Choice of Law in Resolving Takings Claims

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Abstract

This paper considers whether, or to what extent, subsidiary issues that arise in the course of applying federal takings doctrine should be resolved as a matter of federal constitutional law, state law, or some combination thereof. It argues that there are three choices: federal constitutional law, state law, or a federal patterning definition that lays down certain general parameters as a matter of federal constitutional law but otherwise follows state law if it is consistent with these parameters. The paper illustrates these choices by considering a recent Supreme Court decision, Murr v. Wisconsin,[1] which held that the horizontal dimensions of a "parcel of land" should be determined, for takings purposes, as a matter of federal constitutional law. It argues that wholesale federalization of the issue in this context was misguided. A better solution was to adopt a federal patterning definition of "parcel," which would largely resolve the issue by looking to applicable state law unless there is affirmative evidence that parcel boundaries have been manipulated to manufacture a takings claim.

Introduction

Stewart Sterk has been a relatively lonely voice in arguing that takings cases should be resolved with greater attention to the role of state law.[2] I agree with him that state law has been ignored too often. I would like to use this occasion to address one dimension of the state versus federal law question in takings law. Specifically, I argue that in resolving subsidiary questions that arise in adjudicating takings claims there are not two choices -- federal constitutional law or state law -- but three: federal constitutional law, state law, or a federal patterning definition that

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[1] 137 S.Ct. 1933 (2017).

[2] Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L. J. 203 (2004); *see also* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM & MAY L. REV. 35 (2016); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM & MARY L. Rev. 251 (2006).

lays down certain general parameters as a matter of federal constitutional law, after which state law governs if it is consistent with these parameters. I will illustrate these choices by considering a recent Supreme Court decision, *Murr v. Wisconsin*,[3] which held that the horizontal dimensions of a "parcel of land" should be determined, for takings purposes, as a matter of federal constitutional law. I will argue that wholesale federalization of the issue in this context was misguided. A better solution was to adopt a federal patterning definition of "parcel," which would largely resolve the issue by looking to applicable state law unless there is affirmative evidence that parcel boundaries have been manipulated to manufacture a takings claim.

I. State Versus Federal law: Three Options

Let me begin by broadly framing what I regard to be the relevant inquiry. The Takings Clause, whether it applies to traditional eminent domain or to regulatory takings claims, protects "private property."[4] The Takings Clause, of course, is part of the federal Constitution, and as such has been held to apply to both the federal government and the states. So the right in question is one established by federal constitutional law. Private property, which is the object of the right established by the Clause, is primarily governed by state law. Indeed, the Supreme Court is fond of quoting the line from *Board of Regents v. Roth* which says that property interests are "not created by the Constitution" but rather "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[5] So the Takings Clause presents a situation in which the federal Constitution creates a right that protects an entitlement which is primarily created and defined by state law. This means the doctrine developed under the Takings Clause must inevitably delineate in some fashion the respective roles of federal and state law in giving effect to the constitutional right.

Perhaps the most obvious problem of delineation is presented when there is some dispute about whether the interest claimed to be protected constitutes "private property" within the

[3] 137 S.Ct. 1933 (2017).

[4] "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

[5] Bd. Of Regents v. Roth, 408 U.S. 564, 577 (1972). For repetitions of the quotation in the takings context, *see, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984).

meaning of the Takings Clause. Cases that squarely present this issue are relatively uncommon.[6] The most recent skirmish of prominence involved cases presenting the question whether the interest earned on client funds deposited with a lawyer is the private property of the client for takings purposes.[7] (The Court held that the answer is "yes."[8])

I have previously argued that cases presenting this type of question should *not* be resolved by asking what sorts of rights and privileges are classified as "private property" as a matter of state law.[9] Insofar as the quotation from *Roth* suggests this is how courts should proceed it is misleading. Instead, it is necessary to have some federal constitutional conception of the kinds of interests qualify as "private property" in order to decide what entitlements are protected by the Takings Clause. I have called this a federal constitutional "patterning definition" of private property.[10] Armed with the relevant patterning definition, courts can then canvas state law to see if the state has recognized an interest that qualifies as private property under the patterning definition. Such an approach is necessary, I have argued, in order make sense of precedents that tell us, for example, that ownership of land is a type of private property covered by the Clause but government transfer payments and tax breaks are not.[11] In other words, we need some federal constitutional principle that tells us what type of state-created

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[6] *See generally* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 58-60 (2002) (collecting cases from eminent domain and regulatory takings law that present the question whether an entitlement is "private property."

[7] Philips v. Washington Legal Foundation, 524 U.S. 156 (1998).

[8] A subsequent decision, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), adhered to the conclusion reached in *Philips* about whether interest earned on client funds is the private property of the client, but held that no compensation was owed for taking that property because the money would not have earned any interest absent the program.

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

[10] Merrill, *Landscape*, *supra* at 952-54. This approach was anticipated by my colleague Henry Monaghan. See Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 435 (1977).

[11] On the lack of takings protections for transfer payments, see Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986). Taxes have long been regarded as immune from takings challenges. Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586, 2600-01 (2013) ("It is beyond dispute…that taxes….are not takings").

interests fall within the universe of "private property" as that term is used in the Constitution before we proceed to examine state law.

I stand by what I have said on this score with respect to resolving the threshold question of whether an asserted interest is or is not private property protected by the Takings Clause. The objective of this paper is to extend the inquiry beyond this threshold question to consider what I will call subsidiary questions that arise once we decide that the interest is covered by the Takings Clause. These are questions that concern matters such as whether the government has "taken" the property, whether the taking is for a "public use" and, if the government action qualifies as a taking for public use, whether it has given the claimant "just compensation" for the taking.

To illustrate, consider the question of whether the government has given the claimant just compensation. The meaning of just compensation could be resolved exclusively as a matter of federal constitutional law, with courts specifying as a matter of federal law exactly what sorts of valuation procedures all tribunals, state and federal, must use in fixing compensation. Or, conceivably, courts could defer completely to state law for determining what valuation procedures yield just compensation in any given context. Or (as I have argued in deciding whether the claimant has an interest that qualifies as "private property"), courts could articulate a general patterning definition of what constitutes just compensation, which would then be used to determine whether particular state valuation procedures satisfy this patterning definition.

