



**DISAPPOINTED EXPECTATIONS:
HOW THE SUPREME COURT FAILED TO
CLEAN UP TAKINGS LAW IN *MURR V.
WISCONSIN***

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ABSTRACT: This article examines the recently decided case *Murr v. Wisconsin*, demonstrating how the Supreme Court's decision dodged the hard questions latent in applying the "parcel-as-a-whole" test of *Penn Central Transportation Co. v. City of New York* to two contiguous parcels that for some limited period of time came under common

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ownership by different routes. The first part examines how the case should have been decided under *Penn Central* and concludes that Chief Justice John Roberts, the primary dissenter, had by far the better of the argument in insisting that state property lines should govern in preference to the complex facts-and-circumstances test championed by Justice Anthony Kennedy, who wrote for the Court. A simple mistake in conveyancing, easily avoided, should not wipe out development rights that any other owner could possess over the undeveloped parcel.

The second part of this article attacks the dominant *Penn Central* test that makes the availability of any compensation turn on the ratio of the value taken to the full value of the parcel. The same political considerations that justify a per se compensation rule (subject to a police-power exception) in physical cases apply equally in the regulatory context, given that both circumstances present opportunities for majoritarian abuses. The article then examines many of the cases cited in *Penn Central*, and some decided after it, in relation to the taking of partial interests in land, be they air rights, mineral rights, liens, or covenants and concludes that a simple rule that sets compensation equal to the fair market value of the property lost outperforms on administrative and welfare grounds the *Penn Central* test. That test fails because it ignores huge private losses created by takings so long those losses do not result in a sufficient diminution of the property's value, a standard that is nowhere either articulated or defended. As such, *Penn Central* should be overruled or cut down in size.

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INTRODUCTION

One telltale sign of intellectual disarray in any area of law is the extent to which existing doctrine finds itself unable to resolve simple and recurring cases. That problem is evident in spades in dealing with the Constitution's takings clause, which states: "nor shall private property be taken for public use, without just compensation."¹ In an effort to interpret and apply this clause, the Supreme Court commonly hears at most one or two takings cases a year. But with each new doctrinal tweak, the level of gloom and confusion only increases as the Justices struggle to fit each new piece of the puzzle into a framework that has become less tidy and less satisfactory with each new iteration. But any effort at harmonization will necessarily fail if the initial conceptual framework is unsound.² And so takings law remains a disorderly jumble precisely because the Supreme Court, and hence all lower courts, are utterly adamant in their refusal to think hard about first principles.

This pattern held all too firm in *Murr v. Wisconsin*.³ The Supreme Court granted certiorari in *Murr* on this question:

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?⁴

¹ U.S. CONST. amend. V.

² For further discussion, see Richard A. Epstein, *Concepts Before Percepts: The Central Role of Doctrine in Law*, 84 U. CHI. L. REV. 99 (2017).

³ No. 15-214, 2017 WL 2694699 (U.S. June 23, 2017).

⁴ Brief for Petitioner at in *Murr v. State*, No. 15-214 (U.S. Apr. 11, 2016), <http://www.scotusblog.com/wp-content/uploads/2016/04/MeritsBrf.pdf>.

The majority opinion by Justice Kennedy, joined by the four liberal justices—Ginsburg, Breyer, Sotomayor and Kagan—held that a complex facts-and-circumstances test required the integration of the two plots into one, from which it followed that there was an insufficient diminution in value to trigger the government obligation to compensate the Murrs for the loss of their development rights on one of the two parcels. Throughout that analysis, the majority relied heavily on two key Supreme Court precedents. The first of these was the “too far” test announced by Justice Oliver Wendell Holmes in *Pennsylvania Coal v. Mahon*.⁵ The second was the three-part balancing test for regulatory takings developed by Justice William Brennan in *Penn Central Transportation Co. v. City of New York*.⁶ The bottom line was that the majority opted for the ingrained Supreme Court approach that “has been characterized by ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.”⁷ In his view that type of multi-factored test had to be used to determine the “denominator” in a regulatory-takings test. The dissent by Chief Justice Roberts, joined by Justices Thomas and Alito, did not at any point question the soundness of this particular framework, but only disagreed about its application to the parcel-as-a-whole test. In the dissenters’ view, “[s]tate 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.”⁸

⁵ 260 U.S. 393 (1922).

⁶ 438 U.S. 104 (1978). The test is set out in Section I.C *infra*.

⁷ *Murr*, 2017 WL 2694699, at *8.

⁸ *Id.* at *20 (Roberts, C.J., dissenting). A brief dissent of Justice Thomas requested that the Court reconsider: “[T]ake 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.” I shall not venture into those deep waters in this article. *Id.* at *1.

In this Article, I shall engage the justices on two fronts. The first of these is to analyze the way in which *Murr* should come out within the current law, where I agree that the clearer rules of the Chief Justice offer a better roadmap for dealing with this question. I thus begin with a review of the record in *Murr*, followed by a discussion of the case law that developed the Supreme Court's denominator case. It concludes with a discussion of the evolution of the reasonable investment-backed expectations test from *Penn Central* to *Murr*.

In the second portion of the paper, I offer an analysis of the transformation of the reasonable-expectations test from its origins in *Penn Central* to Justice Kennedy's explication of the test in *Murr*. The Court's analytic claim is that it is not possible to develop a coherent set of rules that goes beyond the general facts-and-circumstances standard (this does not sit well with someone who wrote a book entitled *Simple Rules for a Complex World*.⁹)

In order to reject this analytic claim, however, it is not sufficient, in my view, to point out the idiosyncrasies of the current law. It is also necessary to offer an alternative analytical framework that eliminates these oddities and produces substantive results that lead to superior social outcomes. Accordingly, the second half of this Article goes back to first principles. It insists that any correct analysis has to rebuild takings law from the ground up, at which point the distinction between physical and regulatory takings disappears as a failed intellectual experiment. In its place, it is necessary to develop a simpler test that only asks the government *prima facie* to compensate the private owner for the value of the property taken, whether attributable to physical occupation, restrictions on land use and development, or restrictions on the right of an owner to dispose

⁹ RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

of property to a third person by way of any voluntary transaction, be it a sale, lease, gift, or mortgage.¹⁰

Qualifying this basic rule, there are of course the police-power justifications for the protection of health and safety, all of which get lost or misunderstood in the modern analysis. But even if no such justification is found, in many complex cases an implicit-in-kind compensation, arising out of a set of reciprocal benefits and burdens, may either reduce or eliminate the obligation to provide any compensation. I believe that this alternative approach yields a better mix of public and private values, so that the correct division between compensable and noncompensable takings provides desirable incentives for both public and private actors alike.

I. MURR UNDER CURRENT LAW

A. THE RECORD

Murr involved a challenge brought in Wisconsin state court to an ordinance of St. Croix County,¹¹ which had been in effect since the 1970s. *Murr* had its inception when Congress passed the Wild and Scenic Rivers Act (Act) in 1968¹² with the purpose of preserving certain wild and scenic rivers for their enjoyment by present and future generations.¹³ One such protected waterway was the lower portion of the St. Croix River, which was found to meet the statutory standard of “wild, scenic, or recreational.”¹⁴ The federal statute then

¹⁰ For an earlier defense of this position, see Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99 (2012), available at <http://www.stanfordlawreview.org/online/physical-regulatory-takings>.

¹¹ ST. CROIX COUNTY, WIS., CODE OF ORDINANCES ch. 17.36(I)(4)(a) (July 2007) (cited in case).

¹² Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–87.

¹³ *Id.* § 1271.

¹⁴ *Id.* § 1273(a).

led Wisconsin to pass its own statute in order to comply with the federal mandates dealing with wild and scenic rivers.¹⁵

The relevant county ordinance implemented the federal and state mandates by imposing restrictions on the development of land abutting the St. Croix River. In effect, the ordinance provided that building could take place only on plots of land with a sufficient “net project area” of at least one acre.¹⁶ This measurement encompassed the total area of “developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands.”¹⁷ During the 1970s, the basic ordinance was amended to address the development of two adjacent substandard lots (i.e., two lots which do not have at least one acre of net project area).¹⁸ Under this scheme, two adjacent substandard lots with a common owner would be treated as if their titles had merged, allowing the owner to develop only one of the lots. The resulting prohibition on development under Wisconsin law attached to the combined lots forever, remaining in effect even if one

¹⁵ See Wis. Stat. § 30.27(1)-(2).

¹⁶ St. Croix County, Wis., Code of Ordinances ch. 17.36(G)(1)(b).

¹⁷ Wis. Admin. Code NR 118.03(27) (Feb. 2012).

