

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Property

Murr v. Wisconsin, __ U.S. __ (2017)

To comply with federal law, the Wisconsin State Department of Natural Resources in 1976 issued rules limiting the development of land in the St. Croix River area to protect its “wild, scenic and recreational qualities.” In the 1990s, Joseph Murr and his siblings inherited two adjacent parcels of land on the St. Croix River, which had been purchased by their parents in the early 1960s. The parents had built a cabin on their initial lot and shortly afterwards had purchased a neighboring vacant lot. The state’s regulations prohibited the sale or development of separate lots under common ownership unless they had at least an acre of land suitable for development. The parcels owned by the Murr family amounted to less than an acre of buildable land. The family sought a variance that would permit them to sell the vacant lot and use the proceeds to improve the cabin on the original lot, but they were denied. In subsequent litigation, the state courts affirmed the zoning board’s ruling, concluding that the two lots had been “effectively merged” and could no longer be separated.

The Murr family argued that the state had effectively destroyed the market value of the vacant lot, but the state argued that the merged lot was still valuable and could still be used as buildable property. The state supreme court concluded that any analysis of whether the government had engaged in a “regulatory taking” that substantially reduced the value of private property should only be performed on “the property as a whole” and not on the vacant lot as a stand-alone parcel of land. On that basis, the court found that the two lots considered as a unit retained enough value to escape any requirement that the state compensate the family for a “regulatory taking.” In a 5–3 decision, the U.S. Supreme Court affirmed the judgment of the state courts, concluding that it was constitutionally permissible for the state to treat the property as a whole when considering whether a regulatory taking had taken place.

JUSTICE KENNEDY delivered the opinion of the Court,

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The Takings Clause of the Fifth Amendment provides that private property shall not “be taken for public use, without just compensation.” . . . As this Court has recognized, the plain language of the Takings Clause “requires the payment of compensation whenever the government acquires private property for a public purpose,” but it does not address in specific terms the imposition of regulatory burdens on private property. . . . [*Pennsylvania Coal Co. v. Mahon* (1922)] initiated this Court’s regulatory takings jurisprudence, declaring that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” A regulation, then, can be so burdensome as to become a taking, yet the *Mahon* Court did not formulate more detailed guidance for determining when this limit is reached.

. . . The Court has, however, stated two guidelines relevant here for determining when government regulation is so onerous that it constitutes a taking. First, “with certain qualifications . . . a regulation which ‘denies all economically beneficial or productive use of land’ will require compensation under the Takings Clause.” Second, when a regulation impedes the use of property without depriving the

owner of all economically beneficial use, a taking still may be found based on “a complex of factors,” including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Palazzolo v. Rhode Island* (2001).

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A central dynamic of the Court’s regulatory takings jurisprudence, then, is its flexibility. This has been and remains a means to reconcile two competing objectives central to regulatory takings doctrine. One is the individual’s right to retain the interests and exercise the freedoms at the core of private property ownership. . . .

The other persisting interest is the government’s well-established power to “adju[s]t rights for the public good.” As Justice Holmes declared, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Mahon*. In adjudicating regulatory takings cases a proper balancing of these principles requires a careful inquiry informed by the specifics of the case. In all instances, the analysis must be driven “by the purpose of the Takings Clause, which is to prevent the government from ‘forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”

This case presents a question that is linked to the ultimate determination whether a regulatory taking has occurred: What is the proper unit of property against which to assess the effect of the challenged governmental action? . . .

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[T]he Court has declined to limit the parcel in an artificial manner to the portion of property targeted by the challenged regulation. In *Penn Central Transp. Co. v. New York City* (1978), for example, the Court rejected a challenge to the denial of a permit to build an office tower above Grand Central Terminal. The Court refused to measure the effect of the denial only against the “air rights” above the terminal, cautioning that “[t]aking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”

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The second concept about which the Court has expressed caution is the view that property rights under the Takings Clause should be coextensive with those under state law. . . . The Court explained that States do not have the unfettered authority to “shape and define property rights and reasonable investment-backed expectations,” leaving landowners without recourse against unreasonable regulations.

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As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. . . .

First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property.

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Second, courts must look to the physical characteristics of the landowner’s property. . . . In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation. . . .

Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. . . .

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Under the appropriate multifactor standard, it follows that for purposes of determining whether a regulatory taking has occurred here, petitioners' property should be evaluated as a single parcel consisting of Lots E and F together.

First, the treatment of the property under state and local law indicates petitioners' property should be treated as one when considering the effects of the restrictions. As the Wisconsin courts held, the state and local regulations merged Lots E and F [when they were passed on to the children in 1995].

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Second, the physical characteristics of the property support its treatment as a unified parcel. The lots are contiguous along their longest edge. Their rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited. The land's location along the river is also significant. Petitioners could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law long before petitioners possessed the land.