Those familiar with the Supreme Court precedent in this area will recognize that the patterning definition option best describes the approach that has been taken with regard to determining whether the government has provided just compensation. The Court has held that just compensation generally means fair market value.[12] But it has not attempted to dictate as a matter of federal constitutional law what valuation techniques state courts or other subordinate tribunals must use in determining fair market value. The choice of valuation procedures has been left to specification by state law.

[12] *See, e.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 516-17 (1979); United States v. Miller, 317 U.S. 369 (1943).

As this discussion suggests, there are three broad options for fixing the respective roles of federal and state law in resolving subsidiary questions under takings law. One option is to resolve the matter exclusively as a matter of federal constitutional law. A second option is to resolve the matter exclusively as a matter of state law. A third option is to resolve the matter by adopting a federal patterning definition.

Without expressly adverting to these options, the Court has in one context or the other embraced each of the three options. As an example of the pure federal approach, consider the distinction between appropriations and regulations. Appropriations are governed by a per se rule – they are categorically regarded as takings.[13] Regulations are governed by a multi-factor test that rarely results in a finding of liability.[14] The distinction was launched in *Loretto v. Teleprompter Manhattan CATV*,[15] which described the relevant per se category as "permanent physical occupations" of land. Subsequent cases held that the category did not include schemes that prohibit landlords from terminating tenancies, even if this can be said to result in a permanent (or at least indefinite) occupation by the tenant.[16] Then the Court held, without much analysis, that the category includes public easements, even though these entail rights of use as opposed to occupations.[17] Most recently, the Court has extended the category to include personal property as well as land, and has re-described the category as "physical appropriations."[18] The relevant point is that each of these zig-zags was announced as a proposition of federal constitutional law.

One must scratch a bit harder to identify an example of a pure state law approach to a subsidiary issue. One possibility that occurs to me is the determination of the identity of the

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[13] Horne v. Dept. of Agriculture, 135 S.Ct. 2419, 2426-30 (2015).

[14] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[15] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

[16] Yee v. City of Escondido, 503 U.S. 519 (1992); FCC v. Florida Power Corp., 480 U.S. 245 (1987).

[17] Nollan v. California Coastal Comm., 483 U.S. 825, 832 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[18] *Horne*, 135 S.Ct. at 2427.

owner of property. In various contexts where property has been subdivided between surface and subsurface rights, or between landlord and tenant, or when there has been a transfer from corporate ownership to shareholders or from parents to children, the Court has unquestioningly accepted the characterization of ownership under state law.[19] Here we see the gravitational force of the proposition that property rights are defined and enforced as a matter of state law.

For an example of the patterning definition at work in determining subsidiary doctrinal questions in takings law, consider the nuisance exception to takings liability recognized in *Lucas v. South Carolina Coastal Council*.[20] Justice Scalia's majority opinion was clear – controversially so – in stipulating that the exception applies only to government regulation of conduct that would be regarded as a public or private nuisance at common law.[21] This characterization of the nuisance exception constitutes a federal constitutional patterning definition. Federal constitutional law, as set forth in *Lucas*, tells us that the relevant category of laws that would satisfy the exception consists of those that track the common law of nuisance. Having gone this far in describing the exception, the Court then remanded the case to the South Carolina courts for a determination whether the regulation at issue would or would not constitute a nuisance under South Carolina common law.[22] Thus we see the two basic elements that comprise the patterning definition approach: Federal constitutional law prescribes a general definition of a particular state of affairs; whether the definition is satisfied in any particular case requires an investigation of state law.

Before turning to the issue in *Murr*, a further observation about the patterning definition approach is warranted. In contrast to the pure federal option or the pure state option, there are

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[19] For example, in *Loretto v. Teleprompter*, *supra*, the Court accepted uncritically the state law proposition that the landlord has exclusive control over the roof of a building and the tenants' interest is confined to the particular unit in which the tenant holds a lease. 458 U.S. at 439. Similarly, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 614, 626-30 (2001), the Court accepted uncritically the state law proposition that the dissolution of a corporation for nonpayment of taxes effected a transfer of title to property owned by the corporation to its shareholder.

[20] 505 U.S. 1003 (1992).

[21] *Id.* at 1029-31. Justice Kennedy concurred only in the judgment, objecting specifically to this limitation. *Id.* at 1035 (Kennedy, J. concurring in judgment).

[22] *Id.* at 1031.

undoubtedly different versions of the patterning definition option. For present purposes, I will distinguish between "thick" and "thin" patterning definitions. A thick definition is one in which federal constitutional law does most of the work, leaving relatively little room for variations based on state law. A thin definition is one in which federal constitutional law imposes only a mild constraint on the range of permissible variations under state law. These undoubtedly describe points on a continuum, with many conceivable patterning definitions falling somewhere in between.

II. *Murr v. Wisconsin*

The Murr family owned two plots of land on the St. Croix River in Wisconsin. Everyone agreed this land was "private property" protected by the Takings Clause. What *Murr* presented was a subsidiary question under Court-made takings doctrine that has played a prominent role in regulatory takings cases: the extent or degree to which the challenged regulation diminished the value of the claimant's private property. Diminution in value appeared in the Court's inaugural decision recognizing the possibility of a regulatory taking.[23] It was reaffirmed as a factor of "particular significance" under *Penn Central*'s ad hoc approach to identifying a taking.[24] It is also the critical factor under *Lucas*'s categorical rule for regulations that deprive an owner of all economic value.[25]

Diminution in value requires measuring what portion of economic value has been lost because of the challenged regulation. In order to perform this measurement, it is necessary to compare the value of the property after the regulation with the value it had before. This in turn requires that we identify the unit of property that will be used in making the before-and-after comparison. This has been called the "numerator"/"denominator" problem.[26] The

[23] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("One fact for consideration…is the extent of the diminuition.").