¹⁸ St. Croix County, Wis., Code of Ordinances ch. 17.36(I)(4)(a) makes the following provisions for substandard lots:

Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

- 1) The lot is in separate ownership from abutting lands, or
- 2) The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.
- 3) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

of the two lots were subsequently sold to a third party unrelated to the original owners.

It was this prohibition that tripped up the Murrs when they combined two separate lots under single ownership. The two lots in issue were Lots E and F, contiguous properties along the St. Croix River. The Murrs' parents, now deceased, first purchased Lot F in their own names in 1960. Consistent with the laws at that time, they built themselves a cabin close to the river, and subsequently transferred the title to that lot and cabin to a plumbing company of which they were sole owners. Three years later in 1963, the Murrs' parents purchased Lot E, which they kept in their own name. They did not build anything on the property, but instead held it for investment purposes.¹⁹

The two lots share a common topography. Each lot has a low portion near the river, and another flat portion located above a 130-foot bluff. The top and bottom portions of both lots are suitable for construction. Nonetheless, since their combined buildable area is about 0.98 acres of net project area, taken together, they constitute a substandard lot under the Wisconsin ordinance.²⁰

The two lots remained under separate ownership, and thus could have allowed for the construction of two houses under the 1976 ordinance, until the Murrs' parents transferred Lot F to their children in 1994. In 1995, one year after transferring Lot F, they transferred Lot E to their children, which automatically triggered the merger feature of the Wisconsin ordinance.²¹ The conveyances were made even though the Murrs were on notice that the property in question was "subject to easements, covenants, restrictions and declarations of record," including the merger restrictions created under the

¹⁹ *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, at *1 (Wis. Ct. App. Dec. 23, 2014).

²⁰ *Id.*

²¹ *Id.*

Wisconsin ordinance.²² The entire controversy could have been avoided, however, if the Murr children had transferred title to Lot E to a wholly owned corporation to which the merger doctrine would not have applied.

After the various transfers, the Murrs had serious flooding difficulties with the cabin built on the lower portion of Lot F, which they sought in vain to fix. At the same time, they asked for a variance from the ordinance to allow them to carry through with the original plan to sell Lot E, which had been held for investment purposes.²³ That request was denied by the local zoning board, and its decision was affirmed by an earlier decision of the Wisconsin Court of Appeals.²⁴ At that point, the Murrs were confronted with a set of unpalatable alternatives. They could sell Lot E with the right to build, but only if they destroyed the cabin on Lot F. They could repair the cabin on Lot F, but only if they agreed never to build, or let their successors build, on Lot E. They could move their cabin on Lot F to higher land, but only if they razed their cabin on the lower part of the Lot F, while remaining unable to build on Lot E. What they could not do was to build on both lots in the same manner as two separate owners could have done.

Frustrated by this limited menu of choices, the Murrs brought a constitutional challenge to the Wisconsin ordinance, which was rejected by the Wisconsin Court of Appeals.²⁵ The court did not address the state interest in passing this ordinance, but concentrated its attention exclusively on whether the regulation constituted a

²² Brief in Opposition to Petition for Writ of Certiorari at 4, *Murr v. State*, No. 15-214 (U.S. Oct. 16, 2015), available at <http://www.scotusblog.com/wp-content/uploads/2015/11/Murr-opposition-to-PWC.pdf>.

²³ *Id.* at 9.

²⁴ *Murr v. St. Croix County Bd. of Adjustment*, 796 N.W.2d 837, 840 (Wis. Ct. App. 2011).

²⁵ *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, at *8 (Wis. Ct. App. 2014).

taking under the test derived from *Penn Central Transportation Co. v. City of New York*.²⁶ Under the current analysis there is a threshold question: Does a regulation that diminishes the value of a discrete piece of property leave the owner able to make some economic use of the property? If so, then no taking is found, no matter how great the diminution in value.²⁷ In *Murr*, this inquiry naturally raised the question of whether Lots E and F should be characterized as a single unit: If the parcel was one tract, the Murrs' ability to build a single cabin somewhere on the premises meant that the regulation did not constitute a compensable taking of any portion of the merged lots. Conversely, treating Lots E and F separately would result in one of the properties becoming worthless due to the ability to build only one structure. The court elected to treat the parcel as a whole, and proceeded to reason that unless the level of diminution of the entire property reached a certain level, nothing else mattered at all, including the nature of the state interest in imposing the restriction.²⁸ Hence all losses in value from land-use restrictions were outside the scope of judicial review under the takings clause, unless that (unidentified) limit was reached.

In reaching this conclusion, the Wisconsin Intermediate Court relied heavily on earlier decisions of the Wisconsin Supreme Court, which in turn relied on the usual set of United States Supreme Court takings cases: *Pennsylvania Coal v. Mahon*,²⁹ *Euclid v. Ambler Realty*

²⁶ 438 U.S. 104 (1978).

²⁷ The leading case for this point is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (holding that regulation works a taking only when it denies an owner all economically viable use of land).

²⁸ *Murr*, 2014 WL 7271581, at *4, *6.

²⁹ 260 U.S. 393 (1922).

Co.,³⁰ *Penn Central*, *Loretto v. Teleprompter Manhattan CATV Corp.*,³¹ and *Lucas v. South Carolina Coastal Council*.³²

B. THE DENOMINATOR PROBLEM

Putting the parcel-as-a-whole rule in play in *Murr* raises the question of how to conceptualize Lots E and F. If the two parcels are treated separately, the total restriction on development of Lot E would count as a total taking for which full compensation, equal to the fair market value of the asset, would be owed; after all, the new ordinance prevented development of Lot E for any purpose given the presence of the cabin on Lot F. But if the two lots are treated as a single unit, as was the case under the merger ordinance, then the ability to build on one would leave the Murrs with sufficient rights such that they would receive no compensation for a restriction that cut their development rights in half. In the Supreme Court parlance developed after *Penn Central*, this problem is commonly called the denominator question. As noted in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³³ "[b]ecause [the] test for regulatory taking requires [a court] to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" ³⁴

³⁰ 272 U.S. 365 (1926).

³¹ 458 U.S. 419 (1982).

³² 505 U.S. 1003 (1992).

³³ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

³⁴ *Id.* at 497 (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)). See also John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994) (noting the difficulty of determining the correct scope of the "denominator" against which the loss should be measured).

This intellectual journey toward the denominator problem began with Justice William Brennan's pronouncement in *Penn Central* that the proper analysis started with the "parcel" itself:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole — here, the city tax block designated as the "landmark site."³⁵

By treating the single parcel as the relevant unit, it was easy for the *Penn Central* Court to conclude that the loss of air rights above Penn Central Station, standing alone, could not be treated as a complete wipeout when the petitioner retained the ability to operate at ground level. Subsequently, Justice John Paul Stevens explained in *Keystone*

Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."³⁶

In *Keystone*, Justice Stevens simply concluded that a statutory requirement that coal companies leave some 27 million tons of coal in place to support the interests of surface owners did not constitute a taking of that coal because those tons "do not constitute a separate

³⁵ *Penn Central*, 438 U.S. at 130-31.

³⁶ *Keystone*, 480 U.S. at 497 (quoting Michelman, *supra* note 34, at 1192).

segment of property for takings law purposes.”³⁷ In so doing, he necessarily departed from the earlier decision of Justice Oliver Wendell Holmes in *Pennsylvania Coal*, which made no mention of the denominator problem in assessing analogous facts, but simply concluded that “[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”³⁸ Justice Stevens ignored this passage and thus spared himself the need to explain why the basic test for regulatory takings should predicate the availability of comparison upon the ratio between what was taken and what was left behind. He had no occasion to ask how “the parcel” should be defined. Nor did he consider the possibility of police-power justifications that might have been raised in *Murr*.

The denominator issue raised in *Keystone* has often surfaced in the lower courts, none of whose decisions were discussed by the Supreme Court in *Murr*. These cases have uniformly recognized the importance of the inquiry without giving any definitive guidance on how to resolve it. Thus, in *Lost Tree Village Corp. v. United States*,³⁹ the Federal Circuit endorsed the banal proposition that “[t]he relevant parcel determination is a question of law based on underlying facts.”⁴⁰ With those words, the court then upheld a decision of the trial court which had allowed the Army Corps of Engineers to deny Lost Tree a permit to fill in 4.99 acres of wetlands, which it deemed was part of a larger parcel consisting of two “distinct legal parcels” that were “undoubtedly contiguous.”⁴¹ Accordingly, it denied any

³⁷ *Id.* at 498.

³⁸ *Penn. Coal*, 260 U.S. at 414.

³⁹ *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286 (Fed. Cir. 2013).

⁴⁰ *Id.* at 1292.

