary hardship.”¹⁴

Practically, the County’s zoning ordinance prohibited the Murrs from selling Lot E or building a separate home on it. They could build *one* home on Lot E or Lot F, or straddling both lots.¹⁵ They could also sell Lots E and F together as a single lot.¹⁶ They could not, however, sell Lot E to fund improvements on Lot F, as they intended.¹⁷

Disappointed, the Murrs sought and were denied a variance from the St. Croix County Board of Adjustment.¹⁸ The Murrs challenged the

⁷ *Id.* at 1940; *see* 16 U.S.C. §§ 1271–1287 (2012); *id.* § 1271(a)(6).

⁸ *Murr*, 137 S. Ct. at 1941. The lots actually came into common ownership thirteen years earlier when the Murr parents conveyed Lot E from Murr Plumbing Company to themselves in 1982, Brief for Respondent St. Croix County at 11 n.5, *Murr*, 137 S. Ct. 1933 (No. 15-214), but the Court assumed this conveyance away for purposes of its analysis, since the parties and courts had done so in the proceedings below, *Murr*, 137 S. Ct. at 1941.

⁹ *Murr*, 137 S. Ct. at 1941.

¹⁰ *Id.* at 1940 (citing WIS. ADMIN. CODE NR §§ 118.03(27), 118.04(4), 118.06(1)(a)(2)(a), 118.06(1)(b) (2017)).

¹¹ *Id.* (citing NR § 118.08(4)(a)(1)).

¹² *Id.* (citing NR § 118.08(4)(a)(2)).

¹³ *Id.* (citing ST. CROIX COUNTY, WIS., CODE OF ORDINANCES LAND USE & DEV. subch. III.V, § 17.36L.4.a (2005)).

¹⁴ *Id.* (quoting NR § 118.09(4)(b); LAND USE & DEV. § 17.09.257).

¹⁵ *Id.* at 1941.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

denial in state court and lost, with the Wisconsin Court of Appeals holding that the regulations “effectively merged” the two lots.¹⁹ After the loss, the Murrs filed a second action in Wisconsin state court — this time claiming that the State and local authorities effected a regulatory taking by depriving them of “all, or practically all, of the use of Lot E.”²⁰ The Circuit Court of St. Croix County granted summary judgment to the State, explaining that the Murrs retained “several available options” for using their property and noting that the combined value of Lots E and F decreased by less than ten percent as a result of the regulations.²¹

The Wisconsin Court of Appeals affirmed. The court began the takings analysis by determining “what, precisely, [was] the property at issue.”²² It refused to focus its analysis on Lot E in isolation and instead evaluated the effect of the regulations on both lots.²³ Because the “property, viewed as a whole,” could be used as a valuable residential lot, the court held Lot E had not been taken.²⁴

The Supreme Court affirmed. Writing for the Court, Justice Kennedy²⁵ began by reviewing the Court’s regulatory takings jurisprudence. He highlighted the Court’s commitment to “flexibility” in this area²⁶ and explained “two guidelines” for identifying a taking.²⁷ First, a per se taking occurs under *Lucas v. South Carolina Coastal Council*,²⁸ with some exceptions, whenever a regulation eliminates “all economically beneficial or productive use of land.”²⁹ Second, an ad hoc taking may be found under *Penn Central Transportation Co. v. New York City*³⁰ by balancing multiple factors, including the “economic impact of the regulation” on the parcel.³¹

Justice Kennedy then proceeded to explain the denominator problem. While the Court had not offered “specific guidance” on how to identify the relevant parcel for takings purposes, it had foreclosed two extreme approaches.³² On the one hand, litigants may not escape regulation by circularly “defining the property interest taken in terms of the

¹⁹ *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 844 (Wis. Ct. App. 2011).

²⁰ *Murr*, 137 S. Ct. at 1941.

²¹ *Id.* (quoting Petition for Writ of Certiorari app. B at 9, *Murr*, 137 S. Ct. 1933 (No. 15-214)).