[24] *Penn Central*, *supra* at 124.

[25] *Lucas*, *supra*, at 1016-17 & n. 7.

[26] *See* Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497 (1987) (quoting Frank Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. 1165, 1992 (1967)).

"denominator" is the relevant unit of property for purposes of analysis. The "numerator" is the portion of value of that unit eliminated by the regulation.

Often there will be no issue about identifying the relevant unit of property for purposes of measuring diminution in value. Suppose the only property I own is Blackacre, a perfectly square acre of land. The government decides my land is the critical habitat of an endangered species of toad, and forbids all human activity on Blackacre in an effort to save the toad. The denominator is Blackacre and the diminution in value caused by the endangerment order is the numerator.

In other circumstances, identifying the appropriate denominator can pose quite a puzzle. Suppose the property consists of ten acres of land. Suppose further that the owner would like to subdivide the parcel into 10 one-acre lots and sell them for single family homes. The government intervenes and decides that half of the tract – five of the acres – is a wetland, which cannot be developed. Is this a loss of 50% of the value of the ten-acre parcel, or is it a loss of 100% of the value of five individual lots?

Now consider a variation on the hypothetical. Instead of starting with a ten- acre parcel, the developer acquires 10 contiguous undeveloped one-acre plots, with the intention of creating a subdivision and selling the lots for homes. The government intervenes as before. Same question: loss of 50% of the whole or 100% of half?

Murr presented a variation on the consolidation of separate lots version of the problem. The Murr family bought two contiguous lots, Lot E and Lot F, on the St. Croix River, and built a cabin on lot F. Lot E was held for investment and future sale. After the lots were purchased by the senior Murrs, but before they were transferred to the children, the local zoning authority adopted a rule imposing a minimum lot size restriction on future development. The new rule prohibited development on lots the size of lot E if owned next to another contiguous lot like F. The Murrs were permitted to build a fancy new home on the combined lots, but were no longer able to sell Lot E to a third party for development with a separate home. The Murrs argued that lot E, standing alone, was the relevant denominator, which would mean the minimum lot size rule arguably generated a large diminution in value. The government argued that lots E and F together were the relevant denominator, making the diminution relatively small.

Previous decisions had offered some guidance as to how to define denominators. The Supreme Court had seemingly settled on the notion that in cases of land the denominator is the "parcel as a whole."[27] The significance of this, in the cases decided so far, was that one cannot "conceptually sever" the parcel into sub-parcels, which are then used as the denominator.[28] There are ambiguities here, but I take it that what the Court meant in these cases is that one cannot invoke a hypothetical severance of land in determining the denominator. Thus, one cannot divide a single parcel of land into surface rights and as-yet unsevered air rights, and treat the air rights as the denominator.[29] Nor can one divide a fee simple of indefinite duration into as-yet unsevered time-limited rights and residual rights, with the time-limited rights serving as the denominator.[30] One must take the *actual holding* of the claimant at the time of the regulation to be the relevant denominator.[31]

In what follows I assume that the injunction against conceptual severance is properly regarded as part of a federal constitutional definition of denominators in land. But the issue in

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[27] *Penn Central*, *supra* at 130-31; Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 331-32 (2002).

[28] *Tahoe-Sierra*, *supra*; Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993). *See generally* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1677 (1988).

[29] *Penn Central*, *supra* at 130-31.

[30] *Tahoe-Sierra*, *supra*.

[31] Thus, I assume that if the Penn Central Corporation had previously severed the air rights above Grand Central Station and transferred them to a third party, and the Historic Preservation Commission had thereafter prohibited the third party from developing the air rights, the relevant denominator would be the air rights. Similarly, if a property owner in the Lake Tahoe region had previously entered into a three-year lease for purposes of developing property, and the Regional Planning Commission imposed a three-year moratorium on development, the relevant denominator would be the three-year lease. *Keystone Bituminous Coal*, *supra*, might be thought to run counter to this reading, given that the Court declined to treat the right to surface support, an actual holding of some of the claimants in the case, as a denominator. But the Court was careful to explain that "the support estate is always owned by either the owner of the surface or the owner of the minerals." 480 U.S. at 500. Thus the denominator was properly regarded as the mineral estate plus waiver-of-surface-support, not the waiver of surface support standing alone. In any event, the Court did not reach the diminution in value question, because the case was brought as a facial challenge to the statute and the record was "devoid of any evidence on what percentage of the purchased support estates, either in the aggregate or with respect to any individual estate, has been affected by the Act." *Id.* at 501.

Murr could not be answered by invoking the rule against conceptual severance. The question was how to define the "parcel as a whole" when a single owner actually owns two contiguous lots. In other words, the question concerned the proper definition of "parcel as a whole" along the horizontal dimension. The Court had not spoken to this question.[32]

In developing an answer, none of the briefs identified the full range of options. The Murrs and the State of Wisconsin argued that the definition of "parcel" in this context should be resolved as a matter of state law. They disagreed about what state law required. The Murrs maintained that each lot was a parcel.[33] The State said that under state law the two lots should be regarded as merged into one.[34]

St. Croix County, and the federal government, appearing as amicus curiae, argued that the horizontal dimensions of the parcel should not be based on "legalistic distinctions" grounded in state law.[35] Implicitly, this meant the parcel should be defined as a matter of federal constitutional law. Interestingly, however, both briefs were quite coy about acknowledging that the case posed a choice between federal and state law. What is clear is that they were worried that developers could manipulate the size and shape of individual parcels in order to bolster takings claims if the matter were left to state law. As to the content of the proper approach to defining the denominator in this context, both litigants proposed a multi-factor balancing test.[36]

The Justices split along similar lines. Justice Kennedy's opinion for the majority adopted a federal constitutional law solution, which took the form of a multifactor balancing test. Perhaps because the briefs did little to develop the choice of law issue, Justice Kennedy offered only a cursory justification for federalizing the question. *Roth* and the many cases citing the

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[32] For discussion of lower court cases that had struggled with the horizontal definition problem and various possible solutions, see John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI L. REV. 1535 (1994).