⁴¹ *Id.* at 1291.

relief when it was shown that the diminution in value of the combined plots was “approximately 58.4%.”⁴²

Similarly in *Bevan v. Brandon Township*,⁴³ the Michigan Supreme Court held that separate but “contiguous lots under the same ownership are to be considered as a whole.”⁴⁴ Hence the court refused compensation to the owner of a combined lakefront parcel who had been denied a permit to build two houses on his off-road lot. The lot consisted of two separate parcels that had been acquired by the plaintiff at different times under separate deeds before the current zoning ordinance had been put into place. The only access to these two plots was through an easement that was just twenty feet wide, when the applicable ordinance required a roadway of sixty-six feet in width to service multiple units. The lower courts had found a taking when no possible construction was allowed on one of the two plots, after noting that the twenty-foot easement was sufficient to allow fire-fighting and other emergency equipment to go through. In dealing with the appeal, the Michigan Supreme Court disputed the determination of the lower courts that this easement was wide enough to accommodate the provision of any needed emergency services, stating that the individual property owner bore the burden of proof of this issue.⁴⁵ Ultimately, “[b]ecause the access regulation in question serves a legitimate governmental interest and does not deny the owners [all] economically viable use of their land, [the court] conclude[d] that enforcement does not effect an unconstitutional taking of plaintiffs’ property.”⁴⁶ Left unexplained, however, was how the easement – apparently wide enough to allow

⁴² *Id.*

⁴³ *Bevan v. Brandon Twp.*, 475 N.W.2d 37 (Mich. 1991).

⁴⁴ *Id.* at 43.

⁴⁵ *Id.* at 44.

⁴⁶ *Id.* at 39.

emergency equipment access to serve one house—was not sufficiently wide to allow it to service two. *Bevan* thus involved the interaction of both the denominator question and the state’s police-power justification. In *Murr*, the Supreme Court never addressed that second issue, given that the threshold question of diminution in value was resolved against the Murrs.

Finally, on the opposite side of the coin is *Palm Beach Isles Associates v. United States*,⁴⁷ yet another dredge-and-fill case. The Federal Circuit held that “[c]ombining [] two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified,” thus reversing the trial court.⁴⁸ It is instructive that in this instance the court relied on the important 1994 Federal Circuit decision in *Loveladies Harbor, Inc. v. United States*,⁴⁹ which incorporated into its account of regulatory-takings law the proposition that one of the elements that made compensation appropriate was whether a property interest had vested which, as a matter of state property law, was “not within the power of the state to regulate under common law nuisance doctrine.”⁵⁰ In this formulation at least, the diminution-of-value

⁴⁷ *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000).

⁴⁸ *Id.* at 1381.

⁴⁹ *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

⁵⁰ *Id.* at 1179. The full statement of the court’s position on takings reads:

- a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.
- b) With regard to the interest alleged to be taken, there has been a regulatory taking if
 - (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
 - (2) the property owner had distinct investment-backed expectations; and

question does not set a threshold that has to be crossed before other issues—namely the legitimacy of the state’s action—are considered.

A similar result was reached in *Department of Transportation, Division of Administration v. Jirik*,⁵¹ where the Florida Supreme Court stated that “we believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence.”⁵² *Jirik* involved access from a private plot of land to a public road. A newly built retaining wall blocked access to one of three lots that had previously been subject to unitary private ownership, rendering it worthless for construction. In assessing whether the obstruction constituted a taking, the court never asked whether the lot could have been sold for a positive sum to the owner of the neighboring plot of land so as to give it some residual economic value. And once again, the state offered no police power justification for its restriction, such as that advanced in *Bevan*. Rather, the court treated each lot as a discrete unit for the takings analysis.

C. REASONABLE INVESTMENT-BACKED EXPECTATIONS: *PENN CENTRAL* TO *MURR*

As should be evident from the previous discussion, the “parcel-as-a-whole” test formed only a part of the conceptual framework for regulatory takings first set up in the *Penn Central* decision and then modified by Justice Kennedy in *Murr*. It is important to trace the development and transformation of this elusive test. *Penn Central*’s fuller account of regulatory takings does not treat the diminution-of-

(3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

⁵¹ Dep’t of Transp., Div. of Admin. v. Jirik, 498 So. 2d 1253 (Fla. 1986).

⁵² *Id.* at 1257.

value question as an isolated threshold issue. Instead, it joins that inquiry with two other key issues—the property owner’s investment-backed expectations and the state’s justification for its actions—for a more holistic balancing test. Thus, Justice Brennan wrote:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.⁵³

The first puzzle about *Penn Central* is why it imported into takings law the wholly extra-textual term “investment-backed expectations”; Justice Brennan’s sole motivation for its adoption was to degrade the independent status of the air rights located above the terminal. He therefore wrote that the landmark-preservation law

does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to

⁵³ *Penn Central*, 438 U.S. at 124 (internal citations and quotation marks omitted).

profit from the Terminal but also to obtain a “reasonable return” on its investment.⁵⁴

Note his odd use of the passive voice “must be regarded,” without any explanation of why or by whom. The opinion certainly gave no reason why Penn Central would not treat those air rights as an essential component of value for the asset as a whole, thus raising the question then of whose expectations are relevant to this analysis. Of course, the primary expectations referred to in *Penn Central* matter, but so do secondary ones, which are always included in setting the value of property for all market transactions between private parties.

In writing down those air rights to zero via the “reasonable return” test, Brennan incorporated the rate-of-return standard applicable to public utilities into the regulatory-takings area.⁵⁵ In so doing, he made two key errors. First, he shifted the just-compensation measure from the *fair market value* of the asset that is taken, to one that rests exclusively on the *original cost basis*, even for assets that are known to have appreciated in value. But this rule is wholly inconsistent with any standard technique of valuation, which takes into account *all* of the positive features of any given asset. Brennan thus could not explain what should have been done if the air rights had been sold off to a third party before the landmark statute had been put into place, for then their new owner’s sole expectation of value would come solely from the development of air rights that were deemed worthless by this truncated analysis. In addition, Brennan did not explain what should be done to value any asset that is currently not in use, including of course the vacant Lot E in *Murr*, whose entire value rests in its expected future use. If we take

⁵⁴ *Penn Central*, 438 U.S. at 136.

⁵⁵ For a discussion of the various permutations of common-carrier rate regulation, see *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

the investment-backed-expectations test seriously, the point should count strongly in favor of the Murrs, given that Lot E was acquired solely for investment purposes in 1962. Yet that point just disappeared from view in *Murr* given the Supreme Court's preoccupation with the denominator question.

The same analysis applies to the second element of the *Penn Central* test, namely the strength of the government's interest in blocking the development of Lot E as a single-family home. That state power is at its high point whenever the private owner wishes to engage in conduct that counts as a nuisance at common law, for it is hard to imagine any reason why the government could not, as an agent for its aggrieved citizens, enjoin conduct that the citizens themselves are entitled to enjoin. Given the diffuse nature of the harm in public-nuisance cases, it is possible to advance a simple yet compelling transaction-costs justification for direct government regulation. No single person has the incentive to bear the full costs of litigation from which he or she could only expect to receive a tiny fraction of the benefit. But at the same time, the transaction costs of coordinating actions by hundreds, thousands, or even millions of claimants into a single coherent force are prohibitive. The state therefore takes over the task, raising tax revenues for the purpose of controlling harmful actions on behalf of its citizens.

This rationale for government intervention consequently does not carry over to behaviors that do not rise to the level of common law nuisances. Yet one of the features built into *Penn Central* from the get-go was the insistence that the common law of nuisance did not set the outer limits on state power to impose uncompensated restrictions on the conduct of private parties—a result that Justice Kennedy's opinion in *Murr* fully endorsed: "Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the

common law of nuisance might otherwise permit," without explaining why.⁵⁶

In large part, the rejection of the nuisance test, first in *Penn Central* and its progeny, and then in *Murr*, was accomplished by belittling the common-law tests for nuisances as conceptually incoherent.⁵⁷ Thus, in *Lucas*, Justice Blackmun wrote:

There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly "objective" or "value free." Once one abandons the level of generality of *sic utere tuo ut alienum non laedas*, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.⁵⁸

I regard these remarks on the linguistic use of the term "nuisance" as a misguided, uninformed, and unwarranted attack on a body of law that has far more coherence than Justice Blackmun attributes to it, and I have offered a detailed analysis of the subject to explain how that body of law goes far to maximize the value of the land subject to its control.⁵⁹ More generally, I deplore the constant

⁵⁶ *Murr*, 2017 WL 2694699, at *12 (internal quotations omitted) (quoting *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)).

