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The Murkiness of *Murr*: Why the Future of Takings Law Under the *Murr v. Wisconsin* Standard is Less Than Clear

There are many "gray" areas in constitutional law. Even after the Supreme Court decides some questions, the answers remain unclear, undecided, or just plain unsatisfying. The regulatory takings doctrine is no stranger to these facts. In June of 2017, the Supreme Court addressed an area that has been open for some time prior—how to determine what is the "relevant parcel" for takings analysis—in *Murr v. Wisconsin*.[1]

While the *Murr* decision seemingly puts this question to rest, several factors point toward the potential for this to continue being a lingering question in the future. With the makeup of the Court likely to shift over the next several years, and a standard which makes takings challenges more, not less, complex, the Court could revisit the issue in the not-so-distant future. And because there is a strong dissent which outlines a potential new standard, a change is even more easily justified. This paper delves into whether such a change is likely to occur, and one potential impact such a shift could have on the government's ability to regulate.

I. The denominator problem.

Under the regulatory takings doctrine, courts determine when a government regulation goes "too far" in burdening property rights, entitling the owner to "just

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

compensation" under the Fifth Amendment Takings Clause. Before determining if the government has indeed gone "too far," the court must first define what the boundary of the property in question is by looking at the "parcel as a whole." In doing so, it must be careful to consider the property's complete bundle of property rights, rather than a narrowly defined single strand.[2]

In practice, determining what is the "parcel as a whole" has turned out to be extremely difficult. Because this so called "denominator problem" is often outcome determinative, litigants and courts alike have sought answers as to exactly how the courts should define the property that the government has allegedly taken. While some aspects of the problem have been resolved, an important aspect had remained unanswered for some time: How should the boundary of the property be defined when the plots are adjacent to other holdings of the same owner?

Enter the Murr family. It's certain the Murr family had no intention, or desire, to thrust themselves into this unanswered regulatory takings question. Yet their local zoning dispute concerning a family vacation home offered the chance for the Court to answer this lingering question.

II. The *Murr* Decision.

The Murr saga takes place on the St. Croix river in Wisconsin.[3] The Murr family owns two adjacent lots—Lot E and Lot F—on the St Croix River, with a cabin located on Lot E.[4] The lots were purchased separately by the petitioner's

[2] Tahoe-Sierra Preservation Council Inc., 535 U.S. 302, 327 (2002).
[3] Murr, *supra* note 1, at 1936.
[4] *Id.*

parents in the 1960's, and they were held under separate entities by the parents—lot F under the family plumbing business, and lot E held under their own names.[5] They maintained the lots under separate ownership until in the 1990's, when the Murr parents decided to transfer the properties to their children. Lot F was transferred in 1994, and in 1995 lot E was conveyed, bringing the lots into common ownership for the first time.[6]

A decade later, the Murr children decided that they wanted to renovate the cabin, and decided to sell Lot E. While both lots are over one acre in size, neither have over an acre of suitable development area, and thus they were each considered substandard and under local law required a variance to develop or sell.[7] The zoning laws contained a grandfather clause which makes a variance unnecessary if the lots were created prior to the zoning law's enactment. Although both lots were created prior to the law, because the Murrs unified the two substandard lots under common ownership, they "effectively merged" the lots under Wisconsin law. The grandfather clause therefore did not apply, and the Murr family was required to get a variance. The local Zoning Board denied the Murrs the right to sell or develop the lots separately, setting the stage for the takings challenge.[8]

A takings challenge was filed and worked its way all the way up to the Supreme Court. The Court was asked to define what the "relevant parcel" is when

[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 1941 (quoting Murr v. St Coix County Bd. of Adjustment, 332 Wis. 2d 172, 184 (Wis. 2011)).

assessing the "effect of the challenged governmental action."[9] Should the takings analysis be focused only on lot E? Or should the court consider both lots combined?

a. The Majority opinion.