[33] Pet. Brf. At 24-32; Pet. Reply Brf. at 7-11.

[34] Wis. Brf. at 29-37.

[35] U.S. Brf. at 20, 23.

[36] Brief for St. Croix Cty at 52; U.S. Brf. at 20-22.

primacy of state law in creating and defining property were not mentioned. Instead, Justice Kennedy stated that "the Court has expressed caution" about the proposition that "property rights under the Takings Clause should be coextensive with those under state law."[37] The only support for the proposition that "caution" was in order in following state law was a prior opinion by Justice Kennedy holding that regulations in effect when property is acquired do not automatically become background principles qualifying owner expectations.[38] It is reasonably clear from the opinion that the motivating reason for opting for federal law, following the government submissions, was fear of manipulation of denominators, or "gamesmanship" to use Justice Kennedy's term.[39] In Justice Kennedy's exposition, however, fear of government manipulation to *defeat* takings claims received equal billing with fear of developers manipulating the size of parcels to *manufacture* takings claims.

Chief Justice Roberts, in dissent, clearly recognized the centrality of the choice of law issue, and came down forthrightly in favor of state law.[40] The Chief Justice objected to federalizing the definition of "parcel" on the grounds that this was contrary to precedent (namely, the many references in the cases to *Roth*), and (at least in the majority's formulation), confused the question of what property is at stake with whether the regulation constitutes a taking.[41] He also suggested, more briefly, that the concern with manipulation was overblown.[42] There was no discussion in either opinion of the possibility of a federal patterning definition.

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[37] 137 S.Ct. at 1944.

[38] *Id.*, citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). The issue in *Palazzolo* was whether a regulatory limitation on the use of property in effect when title to the property is acquired automatically eliminates any investment backed expectation inconsistent with the regulation. *Id.* at 626-27. In keeping with Justice Kennedy's balancing proclivities, the Court held such a limitation was a factor to take into account, but was not dispositive.

[39] *Murr*, 137 S.Ct. at 1948.

[40] *Id.* at 1953-54 (Roberts, C.J., dissenting).

[41] *Id.* at 1953-56 (Roberts, C.J., dissenting).

[42] *Id.* at 1953 ("[S]uch obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and discern.").

My objective in the remainder of these remarks is to offer a different solution to the numerator/denominator puzzle in the context of fixing the horizontal dimensions of an interest in land. My proposal consists of what I will characterize as a "thin" federal patterning definition. One part of the patterning definition consists of the rule prohibiting conceptual severance. Only actual holdings will be considered, not hypothetical holdings.[43] The other part consists of the rule that actual lot lines as established by state law presumptively control, subject to an exception if it can be shown that the lines have been deliberately drawn to enhance the prospect of federal constitutional takings liability. This is a patterning definition rather than a pure state law approach, because it contains federal content – the rejection of conceptual severance and the instruction to treat lot lines as established by state law as presumptively controlling absent manipulation to create liability. It is thin rather than thick because in nearly all cases the answer will be governed by state law, rather than by federal constitutional law.

The justification for this proposed rule is in three parts. The first consists of the argument that a purely federal definition of "parcel" injects unnecessary complexity into regulatory takings cases. The second, which is contingent on the form of the federal rule adopted by Justice Kennedy, consists of the argument that a multi-factor balancing test is particularly undesirable in this context. The third is based on concerns about manipulability, cited by the government parties in the *Murr* case and echoed by Justice Kennedy's majority opinion. Justice Kennedy's worry about government manipulation, I argue, can be handled by traditional doctrine that would disregard state law that lacks a fair and substantial basis when used to defeat a constitutional right. The governments' anxiety about developer manipulation can be handled by building a narrow exception into the patterning definition that would allow courts to disregard lots lines that have been manipulated to manufacture a takings claim.

III. The Complexity Problem

My proposed federal patterning definition would give presumptive effect to lots lines as established under state law in fixing the horizontal dimensions of the whole parcel. One reason

[43] Although the Court has not offered an explicit justification for the rule against conceptual severance, the most plausible justification would seem to be a concern about potential manipulation of denominators to bolster takings claims. In this respect the rule against conceptual severance is simply one manifestation of a larger patterning rule disallowing attempts by landowners to manipulate denominators.

is to simplify the inquiry and make it relatively easy for state regulators and state court judges – the first line enforcers of regulatory takings law – to comprehend and apply.

To begin, different states have adopted different approaches to determining the horizontal boundaries of parcels of land. As Wisconsin's brief on the merits pointed out, [44] some states use metes and bounds surveys, and some follow the federal rectangular survey. Without regard to which of these basic survey methods is followed, urban land is typically divided into blocks which are in turn divided into lots. So you have three different systems that exist in various combinations in different states.

Moreover, states differ as to the legal requirements for establishing parcel boundaries.[45] Some require formal recordation of plats showing individual parcels in order to give legal effect to particular lot descriptions by survey, others do not. Perhaps most relevant to the *Murr* dispute, some states provide that lots are merged as a matter of law when certain things happen, such as contiguous lots coming into common ownership. Others provide that merger occurs only when a formal process is initiated by an owner or others for canceling previous lot designations and issuing a new description.

Another consideration is that determining the scope of parcels by these methods serves multiple purposes. Discrete parcels are nearly always used for preparing property tax bills. They are also critical in doing title searches, whether for purposes of preparing deeds of sale, processing land in probate proceedings, or using land as collateral for secured loans. They play a critical role a bankruptcy. For example, if the Murrs' plumbing company went bankrupt back before the lots were transferred to the Murr children, Lot F would be an asset of the company in bankruptcy but Lot E would not be.[46] The state law governing parcel identification also plays a critical role in resolving boundary disputes and adverse possession cases. And most relevantly, state rules for identifying parcels are used in establishing zoning districts, and in resolving

[44] Wis. Brf. At 6-7.