²² *Murr v. State*, 2012CV258, 2014 WL 7271581, at *4 (Wis. Ct. App. Dec. 23, 2014) (quoting *Zealy v. City of Waukesha*, 548 N.W.2d 528, 532 (Wis. 1996)).

²³ *Id.* at *5.

²⁴ *Id.* at *8. The Wisconsin Supreme Court denied review. *Murr*, 137 S. Ct. at 1942.

²⁵ Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Gorsuch took no part in the consideration or decision of the case.

²⁶ *Murr*, 137 S. Ct. at 1943.

²⁷ *Id.* at 1942.

²⁸ 505 U.S. 1003 (1992).

²⁹ *Id.* at 1015.

³⁰ 438 U.S. 104 (1978).

³¹ *Id.* at 124.

³² *Murr*, 137 S. Ct. at 1944.

very regulation being challenged.”³³ On the other, states may not “improperly . . . fortify” themselves from takings liability by using state property law to consolidate commonly owned holdings.³⁴

With these principles in mind, Justice Kennedy outlined the proper test. Instead of relying on any one factor, courts must consider (1) “the treatment of the land under state and local law”; (2) “the physical characteristics of the land”; and (3) “the prospective value of the regulated land.”³⁵ Ultimately, the inquiry is “whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.”³⁶

Justice Kennedy also provided some guidance on how to apply the Court’s new test. He clarified that “[t]he inquiry is objective” and stressed that “courts should give substantial weight” to “state and local law.”³⁷ With respect to the third factor, Justice Kennedy instructed courts to give “special attention to the effect of burdened land on the value of other holdings.”³⁸ He explained that in some cases, use restrictions *diminish* the value of one property while *enhancing* the value of other, remaining property.³⁹ In other cases, use restrictions “decrease the market value . . . in an unmitigated fashion.”⁴⁰ In light of this distinction, Justice Kennedy emphasized that “[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel,” while the presence of such a relationship may “reveal the weakness of a regulatory takings challenge.”⁴¹

Justice Kennedy then rebuffed the “formalistic rule[s]” urged by the State of Wisconsin and petitioners.⁴² He reasoned that allowing state law to resolve the question, as Wisconsin requested, would give states the power to regulate without reference to “legitimate property expectations.”⁴³ On the other hand, allowing lot lines to control, as petitioners urged, would overlook “the fact that lot lines are themselves creatures of state law” that can be modified by the same state that created them.⁴⁴

³³ *Id.* (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002)).

³⁴ *Id.* at 1945.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1946.

³⁹ For instance, the regulations might “increas[e] privacy, expand[] recreational space, or preserv[e] surrounding natural beauty.” *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1947. Further, Justice Kennedy observed that following lot lines without regard for the state’s merger provision would ignore the widespread historical use of such provisions as a common-sense means of phasing out substandard lots over time. *Id.*

Finally, Justice Kennedy applied the Court's newly minted test to the Murrs' holdings and found that Lots E and F should be treated as a single parcel. The lots had merged under state law (factor one); they were contiguous and located in an area already regulated by federal, state, and local law (factor two);⁴⁵ and they had a "special relationship" demonstrated through "their combined valuation" (factor three).⁴⁶ By itself, Lot E was worth \$40,000 with the use restrictions,⁴⁷ and Lot F was worth \$373,000 with the Murrs' cabin.⁴⁸ But combined, Lots E and F formed a single "luxury lot"⁴⁹ worth \$698,300, demonstrating their "complementarity" and "support[ing] their treatment as one parcel."⁵⁰

With the denominator established, the Court held that the Murrs suffered neither a categorical taking under *Lucas* nor an ad hoc taking under *Penn Central* since the combined value of the regulated lots was a mere ten percent less than their value without the regulations.⁵¹ Because the Wisconsin Court of Appeals reached the correct result, the Supreme Court affirmed.⁵²