The majority opinion, written by Justice Kennedy, laid out a three-factor test. Under this test, to determine the denominator a court must look at: (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."[10] This test must ultimately determine whether "reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or instead as separate tracts," based on "background customs and the whole of our legal tradition."[11]

Notably, Justice Kennedy gave some specific guidance on potential issues regarding these factors. When looking at the first prong, a state law "use restriction that is triggered only after or because of a change in ownership should help guide the court's assessment of reasonable private expectations."[12] When assessing the geography and physical characteristics of the land, Justice Kennedy made clear that "some features may indeed lead a reasonable land owner to anticipate that their land would be subject to regulation, due to the surrounding human and ecological environment." Finally, Justice Kennedy noted that a diminution of value in one lot may be tempered if the regulated land adds value to the remaining property by

[9] *Id.* at 1938.
[10] *Id.* at 1945.
[11] *Id.*
[12] *Id.*

increasing privacy, expanding recreational space, or preserving surrounding natural beauty."[13]

This approach has several benefits. First, it will reduce the potential for gamesmanship by landowners. The fear is that they may otherwise draw boundary lines in anticipation of regulation, so they can subsequently bring a takings claim for that portion of the property. Under this standard, such attempts will fail. Second, it allows courts to take other relevant factors into account, such as other land holdings in the area that add value to the relevant parcel, and whether a change in ownership occurred that could lead the owner to anticipate the lots being considered as one.

The new approach, however, has its shortcomings as well. An overall complaint about bringing regulatory takings claims is the complexity of the claims. They often take massive amounts of resources that make landowners, who would otherwise have a valid claim to bring, hesitant to assert their rights. This new test only adds to that problem. By adding another three-factor test to determine the relevant parcel, landowners will need to expend time and litigation costs just for a chance to spend more time and money litigating the merits under the *Penn Central* test.[14]

Another complaint brought by property rights advocates is that the tests for regulatory takings claims are stacked against the property owners. By making these determinations on an ad hoc, factual basis, judges are left balancing the

[13] Id. at 1946.
[14] Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

government's need to regulate on behalf of the public good, with "forcing some people alone to bear public burdens which, in justice and fairness, should be borne by the public as a whole."[15] While this seems like a procedurally fair way to adjudicate the claims, there is an argument that in practice, it may leave land-owners without a realistic chance of winning.[16] The majority's new test does nothing to relieve these worries—in fact it likely has exacerbated them. By giving more discretion on an issue that most land owners would feel is straightforward, the perception may be that less fairness is afforded to land owners.

Whether these fears will come to fruition is yet to be seen. Only time will tell as to whether this new standard will actually bring clarity to this question. The standard may not ultimately be judged on its own merits, however. Instead, it may be compared and contrasted to a potential new approach offered up by the dissent in this case.

b. The Roberts dissent.

Chief Justice Roberts penned a dissent, joined by Justices Thomas and Alito. Criticizing the majority's approach as a threat to property rights, Roberts rejected the majority's three-part test, instead embracing a much more straightforward test that favors property rights to a much greater degree.

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[15] Armstrong v. United States, 364 U.S. 40, 49 (1960).
[16] F. Patrick Hubbard, et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121 (2003) (finding that data regarding whether land owners have statistical chance of winning regulatory takings challenges is inconclusive).

Chief Justice Roberts would answer the denominator problem looking first and foremost to how the property is defined under state property laws. The plot lines should define the property in question "in all but the most exceptional circumstances."[17] Once the property is defined in this way, many of the same factors in the majority's opinion would then be examined at the merits stage, under the well-worn *Penn Central* test. By defining the property as such, the court would be adhering to the traditional view that "state laws create property rights in things," and that in the real property context, "those 'things' are horizontally bounded plots of land."[18]

Roberts rejects the majority's fears that any gamesmanship would result from taking this view. Instead, when obvious attempts to create a takings claim are presented, the court can simply reject them. Indeed, Roberts points out that this is precisely what the court did in *Penn Central* when it rejected the property owners attempt to define the relevant parcel as only the air rights in that case.