[45] Wis. Brf. at 11-13.

[46] The senior Murrs transferred title to Lot F to their plumbing company between 1963 and 1994, when it was conveyed to their children. 137 S.Ct. at 1940-41. Lot E was always owned by either the senior Murrs or their children.

requests for zoning variances, amendments, or special use permits.[47] There is much to be said for using the same set of rules for all purposes. Under current law, which relies on state law, this is possible.[48] Adopting a special federal definition of parcel for takings purposes would inevitably mean that there would be two different legal regimes for defining parcels, at least for some purposes.

Another factor to take into account is that local lawyers and officials will have developed significant expertise in applying the relevant state law rules for ascertaining the horizontal boundaries of land parcels. There is, if you will, significant human capital invested in understanding and applying these rules. In contrast, there is zero expertise at this point in applying a special federal constitutional definition of land parcel.

Those of us who spend a lot of time thinking about regulatory takings cases issues tend to forget how extremely episodic these cases are, relative to large mass of transactions involving land that raise other issues.[49] Local property lawyers, state officials, and state judges will be familiar with the state process for defining parcels. It makes sense to piggyback on this local knowledge. Takings cases are sufficiently rare that no relevant expertise is likely to develop for applying a special federal constitutional definition of parcel if it diverges in any significant way from the state definition. Moreover, since regulatory takings challenges will emerge primarily out of fights over zoning, there are particularly good reasons for using the same set of rules for zoning purposes and for purposes of resolving the occasional constitutional challenge to a zoning decision.

IV. The Balancing Test Problem

[47] The *Murr* case arose on a denial of the family's request for a variance from applicable zoning regulations. 137 S.Ct. at 1941.

[48] Wisconsin statutory law would seem to point in this direction. *See* Wis. Stat. § 236.28 (2016) ("[T]he lots in [a] plat shall be described by the name of the plat and the lot and block…for all purposes, including those of assessment, taxation, devise, descent and conveyance.").

[49] An interesting source in this regard is a 50-state survey of takings law commissioned by an ABA committee. See AM. BAR ASS'N CONDEMNATION, ZONING & LAND USE COMM., THE LAW OF EMINENT DOMAIN: FIFTY STATE SURVEY (William G. Blake ed., 2012). The survey reveals a surprising dearth of authority in many states about how to handle regulatory takings claims.

We also have to ask: what would a purely federal constitutional definition of "parcel" look like? Judging by Justice Kennedy's effort in *Murr*, it is a kind of bouillabaisse put together from the catch-of-the-day. Justice Kennedy's opinion for the majority said that "no single consideration can supply the exclusive test for determining the denominator."[50] Instead, a "multifactor standard" is required,[51] one that includes a consideration of the state law treatment of the land, its physical characteristics, and its prospective value. But even these factors were qualified by the Court. The state law treatment is relevant only if it is "reasonable."[52] The physical characteristics include "the parcel's associated topography, and the surrounding human and ecological environment."[53] The prospective value must consider benefits from the regulation such as "increasing privacy, expanding recreational space, or preserving surrounding natural beauty."[54] The ultimate question in every case 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."[55] In short, in what may be the biggest understatement of all regulatory takings jurisprudence, "the question of the proper parcel in regulatory takings cases cannot be solved by any simple test."[56] This is the approach associated with *Penn Central*'s "ad hoc, factual" inquiry – on steroids.

I have an innate aversion to multifactor balancing tests. I always suspect that they are a place holder designed to provide a basis for decision when the proponent has no theory about how the matter in question should be decided. What multifactor balancing amounts to, in practice, is a delegation of authority to courts to decide matters ex post as they see fit. Such approaches have virtually no predictability. This invites litigation and makes it hard to settle

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[50] *Murr*, 137 S.Ct. at 1945.

[51] *Id.* at 1948.

[52] *Id.* at 1945.

[53] *Id.*

[54] *Id.* at 1946.

[55] *Id.* at 1945.

[56] *Id.* at 1950.

cases. It also undermines the central purpose of having a property regime in the first place, which is to protect expectations about the control and use of resources.

In this particular context, the multifactor approach also yields up a kind of mind-boggling complexity. In effect, the federal definition of parcel requires the use of a multifactor balancing test to define the horizontal dimensions of the parcel, with no predetermined weight given to any of the factors. This is just to figure out what the denominator should be for doing the numerator/denominator test. The numerator/denominator test, in turn, is just one of three factors under the *Penn Central* multifactor balancing test. So in effect you have one multifactor balancing test piled on top of another multifactor balancing test.[57]

In *Lucas*-type cases, the effect of the multifactor test to define the parcel is effectively to transform total takings cases into de facto *Penn Central* cases. If you hate *Lucas* and love *Penn Central*, this is perhaps a good thing. But it seems like a backhanded way to overrule *Lucas*, which has turned out to be a pretty harmless precedent in practice.[58] Either way, regulatory takings law, which is already far too complicated and confusing, will become virtually incomprehensible to all but the most diligent student note writers. It will be utterly baffling to most local land use lawyers and state court judges. Given that the Supreme Court has done very little in the 40 years since *Penn Central* was decided to clarify the factors it identified there,[59] it is fanciful to think that the Court will provide significant guidance to state court judges struggling to apply the new federal constitutional definition of "parcel."

The primary effect of the Court's adoption of an ad hoc federal constitutional balancing test for determining the horizontal dimensions of the "parcel as a whole" will be to increase the costs of litigating regulatory takings cases, magnify the uncertainty of the outcome, and give the government another argument that can be used to defeat such claims. If a federal constitutional

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[57] As Nicole Garnett put it in commenting on the decision, *Murr* transforms the "muddle" of the regulatory takings doctrine into a "mudslide." Nicole Stelle Garnett, *From a Muddle to a Mudslide:* Murr v. Wisconsin, 2017 CATO SUP. CT. REV. 131.

[58] *See* James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM & MAY L. REV. 35 (2016) (finding that only about 3.5 percent of regulatory takings cases involve *Lucas*-type claims and only about half are successful).