⁵⁷ Richard. A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

⁵⁸ *Lucas*, 505 U.S. at 1055 (Blackmun, J., dissenting); see also *id.* at 1061 (Stevens, J., dissenting).

⁵⁹ See Richard. A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979).

judicial efforts to expand the scope of judicial deference by insisting on the conceptual incoherence of traditional doctrinal terms, all while confidently asserting the conceptual clarity of their own positions.⁶⁰

A second explanation for the shift away from the nuisance-control standard is that judges came to regard requiring compensation for imposing land-use controls as an intolerable intrusion on the good judgment of local governments in dealing with such hot-button topics as aesthetic regulation, height restrictions, population density, blight control, antigrowth ordinances, affirmative-action mandates, and of course landmark-preservation statutes.

That basic deferential approach was settled at the latest in the 1954 decision of *Berman v. Parker*,⁶¹ where the Supreme Court, speaking through Justice William Douglas, upheld a huge urban renewal project under the police power by insisting that “[a]n attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.”⁶² It then concluded that strong deference was required to allow these urban-renewal projects intended to remove blight from neighborhoods.

No matter how courts analyze the state’s interest in regulatory takings cases, it is only when we add the remaining investment-backed expectations into the mix that it is possible to understand the role of the parcel-as-a-whole doctrine. As to the former, it was clear

⁶⁰ See generally Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J. L. & PUB. POL’Y 583 (2016); see also *id.* 616-617 (discussing the law of nuisance).

⁶¹ 348 U.S. 26 (1954).

⁶² *Id.* For criticism, see Richard A. Epstein, *Public Use in a Post-Kelo World*, 17 SUP. CT. ECON. REV. 151, 167-71 (2009).

that the Murrs at all times had the primary expectation that Lot E was held for investment. Indeed, the Murrs could have avoided the application of the parcel-as-a-whole doctrine by following the simple expedient of keeping the title to the two parcels in separate legal entities at all relevant times. There is nothing that the government could have done to stop them from so doing. The initial question is thus: Why should state power be at its zenith because of that elementary procedural oversight? The state took the position that, “[c]ontrary to what Petitioners suggest, it was their own acts, not the conduct of the County or State, which caused their property to be subjected to the applicable land-use regulations.”⁶³ Justice Kennedy echoed the same theme when he wrote that the decision of the Murrs to put the two plots under the same ownership was “voluntary,” without pausing to consider whether their fundamental mistake as to the state of the law undermined that confident characterization.⁶⁴ Surely, it deserved at least some mention that conveyance only had its calamitous consequences because the Wisconsin ordinance operated as a trap for the unwary. It is perfectly clear that no well-advised parties would ever do what the Murrs did under the same circumstances. Deciding this case in their favor therefore does not open up the world to manipulative behavior, for no person who understands the legal framework would gratuitously choose to expose himself to that high level of risk.

In dealing with this question, Justice Kennedy at no point asks the simple question whether the environmental risks that come from someone building on that second part of plan are greater because the

⁶³ Brief in Opposition to Petition for Writ of Certiorari at 4, *Murr v. Wisconsin*, 136 S. Ct. 890 (2016) (No. 15-214).

⁶⁴ *Murr*, 2017 WL 2694699, at *14 (“Petitioners’ land was subject to this regulatory burden, moreover, only because of voluntary conduct in bringing the lots under common ownership after the regulations were enacted.”).

two lots were merged by operation of state law. To that question, the answer is clearly no. At this point, Justice Kennedy's stated concern with the "fragile" nature of the local environment drops out because, given all the other substantive restrictions that are in place, the environmental issues are no greater here than they are under the alternative scenario where the conveyancing niceties had been observed.

Nonetheless, the stage is now set for the application of the reasonable-expectations tests in *Murr*. In dealing with this issue, Justice Kennedy starts with the position that he has taken elsewhere, namely that bright-line rules do not capture the inherent complexity in the situation. In dealing with the commerce clause, for example, he has written that it is a mistake to approach the constitutional challenge by "defining by semantic or formalistic categories those activities that were commerce and those that were not."⁶⁵ This statement is an illustration of supposed intellectual sophistication that turns every boundary question into a multi-factored balancing test, which is of course useless for anyone who has to decide what actions that Congress can lawfully undertake.

Kennedy adopted the same unfortunate approach in *Rapanos v. United States*,⁶⁶ where, as the decisive fifth vote,⁶⁷ he insisted that a facts-and-circumstances test to establish some "significant nexus" was needed to decide whether wetlands located some eleven to twenty miles from the Rapanos land qualified as "waters of the United States" – understood as a synonym for navigable waters – which could not be filled without a government permit.⁶⁸ The net

⁶⁵ *United States v. Lopez*, 514 U.S. 549, 569 (Kennedy, J., concurring). For my criticism, see Epstein, *supra* note 60, 39 HARV. J. L. & PUB. POL'Y at 615–17.

⁶⁶ 547 U.S. 715 (2008).

⁶⁷ See *id.* at 758 (Kennedy, J., concurring in the judgment).

⁶⁸ See 33 U. S. C. § 1362(7)

effect of this statutory *tour de force* has been to concede virtually full power to the Army Corps of Engineers to decide when to issue permits, and when not. The resulting legal quagmire has added immense confusion to the permitting process, without doing any good for anyone.⁶⁹

Unfortunately, the same disdain for clear tests carries over to the takings area, where Justice Kennedy's *Murr* opinion puts his legal ingenuity into intellectual overdrive, and embellishes on Justice Brennan's dalliance with investment-backed expectations. He begins clearly enough by noting that the challenge of regulatory takings law is to "reconcile two competing objectives."⁷⁰ The first is "the individual's right to retain the interests and exercise the freedoms at a core of private property ownership."⁷¹ The second is "the government's well established power to adjust rights for the public good."⁷² At this point one would hope that he would explain why the traditional tests of nuisance law failed to properly make those needed adjustments. Instead, he returns to his favorite theme of the need for "flexibility" by listing the factors that he regards as relevant in this case.

These constitute a laundry list of considerations relevant to determining the denominator in a regulatory takings case:

⁶⁹ See Lawrence Hurley, "Supreme Court's Murky Clean Water Ruling Created Legal Quagmire," N.Y. TIMES, Feb. 7, 2011 ("Attorneys representing all interested parties say lower court judges, regulators, the business community and individual landowners continue to suffer as a result of the confusion sown by the justices whose main job is to provide clarity in the law."). It was the Kennedy vote in a 4-1-4 split that was decisive.

⁷⁰ *Murr*, 2017 WL 2694699, at *8.

⁷¹ *Id.*

⁷² *Id.* at *9 (internal citation and quotation marks omitted).

As the foregoing discussion makes clear, no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors. These include the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land. The endeavor should 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. The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition.⁷³

What is odd about this list in the first instance is that it never addresses the actual expectations of the landowners in question – the Murrs. They expected to hold the property for investment purposes, which could only be achieved if its development were possible by a potential buyer of the property. Those expectations were based on the state of the law for real estate at the time of the initial purchase, and the expectations were necessarily constant over the entire period in which title was held in various forms by various members of the Murr family. This rewriting of expectations is not too far off from the tactic that Justice Brennan had deployed in *Penn Central*, where he insisted that Penn Central's main expectation was the economic yield from the terminal's operations, and not from some future and uncertain sale of its air rights, all of which were fully vested under New York law. On this view, the Murrs have a stronger case because from start to finish their *only* expectation for lot E was to hold it for investment purposes, an expectation that was completely shattered after the merger took place under Wisconsin law.

⁷³ *Id.* at *11.

It is also the case that little can be gleaned from looking at the status of the land under state and local law. Justice Kennedy tries to have it both ways when he writes, first, that “[a] valid takings claim will not evaporate just because a purchaser took title after the law was enacted,”⁷⁴ and second, that “[a]reasonable restriction that predates a landowner’s acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property.”⁷⁵ On the one hand, yes; on the other hand, no. Once again, everything is relevant, but nothing is decisive. After all, some fraction of these expectations were formed in response to the adoption of the ordinance. But surely part of these same expectations were formed with reference to the engrained practice that the title records determine what counts as a separate parcel (as they did in fact in *Penn Central*), and that the transfer of Lot E to the Murrs individually did nothing to change the boundaries of either of the two parcels (lots) involved in this case.

In this connection, it is instructive to see the confusion a group of law professors, writing as *amici curiae* on behalf of Wisconsin, sowed in seeking to downgrade this element by putting a wedge between public and private law.

State property definitions and corresponding boundary lines – and in particular, surface/horizontal lot lines – reflect historical practices serving technical, and administrative purposes that are unrelated to the purposes of protecting investment expectations or assuring justice and fairness.⁷⁶

⁷⁴ *Id.* at *11.