Roberts also contends that the majority standard has stacked the deck in the government's favor. Having the ad hoc test when defining the parcel would allow the government to create a litigation-specific definition of property designed to avoid liability under the Takings Clause.[19] Furthermore, the majority's framework will take into account the reasonableness of the government's action at this preliminary stage, and not just at the merits stage, which leads to clear double

[17] Murr, *supra* note 1, at 1953.
[18] *Id.*
[19] *Id.* at 1955.

counting of the government's interest. Taking the reasonableness of the government's action into account when defining the property will lead to definitions of parcels that have more to do with adhering to the government regulation, and less to do with property owner's legitimate expectations for their land. This will ultimately make it even less likely that a court would find a taking in many cases.

While Roberts disagrees with how the majority gets there, an interesting facet of this case is that he actually agrees with their conclusion. After defining the property according to its state law property lines, he would have taken into account many of the same factors at the merits stage and found that no taking had occurred.

c. The Thomas dissent.

Justice Thomas also penned a dissent in the case. Thomas's approach is different altogether, but perhaps even more straightforward. Thomas suggests "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.[20] While abandonment of the regulatory takings jurisprudence, rooted in Justice Holmes's famous pronouncement that "regulations can go too far," may seem desirable at first glance, it garners little support on the Court. The dissent embraces the *Penn Central* test and shows little desire to overturn *Penn Central* and its progeny.

[20] Id. at

Both the majority and Robert's dissent approaches have their relative strength and weaknesses. The majority approach affords courts more flexibility to define the relevant parcel, making it less likely owners can create a takings claim when there is none. Yet this flexibility sacrifices a precise and manageable standard, which is the strength of the dissent's approach. It will be the lower courts task in muddying through the new standard, which had purportedly given clarity to this once unanswered area of constitutional law. But if circumstances on the Supreme Court change, courts may not be stuck in the mud for long.

III. Why the future of the denominator problem is less than clear.

Typically, when a decision puts a long-disputed question of law to rest, we can expect that decision to be in place for many years. Principles of *stare decisis* make courts reluctant to overturn precedent quickly. Moreover, reliance by parties on the new rules, as well as a desire for continuity by all parties involved make it much less likely for courts to change course quickly.

Several factors at play in this situation, however, make it seem far more likely that the Court may potentially abandon this new test in the not-so-distant future. First, there is potential for a Supreme Court shake-up of justices in the coming years. If the new justices are stronger property rights advocates, the balance may tip, and these new voices may have the votes to overturn the majority's approach. Second, because the new standard is somewhat nebulous, the potential is there for confusion on how to implement it, which could lead to vastly inconsistent results. Should both factors present themselves, a more property rights oriented

court could revisit this question, and adopt the standard put forward in the Roberts dissent.

a. The potential for a new majority on the Court.

The potential for a Supreme Court shake-up seems likely in the coming years. In fact, it began before the *Murr* decision was even decided. Its newest member—Neil Gorsuch—did not take part in the decision, having not been confirmed at the time of oral argument. While his views on the denominator problem are not known, a 2005 email concerning the controversial *Kelo v. City of New London* decision certainly gives us clues. In the email, Gorsuch applauded Justice Thomas' dissent, which chastised the majority in that case for its interpretation of the Public Use Clause, and for departing greatly from the Takings Clause's original meaning.[21] This view on constitutional property rights seems to be strongly on the side of property owners and may even be more conservative than the justice he replaced, Antonin Scalia.[22] It's a fairly safe bet that Gorsuch would have sided with the Roberts dissent in *Murr*.