[59] Thomas W. Merrill, *The Character of the Governmental Action*, 36 VER. L. REV. 649, 652 (2012).

rule is imperative in these circumstances, the rule adopted by the Wisconsin Court of Appeals – that contiguous lots under the same ownership should always be regarded as a single parcel – was infinitely preferable.[60] This would at least be relatively clear, and would likely reduce the costs of litigating regulatory takings claims. Sometimes a bit of over- or under- inclusiveness can result in more enforcement of constitutional rights than a more fine-grained but decisionally-costly approach.[61]

V. The Risk of Manipulation

Given these objections, what explains the Court's decision to federalize the law for determining the horizontal boundaries of parcels of land for takings purposes? The short answer is that the government parties in *Murr*, and the majority of Justices who joined Justice Kennedy's opinion, were worried about "gamesmanship."[62] Reading the briefs, it is clear that the government lawyers were anxious about manipulation by developers. Especially in the context of subdivision development, developers have considerable discretion in drawing and recording lot lines. The government lawyers worried that if the horizontal scope of "parcel" is determined wholly as a matter of state law, developers will be able to manipulate the denominator to manufacture plausible regulatory takings claims where otherwise they would not exist.[63]

This is not a completely idle concern. The Solicitor General cited several cases, including *Lost Tree Village*,[64] where the government's cert. petition was held for *Murr*, in which

[60] *See* [unpublished decision reproduced in cert. petn. Appendix A]. The Court majority expressed doubt about whether the Court of Appeals had adopted a bright line rule, but said "[t]o the extent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology, as distinct from the result." *Murr*, 137 S.Ct. at 1949.

[61] *See* Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 920-26 (1999).

[62] 137 S.Ct. at 1948.

[63] I will speak throughout the discussion of manipulation of "developers," since real estate developers will be the property owners most frequently involved in regulatory takings disputes. But of course the principles discussed apply to all property owners.

[64] Lost Tree Village Corp. v. United States, 787 F.3d 1111 (Fed. Cir. 2015).

a developer sold off the vast majority of lots in a subdivision and then challenged a development restriction on the small number of remaining lots as a taking.[65] Although these cases confirm that the risk of manipulation is real, they do not tell us anything about the magnitude of the risk. I would observe in this connection that there is no evidence the Murr family set about to manipulate the demarcation of Lots E and F in order to generate a takings claim. Rather than create federal constitutional rules to head off a perceived risk of manipulation, which may or may not be a significant problem, it would seem to be more prudent to wait until a case of manipulation actually arises before determining whether a federal definition is needed as a response.

A preliminary point here is that, putting aside takings claims, manipulation of lots lines is something that makes property in land a valuable institution. Property is scalable, meaning one can add to or subtract from existing property and still have property.[66] Specifically, the ability of an owner of a tract of land to subdivide the land into smaller lots or parcels can enhance the value of the land. Similarly, the ability of an owner to acquire contiguous lots and consolidate them into a larger tract can also enhance the value of the land. This is a primary reason why state law, in every state, gives owners substantial freedom to add to and subtract from existing rights in land, which is another way of saying that law gives owners the freedom to manipulate lot lines. What is of concern is the manipulation of lot lines to create or defeat a constitutional claim for just compensation. It is important that in devising some way to avoid these socially undesirable forms of manipulation we do not interfere with the socially desirable forms.

A second and related point is that manipulating denominators to gin up takings claims is not a very promising way to make money in real estate. Regulatory takings claims almost never succeed,[67] and they require a large investment of time and effort in litigation. A much better way to make money is to plat a subdivision in such a way as to sell lots to prospective purchasers

[65] For other cases allegedly involving gamesmanship by developers see U.S. Brf. at 22-23.

[66] *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1713 (2012).

[67] Empirical surveys of cases that apply the *Penn Central* ad hoc test concur that only about 10 percent of claimants are successful. *See* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or One Strike Rule?*, 22 FED. CIR. B.J. 677 (2013); Krier & Sterk, *supra*.

at attractive prices. So one would expect that manipulation to create or defeat takings claims will be relatively rare behavior.

A third consideration is that it is far from clear that local governments need a federal definition of parcel in order to protect themselves from parcel-manipulating developers. If takings claims succeed based on challenges to local land use regulations, local governments are the ones that will have to pay. This should give them ample incentive to develop rules or doctrines *as a matter of state law* that would disallow plats or plat amendments that seem designed to concoct takings claims. For example, a plat that demarcates lots that exactly trace the boundaries of a wetland could be disallowed. An analogy here is the doctrine of abuse of rights, sometimes relied upon by state court judges to refuse to enforce principles of law when they are manipulated to extort money from others or otherwise engage in opportunistic behavior.[68] Under general principles of subsidiarity it makes sense to see if state law can head off manipulation rather than jumping to a federalization of a key component of property law.

Although the danger of manipulation by private developers was the focus of the government lawyers in *Murr*, Justice Kennedy turned the prospect of manipulation into a bi-directional concern. One danger of using state law to define parcels, he wrote, is that a state might define parcel to include multiple tracts only tangentially related to each other or even all property owned by a person anywhere in the state. These sorts of moves would "improperly…fortify" the state against takings claims.[69] He cited no example of this happening in the nearly 100 years since diminution in value was introduced as a relevant variable in takings cases. Given the general hostility to takings of property by the government, as illustrated by the widespread amendment of state laws in response to the *Kelo* decision,[70] the posited fear of state

[68] There is no formal doctrine of abuse of rights in the common law. *See* Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687 (2010). Some have argued, however, that the principle is implicit in the law of equity. Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37 (1995). A prominent common law case thought to embody the principle is Edwards v. Allouez Mining Co., 38 Mich. 46 (1878) (Cooley, J.) (declining to enjoin a nuisance at the behest of a landowner who purchased in the hope of extracting a large payment from another).

[69] *Murr*, 137 S.Ct. at 1945.