⁷⁵ *Id.*

⁷⁶ Brief of Property Law Professors as Amici Curiae in Support of Respondents at 4, *Murr v. Wisconsin*, 136 S.Ct. 890 (2016) (No. 15-214), <http://www.scotusblog.com/wp-content/uploads/2016/06/15-214-bsac-Property-Law-Professors.pdf>.

Yet how can that possibly be so? The need to determine precise boundary line conditions is necessary for anyone who wants to buy or mortgage any property, and the uncertainties associated with their delineation cause major declines in real estate values.⁷⁷ Those exact same questions are as critical for valuations made in the context of admitted government takings as they are in any private context. Indeed, if the law puts a wedge between the standards of valuation for public and private purposes, it necessarily becomes unclear in this case and thousands of other cases that do not go to litigation, exactly how those differences should cash out. What, for example, should be done if the title to Lot E referenced one person not on the title to Lot F? Is the substantial overlap enough, or is complete overlap required in future cases? There are no answers here, and people are entitled to more certainty than the flexible answer Justice Kennedy provides. Private buyers of property care about the regulatory risk as they do about all other factors that impact property values. It is impossible to protect expectations when these basic norms are systematically flouted. And it is hard to see how massive levels of *ad hocery* advance any conception of fairness and justice.

On this point, therefore, the Chief Justice is surely correct to conclude that following record title is far better because, ironically, it is the only approach that can stabilize expectations as to the denominator of the regulatory-takings formula—whose overall merits I examine in the second portion of this paper. As Chief Justice Roberts explains:

Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. By securing such *established*

⁷⁷ Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 (3) J. POL. ECON. 426–67 (2011).

property rights, the Takings Clause protects individuals from being forced to bear the full weight of actions that should be borne by the public at large. The majority's new, malleable definition of "private property" – adopted solely "for purposes of th[e] takings inquiry," – undermines that protection.⁷⁸

To put this point in its simplest form, one vice of the Kennedy formulation is that it undermines the "settled expectations" on which any system of property rights depends. However, what the Chief Justice does not ask is whether, and if so how, the entire regulatory-takings framework of *Penn Central* is reconcilable with the Taking Clause's purpose of protecting property rights. As the second part of this article explains, whatever reasons the Chief Justice has for disliking the ad hoc judgments on the question of what is the proper parcel apply with equal force to the use of the *Penn Central* balancing test that he accepts?⁷⁹

For all the attention paid to the Murrs' putative expectations, it is striking that neither Justice Kennedy nor Chief Justice Roberts ventured to examine the strength of Wisconsin's interest, another *Penn Central* factor. That point is most unfortunate in this context, because it is hard to see any state justification for the ordinance. Clearly, an ordinary cabin on Lot E is no more a nuisance than the cabin already on Lot F, or indeed for any cabin along the St. Croix River. The only way that Wisconsin could prevail on this factor is to show a need to control some unidentified soft externalities that might compromise the unique character of the river.⁸⁰ But that rationale

⁷⁸ *Murr*, 2017 WL 2694699, at *17 (Roberts, C.J., dissenting) (citation omitted).

⁷⁹ See *id.* at *18 (Roberts, C.J., dissenting).

⁸⁰ See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) 497 (discussing soft externalities); RICHARD A. EPSTEIN,

fails as well. Wisconsin can point to no serious aesthetic or historical concern that would have justified preventing construction of a cabin on Lot E had the land been held by a separate legal entity. Rather, the state's position is based on the *location of the title* rather than the actual *use* of the land. If there are no adverse effects when the two parcels are legally separate, then there are similarly no dangers if the plots are combined. Part B of the St. Croix County ordinance requires that all construction meet the applicable rules on sanitation and zoning, which is sufficient to protect against any and all serious externalities.⁸¹ So the question is this: Why are the state's environmental concerns, however broadly conceived, enhanced simply because Lots E and F had once been in common hands? The chain of title gives no information whatsoever about environmental impacts, all of which are better addressed by alternative means such as case-specific inquiries into the external effects of proposed projects. Thus, the two key components of the *Penn Central* balancing test in regulatory takings cases point to treating the Wisconsin ordinance as imposing a total wipeout on Lot E, which should be fully compensated.

Justice Kennedy's many confusions in *Murr* all stem in large measure from his failure to address a critical ambiguity in the meaning of the term "reasonable expectations." His opinion stresses a meaning of the term which asks whether the property owner will make a *prediction* of whether the state will in fact at some time impose these restrictions. But this test has deep perverse consequences. Knowledge becomes surrender. The more knowledge that the landowner has of the long-time ambitions of the state, the greater his exposure to the regulation.

MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE 227 (2000) (applying the concept to the medical context).

⁸¹ ST. CROIX COUNTY, WIS., CODE OF ORDINANCES ch. 17.36(B) (2007).

Descriptively, there are factors within factors. The treatment of land under state and local law can involve a detailed history of the evolution of the pattern of regulation over many years, which happened in *Murr*. In this particular case, the prediction is a certainty. Once the law is in place, he knows that he will lose. Of course, if the Murrs knew that, they would have avoided the decision to take Lot E out of the corporate entity. Either way, of course, they will know something about the prospective value of the plot in question, but at this point the argument becomes circular. If the landowner thinks that the regulation will not stick, he will value it as a parcel capable of development. If he thinks the regulation will be struck down, then he will set the value of that unit at a far lower level, equal to its residual value as a side lot to Lot F. If he thinks that the lot lines should really matter, he should gain some advantage. If he fears that the state will disregard lot lines, that factor cuts the other way. Nor do the physical characteristics of the lot supply any useful information. The two are adjacent to each other, and one characteristic of Lot E is that it is capable of development as is Lot F. Another is that it retains some modest value if left undeveloped.

To Justice Kennedy, the case becomes easy because the state law was clear at the time of the key transfer of Lot E out of the corporate form, where it had a long common border with the other land. But what is instructive about his ad hoc application of this test is that he never asks what it does to revise the treatment in *any* of the earlier cases that have opined on the “denominator question.” There is, therefore, the real possibility that *Murr* will lead to uniform judicial deference to state administrative action across the board. That is what we should expected, given that his entire conception of reasonable expectations is wrenched out of its correct *normative* context. Justice Kennedy thus repeats the same intellectual mistakes that he made when he constantly invoked the phrase “reasonable expectations” in his 1992 concurrence in *Lucas v. South Carolina*

Coastal Commission,⁸² in which he labored under the false impression that the constant repetition of this elusive phrase could give it some much needed clarity.

In fact, that exact opposite is true. The great value of the phrase “reasonable expectations” is that it lends some precision to a coordination game in which two parties each have to figure out what actions that they should take conditional on the other party making the parallel calculation. The way the exercise works is to make sure that both parties take actions that mesh together so that at the end of the day the value of the entitlements of both parties are maximized even in the absence of some contract between them.

To give one simple example, a rule followed by both parties on the street that each will drive on the right side of the road will allow them both to behave in ways that avoids collision and thus improves their joint position. The alternative rule that each party drive on the left has the same desirable impact. What is excluded is a situation where one party drives on the right and the other drives on the left at which point collisions can abound. In those cases, where it is uncertain whether the correct equilibrium is left/left or right/right, a look to background expectations should be able to identify which of the two eligible pairings offers the stable equilibrium. In this model, of course, we want people to drive in reliance on the preferred equilibrium, because traffic will become an unholy jumble if half the parties drive on the left and half on the right. And oftentimes we take the customary practice and elevate it to a rule in order to reduce the likelihood of noncompliance.

⁸² 505 U.S. 1003, 1032 (1992) (Kennedy, J., concurring in the judgment). I critiqued his analysis there in Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993). For a discussion of the parallel problem in connection with reasonable expectations for searches and seizures under the Fourth Amendment, see Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L. REV. 1199 (2009).

As a *predictive* matter, of course, we can be confident that some persons at some time will make the mistake. But it hardly follows that having the gloomy prediction come true excuses that party from responsibility for the error in question. What it does do is to create, as under the doctrine of the last clear chance, the obligation to react to a breach of the norm provided it has become apparent.⁸³ In all legal systems, the initial entitlements generate strong obligations, even if the prediction is that someone will violate the norm. Equally strong is the duty to mitigate once the transgression is made clear, but with this caveat: the innocent party has to act in good faith, but cannot be held responsible if an honest and reasonable choice does not extricate either or both parties from the dilemma.