Even with Gorsuch, however, the dissent would have fallen short of a majority. But more new voices on the court are likely near. Justice Kennedy, who

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[21] Ariane de Vogue, *What Neil Gorsuch learned from Kennedy, Scalia and Thomas*, CNN POLITICS (March 20, 2017), http://www.cnn.com/2017/03/19/politics/gorsuch-kennedy-scalia-thomas/.
[22] Illya Somin, *Neil Gorsuch opposes the Kelo decision – a terrible Supreme Court property rights ruling that Donald Trump loves*, THE VOLOKH CONSPIRACY (March 28, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/neil-gorsuch-opposes-the-kelo-decision-a-terrible-supreme-court-property-rights-ruling-that-trump-supports/?utm_term=.d3cb1777be48.

wrote the majority decision, has long been rumored to be nearing retirement.[23] Should that retirement happen before President Donald Trump leaves office in 2020—or possibly even 2024[24]—the Justice replacing him will almost certainly be another strong advocate for property rights, and a potential fifth vote that could push the dissent into the majority. And while other retirements do not seem imminent,[25] things can obviously change quickly, which could dramatically shift the dynamic for the denominator issue.

b. The potential problem of implementation in the lower courts.

The second factor which could affect the longevity of the *Murr* decision, and the new test announced, is how it will be implemented by the lower courts. How to apply the factors of *Murr* is unlikely to stump the lower courts. However, there are still some gray areas. Especially important will be how the courts balance these factors. Also relevant will be the interplay with the *Penn Central* factors. If the court finds the property owner did not have a reasonable expectation that his property would be two separate parcels, should the court then apply this finding to the merits decision?

These are potential questions that may lead to inconsistencies across the vast federal and state court landscape. If across multiple jurisdictions the test proves to

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[23] Joseph P. Williams, *All Eyes on Justice Anthony Kennedy's Retirement Plans*, U.S. NEWS & WORLD REPORT (July 10, 2017), https://www.usnews.com/news/national-news/articles/2017-07-10/all-eyes-are-on-justice-anthony-kennedys-retirement-plans

[24] I can only hope not.

[25] Julia Manchester, *Ginsburg: I'll be a SCOTUS justice for as long as I can*, THE HILL, (Oct. 28, 2017), http://thehill.com/blogs/blog-briefing-room/news/357657-ginsburg-ill-be-a-scotus-justice-for-as-long-as-i-can?rnd=1509228187

yield inconsistent results, this might also be a factor for the Supreme Court to revisit the *Murr* decision.

c. How these factors could lead to the court revisiting the *Murr* decision.

Should both these factors come to fruition, revisiting *Murr* would not be out of the question for the Court. Although "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided,"[26] there is plenty of precedent to show that the court has been willing to overturn a case, even shortly after it was decided.

An example of this is the Court's Tenth Amendment jurisprudence. In *National League of Cities v. Usery*,[27] the Court announced that Congress could not directly displace the State integral operations in the areas of "traditional government functions." The "traditional government function" test announced in *Usery*, however, lasted just nine years—an extremely short time period in constitutional terms. During that time, lower courts were all over the map as what in fact constituted a "traditional government function," leading to inconsistency throughout multiple jurisdictions. In *Garcia v. San Antonio Metropolitan Transit Authority*,[28] the Court explicitly overruled *Usery*, finding the test to be unworkable and not grounded in constitutional principles.

It's easy to imagine the court with Gorsuch, and one or more new likeminded justices, invoking a similar rationale as in *Garcia* to overrule *Murr*. Regardless of

[26] Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992).
[27] 426 U.S. 833 (1976).
[28] 469 U.S. 528 (1985).

actual realities, a three-factor standard such as the one in *Murr* will almost surely lead to some lack in clarity in how to apply it, and thus to inconsistencies between courts. Furthermore, the dissent already leveled arguments that the standard is not rooted in Constitutional principles. The new Court could instead turn to a definition rooted in State law—the traditional approach taken by Chief Justice Roberts—or reexamine regulatory takings as a whole, as Justice Thomas suggested.[29] While these new Justices may wish to push the envelope and adopt hardline conservative positions, in order to gain a majority, they may opt to sign on to an opinion adopting the approach of Chief Justice Roberts in his *Murr* dissent.