[70] *See generally*, ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 141-64 (2015).

manipulation of the concept of parcel for the sole purpose of defeating takings claims strikes me as far-fetched. Again, the proper response would seem to be to wait for an actual case of such manipulation before deciding whether a federal constitutional response is warranted.

VI. The Patterning Definition Alternative

It nevertheless remain true that five Justices in *Murr* were convinced that manipulation of denominators is a sufficiently worrisome prospect that the definition of the parcel, for Takings Clause purposes, cannot be left to state law. The solution they adopted was complete federalization. My view, to the contrary, is that the most that was needed to handle the worry about manipulation was a thin federal patterning definition. In addressing the proper legal response to the risk of manipulation, one must divide the inquiry between manipulation by the government to defeat takings liability, and manipulation by developers to generate takings liability.

The risk of government manipulation is the risk that state legislatures or courts will change or interpret *state law* in such a way as to expand the scope of parcels, that is, expand the denominator, and thereby shrink diminution in value. This is similar to the risk as has arisen episodically in other contexts where state governments have attempted to manipulate state law to evade or frustrate the enforcement of federal rights. The time-honored way of policing this kind of effort is something called the "fair and substantial basis" test.[71] The test applies when some proposition of state law is an antecedent to the enforcement of federal rights.[72] Federal courts, when they suspect that state law has been manipulated to frustrate federal rights, will review a purported change in, or reinterpretation of, state law to determine whether it has a "fair and

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[71] The "fair and substantial basis" test was considered as a possible way of resolving "judicial takings" claims in *Stop the Beach Renourishment, Inc. v Florida Dept. of Env. Protection*, 560 U.S. 702 (2010). Justice Scalia's plurality opinion acknowledged that the test has been used in cases of evasion of the Court's ability to review federal questions, *id.* at 725-26, but argued that a better formulation in the context of a judicial takings claim was whether the state court had eliminated an "established property right." *Id.* at 726. His proposed formulation failed to command a majority. In the context of a state manipulating the state law of land boundaries to defeat a regulatory takings claim, the tried-and-true test for dealing with evasions of federal rights seems appropriate.

[72] *See generally*, Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases,* 103 COLUM. L. REV. 1919 (2003).

substantial basis" in preexisting state law. Brantley Webb, in a comprehensive Note in the Yale Law Review, shows that the test is only applied when there are strong reasons to suspect evasion of federal rights. When such evidence is missing, federal courts routinely defer to the state authorities understanding of state law.[73] This seems to me to provide a complete answer to Justice Kennedy's worry about state government manipulation of denominators to defeat takings claims.

The problem of developer manipulation is different. Developers have no power to change state law. Indeed, the danger of manipulation in this context comes about from developers using state law *in a perfectly lawful manner* to make changes in lot lines. Adjusting lot lines is something that developers, like every landowner, have broad discretion to do. The concern is that developers will use the discretion conferred by state law in such a way as to shrink the horizontal dimensions of lot lines, thereby reducing the denominator, thereby making it more likely that they can prevail in a regulatory takings claim. What is needed is some legal basis for judges, when they confront this kind of manipulation, to deem the proper dimensions of the parcel to be something other than what the developer would have them be. Because the problem here is created by the lawful use of state law to generate a federal constitutional claim where none should exist, the solution must come from federal constitutional law.

To the extent then that we credit the danger of developer manipulation of lot lines – as did five Justices in *Murr* – the federal patterning definition of "parcel as a whole" must include the power to deem the horizontal dimensions of the parcel to be other than they are under state law. The power to re-draw lot lines in this fashion should be exercised only when the court is convinced, based on all the evidence, that the lot lines have been manipulated by the developer in an effort to create or maximize the plausibility of a regulatory takings claim. If not convinced that the lines have been drawn in an effort to manipulate the takings inquiry, the lot lines as established by the developer should be accepted as is, and should define the horizontal extent of the relevant "parcel."

[73] E. Brantley Webb, *How to Review State Court Determinations of State Law in Constitutional Cases*, 120 YALE L. J. 1192 (2011).

What kind of evidence should be considered in deciding whether the lot lines are the product of developer manipulation? Obviously, it will be rare to uncover "smoking gun" evidence of an intent to draw lot lines to bolster a takings case. At least this will be rare as along as the attorney-client privilege exists. Two types of circumstantial evidence would seem to be sufficient to raise a red flag that manipulation is likely going on.

One type of evidence would be lot lines that are drawn in such a way as to correspond to the scope of a challenged regulation. For example, if a developer challenges a building set-back regulation, and establishes a lot with lines that exactly correspond to the area of land required to comply with the set-back requirement, this would be strong evidence that the lots lines have been established in an effort to have the set-back regulation declared a taking.[74] The same would follow for lots lines that correspond to a wetland, the critical habitat of an endangered species, or an open space requirement.

A second type of evidence would be lots lines drawn in such a way that they would have no plausible commercial value.[75] Here the inference of manipulation is less clear-cut. Sometimes developers make mistakes about what the market will find attractive. But if it appears that lot lines have been drawn in such a way that they have no plausible commercial value, this at least should give rise to further inquiry into whether the motivation may have been to bolster a takings claim.

The main point is that these sorts of inquiries should be undertaken only when the government has a legitimate basis for claiming that lot lines have been manipulated in order to create or bolster a claim of a regulatory taking. Such cases will be unusual. In the ordinary, run–of- the- mill regulatory takings case, the lot lines as established under state law should be used in fixing the horizontal dimensions of the "parcel as a whole" for purposes of computing diminution in value.

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[74] *See* Fee, *supra* at 1559 (offering this as an example).

[75] This is Fee's test for determining the horizontal scope of the denominator. *See* Fee *supra* at 1557-62. He would evidently apply this test in all cases, whereas in my formulation it would be relevant only as circumstantial evidence of developer manipulation.