It should be clear that the predictive account offered by Justice Kennedy has no application to the normative inquiry of how best to optimize the use of the common resource. It should thus be equally clear why the term “reasonable (investment-backed) expectations” does not appear in the Takings Clause, which pertains to the protection of private property. The correct answer to this coordination game is that the government should pay when it takes property for a public use. When development rights are stripped from the owner’s rights bundle without compensation, that answer is rejected.

II. *MURR* AS A MATTER OF FIRST PRINCIPLE

A. TODAY’S CONCEPTUAL CONFUSIONS

This Part of the Article asks the second of our two questions: how *Murr* should have been decided as a matter of first principle. In this regard, there is something obviously jarring about a rule that allows

⁸³ See RESTATEMENT (SECOND) TORTS, §§ 479,480 (1966).

a land-use regulation to impair sixty, seventy, or eighty percent of the value of any given piece of property without compensation. First, there is no obvious tipping point along that continuum where compensation is suddenly required. Yet no matter where that point is put, the law creates an indefensible discontinuity. Let the amount of value destroyed by the land use restriction be one percent less than some undefined X , and nothing is owed. Let it be X , and full value is now owed. Where should X be located, and why, are obvious questions that have not been answered under *Penn Central*, which offers no theoretical framework to address the issue. Nothing that is said in either of the two primary opinions in *Murr* shows the faintest awareness of the difficulties in the underlying doctrine, nor of the social importance of the basic issue.

Nor, in theory, is there any reason why this discontinuity should be tolerated in the first place, because the same rationales for the robust just-compensation requirement in the physical-takings context carry over to the regulatory-takings arena. The just compensation requirement of the takings clause was designed as an intermediate position between two unpalatable extremes: at the one end, the government could take property without any compensation, at which point individual property owners would be subject to the abuses of a dominant majority faction. At the other end, the property could be taken only with the express consent of the property owner, at which point the holdout problem would become insurmountable. Each owner along the path of a proposed highway, for example, could hold out for some fraction of the social gain that the road generated. As multiple parties engage in the same conduct, the project will be stillborn, and many important social improvements will never take place. The intermediate position lets the government take the property, but not at the price of zero. The original owner is not left worse off, and the just compensation requirement then forces the state to carefully consider whether it is worth appropriating funds for the project in question. A simple compensation requirement thus prevents abuse at one end of the takings equation

while inducing responsible behavior on the other. *That* is a sensible way to create reasonable, investment-backed expectations.

These rationales developed in the context of physical-takings cases carry over with undiminished force to regulatory ones. Thus, the development rights in *Euclid*, the air rights in *Penn Central*, the mineral rights in *Pennsylvania Coal*, and the materialmen's liens in *Armstrong v. United States*⁸⁴ are subject to huge political forces if they can be taken without just compensation, leading to the same kind of indefensible overreach that prompted the adoption of the takings clause in the first place. The compromise here allows the government to have its way on matters pertaining to public use, but not to wipe out private holdings when it abstains from taking, either in whole or in part, physical possession of property whose value it nonetheless destroys in part. To show that these takings are justified requires evidence that the public gains exceed the private losses. Yet without a compensation requirement, that showing can rarely be made, thus demonstrating that the aggressive application of the regulatory-takings doctrine is necessarily contrary to any sound system of social welfare.

There is ample reason, therefore, to start over, and that means taking a hard look at the supposed constitutional distinction, entrenched by volumes of precedent, between permanent physical takings and regulatory takings. The former, which are governed by *Loretto*, involve situations where the state either enters into the property of private owners or authorizes private individuals to enter for their own benefit. It is now settled, for example, that easements allowing either the government or private parties to walk across the land of another count as physical takings.⁸⁵ Under the *Loretto* rule,

⁸⁴ *Armstrong v. United States*, 364 U.S. 40, 47 (1960).

⁸⁵ See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) ("We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are

such physical takings require compensation. In contrast, regulatory takings leave a property owner in exclusive possession of his land, but subject him to restrictions, often quite severe, on the traditional powers of use and disposition.⁸⁶ The availability of compensation is subject to an *ad hoc* balancing test under *Penn Central*, which typically finds that the property's lost value is non-compensable when the parcel as a whole retains some degree of economic value.

In announcing this test in *Penn Central*, Justice Brennan did not offer any reason why takings law should offer no independent protection to the divided interests—such as air rights—within a single parcel when it is undisputed that one of the prime missions of state property law is to encourage the creation of such divided interests in order to maximize the productive value of any given parcel of land. It is for just that reason that state law recognizes not only the creation of air and mineral rights, but also divisions of real property into life estates and remainders, mortgages and equity interests, leases and reversions, use and development rights, and servitudes (covering both easements and restrictive covenants) over the property of another.⁸⁷ It is no mere coincidence that the

given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”).

⁸⁶ *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979):

The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

⁸⁷ See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (2000) (showing unification). See also Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928 (1988) (defending the

difficulties that have emerged in takings law arise precisely because of the failure of modern takings law to track the private law's formulation of these well-established forms of property interests.

That gap has fatal consequences for the political economy of takings. In all private transactions, any neighbors that trespass or infringe upon any property right of a neighbor can be enjoined or required to pay full compensation. In the public law established by *Penn Central*, however, those same neighbors can use majority rule to intrude upon others by persuading local governments, where they hold disproportionate influence, to take that same interest by regulation—at least if it is not a physical interest within the meaning of *Loretto*. But that purported boundary between the physical and the regulatory quickly gives rise to the art of circumvention by clever draftsmanship, because it is clear from *Loretto* that some physical invasions are allowed notwithstanding the ostensible per se rule requiring compensation in such cases. Thus the Court held, without explanation, that prohibiting installations of cable equipment unless just compensation was paid “in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building.”⁸⁸ The obvious explanation lies in the health and safety justifications—the police power, once again—that are available in these cases, but not when a cable company wants for its own benefit to place its box on a landlord's roof.

It is critical to note, however, that these safety-based rationales are not available for rent-control and antidiscrimination laws, also mentioned in *Loretto*. In those cases, the sole purpose of the law is to

unified conception); Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. 1353 (1982).

⁸⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

create a wealth transfer from existing landlords to current or prospective tenants. Yet it defies any rational explanation to claim that these bodies of law do not involve the state authorization of one group's entry into, and permanent occupation of, the private property of another group. After all, the central purpose of rent-control laws is to authorize a tenant to remain in possession of property at a state-determined rental after the expiration of a lease, and the major purpose of the antidiscrimination laws is to remove the landlord's right to exclude tenants to whom he does not wish to surrender possession. Let us assume that there is some public use in putting particular tenants where they are not, for whatever reason, welcome. It is still the case that these forced entries should be subject to the per se compensation requirement under *Loretto*. Under any rent control or stabilization scheme, the rent that is required from the unwelcome tenant is a down payment on that obligation, which the state is then required to top off until the landlord receives compensation that leaves him at least as well off as he was before the regulatory imposition. Under the antidiscrimination laws, the measure of damages is the loss in value attributable to the substitution of a less desirable tenant for a more desirable tenant. It is quite clear that the per se rule that protects against physical takings should be far more extensive than Justice Thurgood Marshall suggested in *Loretto*. It is equally clear that all the movement in the case law has gone in the opposite direction, given the strong political support in many circles for both rent-control and antidiscrimination laws. It has narrowed the class of physical takings and expanded the scope of the balancing test under *Penn Central*.

The key point of that transformation is as follows. When a taking is treated as a physical taking, the correct measure of damages is the fair market value of the estate lost, wholly without reference to the

amount of property that is retained. Thus, in *United States v. Causby*,⁸⁹ distinguished in *Penn Central*, the United States organized direct invasions of the plaintiff's property that was located under the flight path of incoming planes. In measuring the compensation owed for the loss of the air rights, Justice William O. Douglas stated that "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."⁹⁰ The hard question is why this rule should not be applied across the board, to physical and regulatory takings alike.

B. THE CHIEF JUSTICE ROBERTS ON STRATEGIC BEHAVIOR

This question is one that has already confronted the Chief Justice, who in *Horn v. Department of Agriculture*⁹¹ had insisted that the distinction between physical and regulatory takings was embedded in Supreme Court case law, without probing the reasons behind the distinction.⁹² Yet in this case the Chief Justice felt compelled to explain why he thought that a per se rule was appropriate for the definition of "the" parcel, but not for the ultimate determination of whether compensation was owed once the regulation was put in place. At multiple points in his opinion, the Chief Justice insisted that the balancing test was developed in "response to the risk that owners will strategically pluck one strand from their bundle of property

⁸⁹ *United States v. Causby*, 328 U.S. 256 (1946).