While the odds are against overturning this newly announced test in the near future, the possibility is there. But would such a dramatic shift even matter in a practical sense? A look at how a likely scenario—regulations in response to climate change—will play out under both the majority and dissenting opinions in *Murr* can help illuminate why this is such an important question.

IV. The practical effects of the *Murr* standard in California, and what a future under the dissent may look like.

The factual circumstances that led to the *Murr* litigation are possible, but unlikely in California. California does have a law that allows commonly owned properties to be merged, but the law only allows for a merger after a property owner has notice and an opportunity to be heard.[30] It does not automatically merge commonly owned properties.[31] More importantly, the Supreme Court seemed to

[29] Murr, *supra* note 1, at 1957-58.
[30] Cal. Gov. Code § 66451.10 (2018).
[31] *Id.*

close the door on challenging this type of regulation based on a Fifth Amendment takings theory. However, the relevant parcel question is still likely to come up in important ways in California—most probably in the context of large coastal developments in face of climate change.

The biggest area of regulatory growth in the coming years will be a result of climate change. And among the multitude of effects that climate change is causing, there might be none as dramatic for land regulation purposes as sea level rise. Properties along the coast will see the high-tide-line creep more and more inland, which could affect current developments, and reduce the developable land available.

Although the most devastating effects are years away, regulation along the California coast is greatly needed now.[32] New developments near the coast will continue to be sought. And as existing developments age, permits will be sought to renovate, and rebuild.[33] State and local governments will have a huge incentive to limit seawalls—which often lead to beach erosion—and move development away from the shore. There are several available strategies, some of which will have implications for future takings cases.

a. Sea level adaptation measures that could lead to takings claims.

To combat sea level rise, local government have several possible strategies to implement. Local governments will likely use a variety of adaptation measures as

[32] Tiffany Hsu, *New real estate developments abound up and down the coast, but challenges persist*, L.A. TIMES, (June 10, 2017), http://www.latimes.com/business/realestate/hot-property/la-fi-hp-coastal-development-20170610-story.html.
[33] *Id.*

the geography and local character dictate. An example of one of these measures is seawalls that can be used to protect structures already in place.[34] Permits denied, or permits granted with conditions placed on them, can, and will, give rise to takings challenges. One such challenge has already made its way to the California Supreme Court in the recently decided case *Lynch v. California Coastal Committee*.[35]

The type of adaptation measure that this paper considers, however, is outright denial of permits to build in areas that are most prone to flooding due to sea level rise. Local governments need to take a close look at these high-risk flood areas as they begin to use sea level rise models in their land use planning. In seeking ways to protect developments in these high-risk areas, they may find that the most effective way to guard against damage to buildings and homes is to simply deny developers the right to build there to begin with.

As governments begin to grapple with this challenge and start initiating the steps necessary, a wave of takings claims will surely follow. The definition of the relevant parcel will become a crucial aspect of the government's ability to regulate in this way.

b. A hypothetical development that may raise a takings challenge.

Considering when and how claims may come about can be helpful to see how the *Murr* decision will affect future cases. To do so, we can look at a hypothetical scenario that could raise these issues.

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[34] Robynne Boyd, *Why Build a Seawall When You Can Plant Some Grass?*, NRDC, (Sept. 15, 2016), https://www.nrdc.org/stories/why-build-seawall-when-you-can-plant-some-grass.
[35] 3 Cal. 5th 470 (2017) (takings claim brought by owner challenging seawall permit condition).

Our hypothetical parcel is close to the coast and undeveloped. The parcel was subdivided several years ago in accordance with applicable state and local zoning laws, but the original owner of the parcel never developed the land. According to several models predicting sea level rise in the area, several lots of the parcel are in the high-risk flood zone, but a majority of the lots would not be affected by sea level rise. A new owner of the parcel has a new development plan, and has brought the plan to the local planning agency for approval. In the plan, the developer wishes to build homes on each of the lots that are in the predicted sea level flood areas.