VII. The Proper Disposition

Suppose I am right that *Murr* should have been resolved by adopting a thin federal patterning definition that treats lots lines established under state law as presumptively valid unless the court is convinced the lines have been manipulated to bolster a takings claim. What then was the proper measure of the "parcel as a whole" in Murr? As previously indicated, there is no evidence the Murrs acquired lots E and F in the effort to manipulate the numerator/denominator inquiry under federal takings law. Consequently, there was no basis, under my proposed patterning definition, to disregard the relevant definition of the parcel under Wisconsin law. So which was it: Lot E alone, or lots E and F merged together?

It turns out that the answer was not very clear. The question boils down to whether Wisconsin, or more accurately, St. Croix County, had a rule of law requiring that contiguous lots be merged into a single lot in circumstances like the one involving the Murrs. Wisconsin's brief relied on the Wisconsin Court of Appeals' decision rejecting the family's request for a variance. That decision said, at one point, that under the relevant county zoning rules Lots E and F were "effectively merged."[76] But note carefully the qualifier: *"effectively."* What does effectively merged mean? Does it mean that the minimum lot-size regulation had the same practical effect as if the lots had been merged? This is not the same as saying they were merged as a matter of law.

In the second decision by the Wisconsin Court of Appeals that addressed the Murrs' constitutional challenge, the court said flatly that the transfer of Lot E to the Murr children "brought the lots under common ownership and resulted in a merger of the two lots under [the local ordinance]."[77] But this decision, which was unpublished, was based on the understanding that *for regulatory takings purposes* contiguous lots must always be regarded as merged – an

[76] Murr v. St. Croix Cty Bd of Adjustment, 332 Wis. 2d 172, 796 N.W. 2d 837, 844 (Wis. App. 2011). Several paragraphs later, the court stated: "[M]erger of adjacent substandard lots that come under common ownership will preserve the environment in the same ways that merger of lots already under common ownership would do. The failure to merge would have the opposite effect, with no countervailing property value concern." *Id.* at 844. This also falls short of saying that the lots were merged as a matter of law, as opposed to "effectively merged' because of the prohibition of building on "substandard" lots contiguous with another lot.

[77] [Need to get cert. petn appendix]

idea expressly disapproved by the U.S. Supreme Court.[78] The Wisconsin Supreme Court declined to review either of the Court of Appeals' decisions in the *Murr* controversy.

In effect, there was no Wisconsin precedent, before the *Murr* controversy arose, that ruled the St. Croix zoning ordinance required a merger of contiguous lots as a matter of law. The County and the National Association of Counties as amicus curiae argued at length that merger provisions have a "long and rich" history and have never been held to cause a taking.[79] This is true but is beside the point. The question was whether Wisconsin, either through state statute, the local ordinance, state common law, or otherwise, had a mandatory merger rule. As to that question, *only one* authority was cited by the governments – the first Wisconsin Court of Appeals decision in *Murr*. And that decision said only that the lots were "effectively merged," not that they were merged as a matter of law.

In these circumstances, if the Court had concluded that under the relevant federal patterning definition the scope of the relevant parcel was controlled by state law, the proper course was to remand the case to the Wisconsin Supreme Court, with instructions for that court to clarify whether, under Wisconsin law, a zoning ordinance like the one in St. Croix county requires a merger of contiguous lots *as a matter of law*. Rather than adopting a federal constitutional definition of parcel, which will only be a source of endless confusion and litigation, the U.S. Supreme Court should have asked Wisconsin's courts to clarify what Wisconsin law says about the scope of the relevant parcel. The answer to this question would then establish whether the denominator for purposes of evaluating the regulatory takings claim was one lot or two.

The last thing I should note is that the resolution of the relevant denominator, under Wisconsin property law, would not resolve the regulatory takings question. Even if it turned out that Wisconsin law would treat Lot E and Lot F as distinct parcels, it would still be necessary to show that the diminution in value caused by the minimum lot size requirement caused a taking of Lot E. The County argued, with considerable plausibility, that the highest and best use of Lot E

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[78] *See supra* note xx.

[79] Brf. for Nat'l Assn. of Counties at 5-10.

was as an auxiliary holding to Lot F. Which of course is the current state of affairs: both lots are owned by the Murrs and they have a variety of options for developing the two lots together. Some evidence cited by the Supreme Court suggested that the reduction in value was on the order of 10 percent.[80] So it was at least plausible to argue that the difference between what Lot E would fetch if it could be sold without restriction, versus its value as an auxiliary holding to Lot F, was not very great. If so, this would almost certainly not be great enough to establish a taking under the numerator/denominator calculus, under either the *Penn Central* or the *Lucas* incarnations.

Conclusion

To summarize briefly: The horizontal dimensions of "the parcel as a whole" should be determined under a thin federal patterning definition. That definition, as previous decisions establish, prohibits conceptual severance. It should also permit courts to disregard established lot lines if they have been adopted in an effort to manipulate the regulatory takings inquiry. Otherwise, the horizontal dimensions of the parcel should be determined by the way lot lines have been configured under state law. In the *Murr* case, it was unclear whether Wisconsin law would treat the Murrs' two lots as separate parcels or as a single merged parcel. The case should have been remanded to the Wisconsin Supreme Court for an answer. Even if Lot E standing alone is the relevant parcel, it is far from clear that the minimum lot size requirement was a taking, since the lot still had significant value in its current use or possible future use in conjunction with Lot F.

Nothing I have said in this paper about the proper approach to defining the denominator should be taken as an endorsement of the diminution in value approach to regulatory takings. If anything, the hash the Court made of this question in *Murr* strongly supports the conclusion that diminution in value is the wrong test for identifying regulations that should be regarded as a taking requiring just compensation. Here as elsewhere, the path dependent nature of the Court's constitutional jurisprudence has led the Court to dig a deeper and deeper hole that should not have been started in the first place. But that is a topic for another day. My point here is that the

[80] 137 S.Ct. at 1941 (citing the Wisconsin Circuit Court decision).

choice between state and federal law is inevitable given the nature of the right created by the Takings Clause. And the Court would be well served by giving more thought to the possibility of intermediate solutions, such as the federal patterning definition, before federalizing bits and pieces of doctrine in this area.