⁹⁰ *Id.* at 261. Where there are either incidental benefits or costs from taking only part of a given property it gives rise to complex valuation issue, not present in *Murr*, on how to modify the basic formula. See generally *United States v. Miller*, 317 U.S. 369 (1943).

⁹¹ 135 S. Ct. 2419 (2015).

⁹² *Id.* at 2428: "But that distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends." For my critique of that decision, see Richard A. Epstein, *The Unfinished Business of Horne v. Department of Agriculture*, 10 N.Y.U. J. Law & Lib. 734 (2017).

rights – such as the air rights at issue in *Penn Central* – and claim a complete taking based on that strand alone.”⁹³ He added, “[The Court] rejected the strategic splitting of property rights in *Penn Central*, and courts could do the same if faced with an attempt to create a takings-specific definition of ‘private property.’”⁹⁴

The initial response to the Chief Justice is there was no risk of strategic behavior by the landowner in either *Penn Central* or *Murr*. In *Penn Central* the landowner had always planned to develop the air rights; in *Murr* the same was true with respect to Lot E. Neither property owner “plucked” one right out of the entire bundle of rights for special protection. Both just wanted to preserve the rights that they had before their respective regulations went into place.

Unfortunately, Roberts’ myopic view of property rights leads him to misunderstand the risk of strategic behavior in connection with air rights, or indeed, mortgages, reversions or any other property interest. The only reason why this so-called problem of strategic behavior arises is because the Supreme Court has insisted on using the denominator test in dealing with restrictions on use, even though it rejects that approach in physical occupation cases. But at no point has the Court offered an explanation as to why that distinction should have any traction. Thus, suppose the Court applied the same test that Justice Douglas applied to the overflight easement – namely, applying what is lost, not what is gained. At this point, there is zero risk of strategic behavior in any regulatory takings situation. At no point in time is there any action that any property owner can take that will lead to a divergence between private and social cost. At all points in time, the government has to pay the fair market value of the property taken, which it will do only if the

⁹³ *Murr*, 2017 WL 2694699, at *20 (Roberts, C.J., dissenting).

⁹⁴ *Id.*

political branches of government conclude that the property is worth more than the price accurately set by the takings law. Those private rights were not some arbitrary assemblage of rights that had no market value.

In *Penn Central*, for example, the air rights in that case were not plucked out from some arbitrary bundle of rights; the air rights were a recognized property interest under New York law that could be sold, mortgaged, and leased just like any other property interest. In a private market, these rights will be transferred in some way from the owner of the fee simple only if the gains from trade exceed the costs of organizing and enforcing the transaction.

Given this simple relationship, where is the opportunity for private strategic behavior if the government is required to pay just compensation for the interest that it chooses to take, either by occupation or by restriction? The only way in which private owners can increase the compensation owed to them is to increase the value of their private holdings through appropriate market transactions, which is, of course, precisely what the social interest demands. In *Penn Central*, the owners did not sell the air rights because they thought that they had greater value when attached to the land below. The unified ownership essentially eliminated the costs of having to negotiate a set of support easements between strangers. Hence this issue of strategic behavior did not arise at all in that case, which makes clear that the rationale offered by the Chief Justice is an *ex post* rationalization that fails to justify the balancing test which he favors.

The same argument, moreover, applies to any and all other partial interests in property. The divisions take place when they increase net value, at which point the compensation paid should increase to ensure that the value of the property taken for public use has greater value in the hands of the state than it had in private hands.

But the situation is indeed worse than this. Under *Penn Central*, the opportunities for strategic behavior *by the government* are now vastly increased, for there are now manifold ways in which

governments can take actions where private and social costs diverge. The basic formula is that the takings that do not go “too far” are left uncompensated, while those that do go too far are fully compensated. Thus, the dominant, and socially perverse, government incentive is to stop just short of that undefined line so that it can gain rights, often in the form of restrictive covenants, for a price of zero.

To see how this works, return again to the air rights in *Penn Central*. Assume first that the government has two options for taking those air rights. The first of these is to announce that it will take them so that it would have the right to build some structure. At this point, the government would be engaging in a physical taking under *Loretto* such that full compensation would be owed. If the gain to the government from that approach is 100 and the losses to the private owner are 150, the government, if under an obligation to pay full compensation, will decline to take action. But now suppose that the government backs off the original plan, and only imposes a restriction on the ability of the landowner to build on those air rights but does not seek to develop the air rights itself. The loss to the *Penn Central* owner remains at 150, because it still cannot use those rights. If the benefit to the government from this secondary approach is 90, then the social losses will increase by 10 from 50 to 60. Yet the compensation owed by the government from its strategic decision to scale back its demands will remain precisely zero under *Penn Central*. The government compensates nothing for a social loss of 60—a classic form of strategic behavior.

The takings calculations only become more convoluted if one asks what should be done in *Penn Central* if it turns out that the terminal itself can only be operated at a loss, but the property, as a whole, has positive value if it can exercise those air rights. In this case, does the *Penn Central* case require compensation, and if so, how much? If no compensation is owed, then the government will again claim too much. But if compensation is owed, then, again, the government has every incentive to engage in strategic behavior.

Instead of condemning all the air rights, it might decide to condemn only some of them if it can escape the obligation to compensate for any loss if it merely scales down its claim. But the social losses still remain if the value of the air rights taken is worth less to the government than to the owner. And, of course, the situation only gets more bizarre where the *Penn Central* analysis applies to *undeveloped* land, where it is still not clear under *Penn Central* what is owed. In all these cases, the standard formula—you pay for what the owner loses—avoids all of these problems and forces the government to engage in honest valuations. The mistaken premise of the Chief Justice’s analysis is that it treats the problem of strategic behavior by private parties as something that the takings law has to counter. In practice, it is the government who gets all of the options of how to take or to regulate. The risk of strategic behavior is, therefore, all on government side of the ledger. The *Penn Central* rule that he embraces only makes the entire situation far worse.

C. A FRESH START

It seems clear that both the majority and the dissent in *Murr* have badly muffed the conceptual challenge when they treat the combination of the “too far” test in *Mahon* and the balancing test of *Penn Central* as an accurate statement of the law. Neither of these two tests has *any* textual foundation in the takings clause, and together they systematically encourage the government to impose regulations with public benefits that are less than the private costs imposed on the landowner.

It is important, therefore, to start over. To do so, it is essential to unpack the various factors that are larded into the modern takings tests. Disaggregation of the takings problem into its constituent elements is the key to developing a unified approach that treats occupation, regulation, and all combinations of the two as part of a unified theory. In past work, I have identified four key questions that

have to be tackled, in sequence, in connection with the Takings Clause, all of which have been referred to above:⁹⁵

First, has there been a taking of private property?

Second, if so, is it justified under the police power so that no compensation need be paid?

Third, if not, has the taking been for a public use?

Fourth, if so, has just compensation, be it in cash or in-kind, been provided?

In dealing with the first of these questions, the phrase “private property” bears no connection to the Supreme Court’s favorite expression, “investment-backed expectations,” which is, of course, plucked from thin air. Rather, the term private property has a long and powerful lineage. The term chosen in the Fifth Amendment is perfectly general. It is not limited to land or to any other specific form of property, such as chattels, water rights, air rights, or intellectual property. As the Chief Justice properly noted in his dissent, “[o]ur decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them.”⁹⁶ It protects those interests as defined under state law from government taking. Partial interests in property are protected as much as outright ownership. The size of the takings may be smaller,

⁹⁵ See Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 5 (1987).

⁹⁶ *Murr*, 2017 WL 2694699, at *17 (Roberts, C.J., dissenting). For further support, see e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits”).

and the compensation owing may be less given the smaller size of the interest taken.

Prima facie, the just-compensation requirement attaches to all forms of property taken. But there are further complications, as a separate and independent inquiry looks to police power justifications of health and safety, and in this regard the connection between the law of nuisance and the law of takings is powerful, notwithstanding Justice Kennedy's refusal to see that it imposes a critical limitation on government power. The conceptual underpinnings of this branch of law have become thoroughly confused because of the failure, most notably in *Berman v. Parker*,⁹⁷ to distinguish between the police power and public use under the Fifth Amendment. Thus, in *Berman*, compensation was offered for taking down a building that in itself was neither ugly nor blighted, simply because it was located in an urban renewal district. But precisely because it was *not* a nuisance, Berman's suit was to enjoin condemnation when compensation *was* offered, not to enjoin it when it was not. The court nonetheless found that the state's aesthetic interests fell within the police power, even though earlier cases rejected that line on the ground that private parties cannot bring actions for nuisance on these grounds. Thus, *State v. Brown*⁹⁸ invalidated a statute that required fencing or screening to keep from public view junk yards, trash, refuse or garbage. More modern cases tend to take a broader view but the construction of an ordinary, even elegant, riverfront house is miles away from those rules intended to regulate eyesores.⁹⁹ The slightly broader definition of the police power, however, does not make the tests for the police power converge with the public-use requirements,

⁹⁷ *Berman v. Parker*, 348 U.S. 26 (1954).