Facing this type of scenario, the local land planning agencies undertakes the difficult decisions on what—if anything—the developer should be able to build on the lots in question. They also consider mitigation measures, and the potential for seawalls in the future. After considering several adaptation strategies, and looking at the sea level rise models, our hypothetical local government decides to deny the permits to build houses on those lots. They do, however, approve the rest of the development. The land owner challenges the permit denial on the lots in question, claiming a compensable taking under the Fifth Amendment.[36]

A complaint is filed. Litigation ensues. Before the court, the government first raises the question as to what the relevant parcel in this case should be. It focuses its argument on the holding in *Murr*, claiming that the denominator in the takings analysis should be the entire development and not just the individual lots that were

[36] Our hypothetical assumes they have exhausted all state remedies in accordance with *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County* and brought their challenge in federal court.

denied building permits. If the court decides that the relevant parcel is the whole development, the government argues that under *Penn Central* the diminution of value is only slight because the government has not denied permits to build on the rest of the parcel. Thus, there has been no compensable taking.

The property owners argue otherwise. They claim the court should only consider the individual lots as they were divided under state and local laws. They argue this is the case under the majority opinion in *Murr*, but they also argue the court should consider the case under the Roberts approach as well. Based on their argument that the relevant parcel is the individual lots, they plead this is a "total taking" under *Lucas v. South Carolina Coastal Council*,[37] because the denial to build on the individual parcels wiped out all economic value of the individual parcels.

The issued teed up for the court in this scenario is whether, based on *Murr*, the denominator should be the individual parcels that were denied permits to build upon, or the entire development as a whole.

c. Takings challenge under the majority approach.

Under the majority approach's three prong test, the court will first consider the "treatment of the land under state and local law."[38] In California, as noted above, no merger provisions exist that would automatically treat separate parcels under common ownership as one parcel, and the local government never took the

[37] *See* 505 U.S. 1003 (1992) (holding that a regulation that deprives a property of economic value or use results in a taking).
[38] Murr, *supra* note 1, at 1945.

steps necessary to merge the parcels. The parcel was properly subdivided under applicable laws. And no background principles of state law call for the court to consider these parcels as one. The individual lots are not substandard and typically would be approved for permits if not for the sea level rise dangers. This factor seems to weigh in favor of the landlords.

The court will next consider "the physical characteristics of the land."[39] The lots within the development are all contiguous, and the terrain is such that the lots in question add value to the rest of the parcel. More importantly, owners along the coast in California—perhaps more than anyone else in the nation—are on notice that their land will be subject to regulation. The California Coastal Act, which requires permits for any development in the coastal zone, has been a part of land use regulations for decades.[40] Furthermore, the fact that the parcels are shown to be in high risk flood areas puts owners on notice that the property will be subject to regulation to an even great extent. These facts show that the owners of the development knew their land was likely to be subject to regulation, and points toward the court treating the parcel as one.

Finally, the court will consider "the prospective value of the regulated land."[41] The denial of building on the lots in question would certainly reduce the value of the individual lots, and the overall return on investment of the owners. But leaving the lots in question vacant may actually enhance the value of the remaining lots. If

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[39] *Id.*
[40] See Pub. Res. Code 20, §§ 3000 et seq.
[41] Murr, *supra* note 1, at 1945.

natural barriers to stop encroachment are added, they would provide a natural protection to flooding. There may also be added visual benefits to some lots, as they could have enhanced views of the ocean. Furthermore, similar to *Murr*, the open space may provide recreational opportunities for the remaining lots. While the value may be reduced, it may not be to an overwhelming extent, pointing towards the government's argument being correct.

This test must ultimately determine whether "reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or instead as separate tracts."[42] The factors seem to point in different ways, and a court will have to determine how to weigh each one before making its conclusion. With *Murr* as the courts' guidepost, it seems that in this scenario the denominator could be the entire development. While this seems to be a closer call than *Murr*, many of the same factors are present. Furthermore, the high importance of climate change regulation could tilt the balance in the government's favor.