Chief Justice Roberts dissented.⁵³ While he was not bothered by the majority's ultimate conclusion, he criticized its "elaborate test" as inconsistent with the premise that "the Takings Clause protects private property rights *as state law creates and defines them*."⁵⁴ He explained that the Takings Clause raises "three basic questions": (1) what the private property *is*; (2) whether that property has been *taken*; and (3) how much just compensation is *due*.⁵⁵ Given that the first question "requires looking outside the Constitution,"⁵⁶ state law boundaries should determine the denominator "in all but the most exceptional circumstances."⁵⁷ While acknowledging that owners and states have an incentive to define the denominator in an opportunistic fashion, Chief Justice Roberts argued that attempts to gerrymander the definition of state property rights were "unlikely and not particularly difficult to detect and disarm."⁵⁸

⁴⁵ The lots' rough terrain and narrow shape also "ma[de] it reasonable to expect their range of potential uses might be limited." *Id.* at 1948.

⁴⁶ *Id.* at 1949; *see id.* at 1948–49.

⁴⁷ This valuation was hypothetical since the merger provision prevented such a sale.

⁴⁸ *Murr*, 137 S. Ct. at 1949.

⁴⁹ Transcript of Oral Argument at 56, *Murr*, 137 S. Ct. 1933 (No. 15-214) (statement of Richard Lazarus).

⁵⁰ *Murr*, 137 S. Ct. at 1949.

⁵¹ *Id.* at 1949–50.

⁵² *Id.* at 1950.

⁵³ Chief Justice Roberts was joined by Justices Thomas and Alito.

⁵⁴ *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting) (emphasis added).

⁵⁵ *Id.* at 1951.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1953.

⁵⁸ *Id.*

Chief Justice Roberts then critiqued the majority's test for including factors already considered under *Penn Central* at the takings stage.⁵⁹ Specifically, by considering the "importance of the ordinance" at *both* the parcel *and* the takings stages of the analysis, the majority double-counted the government's regulatory interests.⁶⁰ This approach, Chief Justice Roberts urged, "compromises the Takings Clause as a barrier,"⁶¹ "provides little guidance,"⁶² and allows courts and regulators to concoct a "takings-specific" definition of private property.⁶³ By contrast, Chief Justice Roberts would have chosen the denominator through a straightforward application of Wisconsin's general property law.⁶⁴ And he would have considered the fact that the Murrs could use Lot E "as a valuable addition to Lot F" at the takings stage under *Lucas* and *Penn Central*.⁶⁵

Justice Thomas dissented separately. While he agreed with Chief Justice Roberts's application of precedent, he expressed his desire to "take a fresh look" at the Court's regulatory takings doctrine "to see whether it can be grounded in the original public meaning of the Takings Clause . . . or the Privileges or Immunities Clause of the Fourteenth Amendment."⁶⁶

The Court's third factor marks an innovation in takings law by clarifying when and how offsetting regulatory benefits that impact multiple holdings should be considered. Because Justice Kennedy appeared to treat both the *absence* and *presence* of "special relationships" between commonly owned properties as highly probative of the ultimate takings question, factor three may well become the battleground in denominator fights. Regulators have an incentive to characterize factor three as a *sufficient* condition for aggregation — downplaying the relative importance of state law and contiguity and urging courts to treat large development projects as a whole. In turn, developers have an incentive to characterize factor three as a *necessary* condition — limiting *Murr* to lots with powerful economic synergies. While the majority opinion contains the seeds for either approach, courts should resist the temptation to elevate objective value relationships to a necessary or sufficient basis for aggregating multiple lots and instead situate them within the Court's broader commitment to multifactor balancing.

⁵⁹ *Id.* at 1954.

⁶⁰ *Id.* at 1954–55.

⁶¹ *Id.* at 1956.

⁶² *Id.* at 1955.

⁶³ *Id.* at 1956.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1957. Rather than affirm, Chief Justice Roberts would have vacated the judgment and remanded for the Wisconsin Court of Appeals to identify the denominator "using ordinary principles of Wisconsin property law." *Id.* at 1956.

⁶⁶ *Id.* at 1957 (Thomas, J., dissenting).