Third, the prospective value that Lot E brings to Lot F supports considering the two as one parcel for purposes of determining if there is a regulatory taking. Petitioners are prohibited from selling Lots E and F separately or from building separate residential structures on each. Yet this restriction is mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space, plus the optimal location of any improvements. . . .

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Considering petitioners' property as a whole, the state court was correct to conclude that petitioners cannot establish a compensable taking in these circumstances. Petitioners have not suffered a taking under *Lucas v. South Carolina Coastal Council* (1992), as they have not been deprived of all economically beneficial use of their property. . . .

Affirmed.

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

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Because a regulation amounts to a taking if it completely destroys a property's productive use, there is an incentive for owners to define the relevant "private property" narrowly. This incentive threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes: Put in terms of the familiar "bundle" analogy, each "strand" in the bundle of rights that comes along with owning real property is a distinct property interest. If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings.

And so we do not allow it. In *Penn Central Transportation Co. v. New York City*, we held that property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest." . . . We rejected that narrow definition of the "property" at issue, concluding that the correct unit of analysis was the owner's "rights in the parcel as a whole." . . .

The question presented in today's case concerns the "parcel as a whole" language from *Penn Central*. This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors "would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel

at issue. Even in regulatory takings cases, the first step of the Takings Clause analysis is still to identify the relevant “private property.” States create property rights with respect to particular “things.” And in the context of real property, those “things” are horizontally bounded plots of land. . . .

Following state property lines is also entirely consistent with *Penn Central*. Requiring consideration of the “parcel as a whole” is a response to the risk that owners will strategically pluck one strand from their bundle of property rights—such as the air rights at issue in *Penn Central*—and claim a complete taking based on that strand alone. That risk of strategic unbundling is not present when a legally distinct parcel is the basis of the regulatory takings claim. State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

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In deciding that Lots E and F are a single parcel, the majority focuses on the importance of the ordinance at issue and the extent to which the Murrs may have been especially surprised, or unduly harmed, by the application of that ordinance to their property. But these issues should be considered when deciding if a regulation constitutes a “taking.” Cramming them into the definition of “private property” undermines the effectiveness of the Takings Clause as a check on the government’s power to shift the cost of public life onto private individuals.

The problem begins when the majority loses track of the basic structure of claims under the Takings Clause. While it is true that we have referred to regulatory takings claims as involving “essentially ad hoc, factual inquiries,” we have conducted those wide-ranging investigations when assessing “the question of what constitutes a ‘taking’” under *Penn Central*. . . . And even then, we reach that “ad hoc” *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. Both of these inquiries presuppose that the relevant “private property” has already been identified. There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of “property” designed for a claim under the Takings Clause. Whenever possible, governments in regulatory takings cases will ask courts to aggregate legally distinct properties into one “parcel,” solely for purposes of resisting a particular claim.

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Regulatory takings, however—by their very nature—pit the common good against the interests of a few. There is an inherent imbalance in that clash of interests. The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the Takings Clause “prevents the public from loading upon one individual more than his just share of the burdens of government,” by considering the effect of a regulation on specific property rights as they are established at state law. But the majority’s approach undermines that protection, defining property only after engaging in an ad hoc, case-specific consideration of individual and community interests. The result is that the government’s goals shape the playing field before the contest over whether the challenged regulation goes “too far” even gets underway.

Suppose, for example, that a person buys two distinct plots of land—known as Lots A and B—from two different owners. Lot A is landlocked, but the neighboring Lot B shares a border with a local beach. It soon comes to light, however, that the beach is a nesting habitat for a species of turtle. To protect this species, the state government passes a regulation preventing any development or recreation in areas abutting the beach—including Lot B. If that lot became the subject of a regulatory takings claim, the purchaser would have a strong case for a *per se* taking: Even accounting for the owner’s possession of the

other property. Lot B had no remaining economic value or productive use. But under the majority's approach, the government can argue that—based on all the circumstances and the nature of the regulation—Lots A and B should be considered one “parcel.” If that argument succeeds, the owner's *per se* takings claim is gone, and he is left to roll the dice under the *Penn Central* balancing framework, where the court will, for a second time, throw the reasonableness of the government's regulatory action into the balance.

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As I see it, the Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a “taking.” If Lot E is a legally distinct parcel under state law, the Court of Appeals would have to perform the takings analysis anew, but could still consider many of the issues the majority finds important. . . .

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JUSTICE THOMAS, dissenting.

I join the chief justice's dissent because it correctly applies this Court's regulatory takings precedents, which no party has asked us to reconsider. The Court, however, has never purported to ground those precedents in the Constitution as it was originally understood. . . . In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. . . .

JUSTICE GORSUCH took no part in the consideration or decision of this case.