The parties would next have to battle out whether this was a taking under the *Penn Central* analysis. With a small diminution in value because of the large denominator, the landowners would have an uphill battle, and may just drop their claims—lest be subject to more litigation costs with a low chance of success.

[42] *Id.*

d. Takings challenge under the Roberts dissent.

Under the Roberts approach, on the other hand, this claim would likely proceed to the merits stage of the analysis. Because the lots subject to the permit denials were properly subdivided under state law, the government would have a heavy burden to overcome the presumption that the lot lines are determinative. Outside a showing that the landowners acted nefariously—which is not present in our facts—it is likely the landowners would win on the initial question of what to consider the relevant parcel.

This by no means guarantees that the landowners would win at the merits stage, however. Like in Justice Roberts' dissent, the court could look at all the factors under the *Penn Central* analysis and find that no taking has occurred. As Justice Roberts made clear, many of the same factors that the majority looked at in determining what the denominator is, can, and should be considered in determining what the diminution of value would be, what the reasonable investment backed expectations of the owners are, and what the character of the government action is. Under this approach, the government would have a strong case—similar to what Roberts stated in *Murr*—that no taking occurred.

This would presume, of course, that the court was analyzing the merits of the case under *Penn Central*, and not *Lucas*. Under *Lucas*, however, it could be shown that the lots retain some value as recreational spaces for the remaining lots, which may preclude a *Lucas* claim.

Ultimately, it seems that under either the majority or dissent, the government would have a strong—but not overwhelming—chance to prevail. But despite the similar outcomes, the approach used could still have a large effect on climate change regulation.

e. Policy implications of using either approach.

In addition to the practical effects for individual cases, the approach used to determine the relevant parcel will have large effects on how governments address climate change. Making lot lines presumptively determinative, as the Roberts approach calls for, may force governments to regulate less aggressively, or not at all, for fear of the onslaught of takings claims that will inevitably come. This is because takings claims bring high costs for local governments to litigate, even if they may ultimately prevail at the merits stage under *Penn Central* or *Lucas*. And based on the facts in the hypothetical, winning is not certain. Faced with these outcomes, governments may decide to refrain from taking active steps now to stop the most devastating effect of climate change, which is a terrible long-term policy.

Another facet to consider is the problem of owners creating takings. While Justice Roberts makes assurances that the judiciary will be able to root out gamesmanship by landowners, it's far from certain that is true. Climate change regulations are coming, but many of the worst effects may still be many years off. Thus, government regulations may be years away as well. Savvy landowners could begin to position themselves bring these claims well before the regulations are

adopted. As time passes, it will be harder and harder to prove a corrupt motive behind these maneuvers.

In contrast, the majority's approach will likely cut off some of the most egregious attempts by land owners to take advantage of this coming wave of regulations. Any attempt to subdivide their lots in such a way as to maximize the potential for a complete regulatory taking will be thwarted by the multi-factor test. Moreover, as more and more land owners become aware of the new realities, the overall number of takings claims may lessen. This will reduce the cost of litigation for governments and allow more money to be spent on adaptation. Under the majority approach, government regulators will have a much clearer path to regulating in the face of climate change.

V. Conclusion

The actual ramifications of the *Murr* decision are far from clear. Over the coming years lower courts will struggle to implement the new standard. Land owners will likely cry foul as the cost of litigating these claims rises, and claims are rejected. But their cries may not fall on deaf ears, as new faces on the courts may hear them, and take up the call to revisit this issue. Hopefully, if this is the case, the Court will heed its own words and recognize that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the law."[43] In the face of the dire effects of climate change, the need for government regulations is crucial, and forcing government to

[43] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

pay for small diminution of values is unwise, and unsustainable. Private property rights are important to protect, but in the face of a common problem of this magnitude, those rights must give way to the common good.