The notion that regulatory burdens can produce offsetting regulatory benefits is not new to takings law.⁶⁷ Indeed, *Penn Central* explicitly contemplates a “reciprocity of advantage” between individual property owners and the public.⁶⁸ If *nobody* in the neighborhood can develop their property in a certain way, then *everybody* in the neighborhood benefits from the resulting increase in peace and beauty. Thus when regulators take, they also give, by improving the area, reducing supply, and raising property values as a result. These offsetting benefits may be more or less significant in comparison to their corresponding burdens, but they sit comfortably within the “economic impact” prong of the *Penn Central* analysis.⁶⁹ And once a taking has been established, courts routinely consider offsetting benefits in calculating just compensation.⁷⁰

It remained less clear, until *Murr*, what to do when offsetting regulatory benefits redound not to a single property, but to separate yet commonly owned holdings. *Penn Central*, for its part, sent conflicting messages. On one hand, the Court highlighted the claimant’s ability to transfer the development rights at issue to other buildings nearby.⁷¹ On the other, it insisted the takings inquiry “be narrowed to the question of the severity of the impact of the law *on appellants’ parcel*” and called for “a careful assessment of the impact of the regulation *on the Terminal site*.”⁷² *Lucas* appeared to resolve this tension — calling “extreme” and “unsupportable” an approach that would measure the decrease in value of one unit of property in light of the remaining value of “other holdings in the vicinity.”⁷³ This language cut against peeking outside the denominator at the takings stage, but the answer was hardly definitive.⁷⁴

Against this backdrop, it may be true that *Murr* creates “*Penn Central* squared”⁷⁵ by double counting factors that resurface in the takings inquiry, but there is a reason to consider economic relationships between properties twice: if they are ignored at the denominator stage, they might be excluded from the takings stage. Factor three, then, tees

⁶⁷ See, e.g., *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“[W]hen part only of a parcel of land is taken . . . the incidental injury or benefit to the part not taken is also to be considered.”).

⁶⁸ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.)); see also *id.* at 134–35 (majority opinion).

⁶⁹ *Id.* at 124 (majority opinion).

⁷⁰ See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2434 (2015) (Breyer, J., concurring in part and dissenting in part) (“The Court has consistently applied this method for calculating just compensation: It sets off from the value of the portion that was taken the value of any benefits conferred upon the remaining portion of property.”).

⁷¹ See *Penn Central*, 438 U.S. at 137.

⁷² *Id.* at 136 (emphasis added).

⁷³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992).

⁷⁴ See, e.g., *Murr*, 137 S. Ct. at 1957 (Roberts, C.J., dissenting) (arguing that the use of Lot E “as a valuable addition to Lot F . . . could be relevant” to both the *Lucas* and *Penn Central* analyses).

⁷⁵ Transcript of Oral Argument, *supra* note 49, at 35 (statement of Misha Tseytlin).

up the takings inquiry by clarifying the kinds of real-world economic relationships a court can consider when it gets to the “real work”⁷⁶ of the analysis.

Prior to *Murr*, courts addressing the denominator problem had experimented with the concept of economic synergies without fully committing to it. For example, in *District Intown Properties L.P. v. District of Columbia*,⁷⁷ the D.C. Circuit listed “the extent to which the restricted lots benefit the unregulated lot” as a factor but did not rely on it.⁷⁸ And courts that came closer to emphasizing economic synergies tended to view them as subjective, focusing on the owner’s “actual and projected use,” rather than market value.⁷⁹

By contrast, *Murr* embraced synergies between properties and made clear that the inquiry is objective. Conspicuously absent from the Court’s decision was any reliance on the Murrs’ actual or intended use of the properties. Instead, the Court noted that the limitations left the Murrs “able to swim and play volleyball at the property” and that objective appraisal values revealed a “special relationship” between the lots.⁸⁰ What matters under *Murr*, then, is not the owner’s past or preferred use, but the land’s potential use, as reflected in market prices.

Regulators might reasonably advocate for an expansive interpretation of factor three’s synergy inquiry. While *Murr* presented a perfect storm in which the lots were merged under state law, contiguous, and economically related (all three factors), its logic could extend to two scenarios not before the court. First, regulators might seek to combine an entire development of lots that are contiguous and economically related but distinct under state law (factors two and three). Second, they might try to treat even noncontiguous lots as part of a single parcel (factor three only). Naturally, governmental authorities would prefer the freedom to aggregate across state lot lines and geographic borders, which explains why the County and the United States both argued for flexible tests.⁸¹

⁷⁶ *Murr*, 137 S. Ct. at 1953 (Roberts, C.J., dissenting).

⁷⁷ 198 F.3d 874 (D.C. Cir. 1999).

⁷⁸ *Id.* at 880 (“While there is a dispute as to whether the adjacent landscaped lawn increases the apartment building’s value, this is immaterial.”); *see also id.* at 890 (Williams, J., concurring in the judgment) (observing that the prevailing approach to defining the denominator “focuses on marginal issues and largely overlooks the more critical concern of synergies”).

⁷⁹ *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (quoting lower court approvingly); *see also Giovanella v. Conservation Comm’n of Ashland*, 857 N.E.2d 451, 459 (Mass. 2006) (“[W]e consider an owner’s *intended* use to be an important factor when deciding whether property should be protected as a distinct unit under the takings clause.” (emphasis added)); *K&K Constr., Inc. v. Dep’t of Nat. Res.*, 575 N.W.2d 531, 537 (Mich. 1998) (“The plaintiffs’ *proposed* use of the property is highly relevant to establishing the denominator parcel.” (emphasis added)).

⁸⁰ *Murr*, 137 S. Ct. at 1949 (emphasis added).

⁸¹ The Solicitor General requested a flexible standard focused on “fairness and justice,” *see* Brief for the United States as Amicus Curiae Supporting Respondents at 12, *Murr* 137 S. Ct. 1933 (No.

At times, regulators will have a strong economic argument for aggregation. Even amici developers noted the significant positive impact that “a conservation easement on nearby parkland”⁸² can have on an entire “residential community.”⁸³ In the same vein, preserving several lots in a larger development for wetlands or wildlife conservation might affect dozens of adjacent lots that benefit from the increased “privacy,” “space,” or “natural beauty”⁸⁴ created by the preservation. As a factual matter, the same could hold true for noncontiguous properties that benefit from restrictions on a shared scenic area like the river in *Murr*.⁸⁵

A powerful version of factor three could thus cabin *Lucas* total-elimination-of-value claims in contexts that matter to regulators and landowners. Suppose, for instance, a developer buys 100 acres and divides them into 100 one-acre lots. But three of the acres turn out to be protected by environmental regulations.⁸⁶ If the developer is denied the necessary permits to develop these acres, has there been an incidental, three-percent limitation on the whole, or a “total” taking of three distinct lots? Under *Murr*, the answer will turn, in part, on the objective economic relationship between the three lots in their regulated states and the other 97 acres. If the restrictions placed on the three *increase* the value of the 97 — by, for example, keeping the natural area pristine — then regulators would have a strong argument under factor three. If this argument proves decisive, *Lucas* will not require compensation, and landowners must “roll the dice” under *Penn Central*.⁸⁷

15-214), and the County urged a fact-sensitive test distilled at oral argument into the factors adopted by the Court, compare Transcript of Oral Argument, *supra* note 49, at 51–52 (statement of Richard Lazarus), with *Murr*, 137 S. Ct. at 1945–46. Note, however, that while regulators would ordinarily have the incentive to expand the denominator, developers may as well. In *Naegle Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), for instance, the owner of a chain of billboards sought to include its entire business in the denominator to demonstrate the damaging ripple effects caused by the regulation. *Id.* at 176. The owner explained that “the prohibition against some of its signs w[ould] lessen the value of the remaining signs” since its customers typically sought to advertise across a broad geographic area. *Id.*

⁸² Brief of Amici Curiae National Ass’n of Home Builders et al. in Support of Petitioners at 16–17, *Murr*, 137 S. Ct. 1933 (No. 15-214) [hereinafter Brief of Home Builders et al.].

⁸³ *Id.* at 16.

⁸⁴ *Murr*, 137 S. Ct. at 1946.

⁸⁵ That said, Justice Kennedy may have clouded this possibility by selecting for an illustration of special relationships a hypothetical in which the lots were also adjacent. See *id.*

⁸⁶ For instance, they might constitute a wetland within the meaning of the Clean Water Act, 33 U.S.C. §§ 1251–1388 (2012), see, e.g., *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (evaluating *Lucas* claim based on denial of Section 404 permit), or a critical habitat under the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2012), see, e.g., *Seiber v. United States*, 364 F.3d 1356, 1369 (Fed. Cir. 2004) (evaluating *Lucas* claim based on denial of incidental take permit from Fish and Wildlife Service).

⁸⁷ *Murr*, 137 S. Ct. at 1955 (Roberts, C.J., dissenting). Of course, *Lucas*’s per se rule may have been “dead on arrival” long before *Murr*. Richard J. Lazarus, *Lucas Unspun*, 14 SE. ENVTL. L.J. 13, 23 (2007) (counting “fewer than ten” federal or state cases in “more than fifteen years of litigation” in which courts applied *Lucas* to find that a per se taking had occurred, *id.* at 28).

At the same time, however, developers might claim factor three for themselves as *limiting* the government's ability to aggregate. Justice Kennedy emphasized that "[t]he *absence* of a special relationship between . . . holdings" may caution against viewing them as a single parcel.⁸⁸ Armed with this language, developers may argue that *Murr* makes "complementarity" a necessary requirement for treating multiple lots as one parcel, even if they are adjacent and/or merged under state law.

This view has some intuitive appeal. Surely the Takings Clause does not turn on a given property owner's wealth.⁸⁹ There must be some principled reason to combine multiple lots, or else the Takings Clause risks becoming an "anti-deep pocket rule" that punishes landowners merely for owning more than one property.⁹⁰ Factor three could provide this principle by tethering all aggregation to economic reality. Only owners who disproportionately benefit from a regulation *by virtue of their related holdings* would have their holdings combined. Factor three could thus track the logical inverse of the purpose of the Takings Clause: to avoid "forcing [the public as a whole] to bear public burdens which, in all fairness and justice, should be borne by [some people alone]."⁹¹

In light of the conflicting incentives at play, courts applying *Murr* should be skeptical of attempts to convert factor three into a necessary or sufficient condition for combining multiple lots. If *Murr* has a single touchstone, it is that "no single consideration can supply the exclusive test for determining the denominator."⁹² Whether a "stand against simplicity"⁹³ or a commitment to "flexibility,"⁹⁴ the Court's approach has rejected any definitive or presumptive rule for solving the parcel problem. Therefore, factor three should not be transformed into a per se rule as "wooden" as the tests submitted by petitioners and Wisconsin and rejected by the Court.⁹⁵

By inviting a tale of two *Murrs*, factor three vests future and lower courts with the responsibility of sorting out competing visions of how to weigh economic synergies and in which direction. Naturally, litigants on both sides of the takings question have incentives to stretch factor three as far as it will take them. But courts faithful to the spirit of *Murr* should take note of these incentives and consciously situate each factor of the Court's test — including its "special attention" to value relationships — within a broader commitment to flexible, multifactor balancing.

⁸⁸ *Id.* at 1946 (majority opinion) (emphasis added).

⁸⁹ See John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1032 (2003) (discussing the absurdity of such a result).

⁹⁰ Brief of Home Builders et al., *supra* note 82, at 15.

⁹¹ Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (inverting clauses for effect).

⁹² *Murr*, 137 S. Ct. at 1945.

⁹³ *Id.* at 1954 (Roberts, C.J., dissenting).

⁹⁴ *Id.* at 1943 (majority opinion).

⁹⁵ Transcript of Oral Argument, *supra* note 49, at 34 (statement of Kennedy, J.).