⁹⁸ *State v. Brown*, 108 S.E.2d 74 (1959).

⁹⁹ See *Aesthetic Purposes in the Use of the Police Power*, 1960 DUKE L.J. 299 (1960) (commenting on *Brown*).

for surely the state needs a more powerful justification to take property without compensation than to take the property with it. If the law of nuisance does not establish that boundary, what does?

Neither Justice Kennedy nor Chief Justice Roberts offers any considered answer to this challenge. Nor do they recognize that the resort to the nuisance law has this enormous social advantage: it avoids political arbitrage between the judicial and legislative branches. By tying government power to a well-established branch of private law, the state can act on behalf of its citizens only when they cannot act on their own behalf. There is therefore no strategic advantage in seeking to use legislative power, as the only reasons that justify public action without compensation are those that justify private action without compensation. Hence the sole determinant of whether to rely on public or private enforcement of various public and private rights is the relative efficiency of the two systems in protecting those same set of rights. In general, private enforcement will work well for discrete harms directed against particular individuals. Public enforcement works better when diffuse injuries, often from multiple sources, harm large numbers of parties. But there is no way in which the shift in enforcement can expand the permissible grounds for coercive intervention and its attendant risks of majoritarian overreach.

At this point, the next stage of the nuisance – or police power – inquiry is the same in both public and private law: Does the relief sought fit the injury suffered? In general, the principle of proportionality requires a court to balance the equities in all cases, so as to minimize the errors of over- and under-enforcement. For these purposes, it is often the case that the correct set of remedies starts with injunctive relief and then uses damages to clean up the residual harms that are not enjoined. The use of these mixed remedies will in general work better than a complete injunction, which can go too far, especially when crafted so that it does not tolerate background risks. This mixed approach also works better than the total denial of any injunctive relief that in turn permits the wholesale destruction of the

interests of innocent parties when it is difficult to value the consequential losses that flow from massive property destruction. In short, tying the use of police power to the private law's nuisance framework offers both a necessary limit on majoritarian impulses and a viable mechanism for assessing the proper scope of the government's remedial actions.

Third, if the police-power justifications are not available, then the taking in question must be for "public use." Under the Supreme Court decision in *Hawaii Housing Authority v. Midkiff*,¹⁰⁰ that term has been unduly expanded to allow for virtually any "conceivable" social benefit to count as a public use,¹⁰¹ including the transfers of given parcels of land from one private person to another. But even if those direct transfers are ruled out, the public-use requirement does not require that the government take ownership of what is taken. It is quite sufficient to let private parties own property so long as it is in some sense open to the public, as is the case with common carriers and public utilities, which commonly exercise the condemnation power.¹⁰² In addition, the public-use requirement is surely fulfilled in cases like *Penn Central*, where the preservation of views along Park Avenue could be enjoyed by the public at large. Similarly, the environmental benefits posited by the Wisconsin ordinance in *Murr* also satisfy the public-use requirement, so there are no difficulties here. Indeed, Supreme Court cases have rightly extended the public-use requirement to cover genuine bilateral-monopoly holdout cases, for otherwise a single well-situated property owner could undermine the functions of the takings clause by blocking the

¹⁰⁰ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁰¹ *Id.* at 242 ("Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause").

¹⁰² See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

assembly of larger property units by demanding an extortionate price for a trivial asset.¹⁰³ However, note that even under this broader definition, the Court's decision in *Kelo v. City of New London*¹⁰⁴ was incorrect given that the property condemned was neither for use by the government nor necessary to overcome a holdout problem in assembling land for some licit government project.¹⁰⁵ This issue is not in play in these regulatory-takings cases.

Finally, where the taking is for a public use, because injunctive relief is not available under the police power, the taking of any interest in private property has to be compensated. In those situations where a single party, or a small group of parties, is singled out for special treatment, the compensation must be in cash so that they receive "'just compensation' [that is the] full equivalent [of] the property taken."¹⁰⁶ This metric does *not* include "any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated."¹⁰⁷ That last qualification is strictly necessary because there is no reason why the party who contributes property to the public should not share equally in the public gains from the project. If those social gains were an offset against compensation, he would be left worse off than every other member of the public. In addition, the valuation questions inherent in measuring these diffuse social benefits would impose

¹⁰³ See, e.g., *Clark v. Nash*, 198 U.S. 361 (1905) (allowing condemnation of a right of way to allow plaintiff to access to a stream of water needed for irrigation); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (permitting condemnation of aerial buckets to carry ore over defendant's property).

¹⁰⁴ *Kelo v. City of New London*, 545 U.S. 489 (2005).

¹⁰⁵ See ILYA SOMIN, *THE GRASPING HAND: "KELO V. CITY OF NEW LONDON" AND THE LIMITS OF EMINENT DOMAIN* (2015) (discussing the case).

¹⁰⁶ *Monongahela Navigation Co. v United States*, 148 U.S. 312, 326 (1893).

¹⁰⁷ *Id.*

heavy and unnecessary burdens through the operation of the condemnation system in every case of a targeted acquisition.

The overall analysis, however, becomes more difficult when a comprehensive regulation impacts large numbers of persons at the same time. At this point, the key insight follows from Justice Holmes's famous remark in *Mahon* that compensation is not needed when the regulation in question secures "an average reciprocity of advantage" among all the relevant players.¹⁰⁸ To make the theoretical point more explicit, each comprehensive regulation imposes burdens and benefits on the same parties. The burdens in question are the limitation in the occupation, use, or disposition of various forms of property, all of which count as takings which are *prima facie* compensable. The benefits of these regulations inure to the same parties who are subject to the burdens, and thus count as implicit (and inseparable) in-kind compensation that satisfies the demands of the just-compensation requirement of the Fifth Amendment. In these cases, so long as there are no negative spillovers to third parties, there is every reason to believe that the uniform imposition of both benefits and burdens will produce a net benefit for each party within this closed system, and therefore no cash compensation is required. Typically, it is difficult to make direct valuations of the interests that are taken under these general laws, so the useful proxy is to allow such laws to go forward so long as they do not have a disproportionate impact on one group of affected parties relative to another. But in those cases where a disproportionate impact on the affected parties is detected, then an explicit cash compensation is required from public funds to make up

¹⁰⁸ Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

the shortfall, leaving open the question of whether these funds should be raised by a special assessment or from general revenues.¹⁰⁹

D. THE *PENN CENTRAL* LINE OF CASES RECONSIDERED

The decisive advantage of the alternative approach sketched out here is that it does not have the *ad hoc* quality that is found in the *Penn Central* version of takings law, and it makes easy those cases that otherwise seem difficult. The only issues on which factual disputes can arise are empirical questions on the valuation of property interest taken and on the choice of remedy against actual or imminent nuisances, which are unavoidable in any cases. But on the conceptual issues the results are both clear and unambiguous. The strength of these claims becomes clear by going back over all of the cases that were discussed above, as well as several others that figured in the articulation of the *Penn Central* standard.

Start with *Penn Central* itself. The property taken, as protected under state law, was the air rights. Justice Brennan points to the promotion of the general welfare, but that should count only on the question of public use; it does nothing to create a credible police power claim under the nuisance law, unless every building above a certain height counts as a nuisance. The blocking of the views of others by using one's air rights is not a nuisance any more than their blocking a latecomer's views with their own prior structure is a nuisance. The basic structure of nuisance does not allow any person to get a strategic advantage over others by building either early or late, which is why the "coming to the nuisance" doctrine does not allow a party that creates a nuisance to claim prescription against a

¹⁰⁹ For discussion of the many variations, see Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUDIES 201 (1983).

neighbor that builds at a subsequent time.¹¹⁰ Public use is of course no issue. Moving to the compensation issue, there is no average reciprocity of advantage to supply in-kind compensation, for even if other sites are designated as landmarks, those benefits inure to the public generally and not to Penn Central's owners. Nonetheless, the just-compensation problem under this landmark-preservation scheme does raise important complications, given that one part of the landmark preservation package came in the form of air rights over other properties, whose value could be substantial. The correct way to treat these in-kind benefits is as an offset against the compensation owed. But there is no reason to presume conclusively that the rights received as the perfect equivalent of the air rights surrendered, a proposition supported by the "full equivalent" principle of *Monongahela Navigation Co. v United States*.¹¹¹ Instead, the correct way to proceed in these cases is to avoid these knotty valuation questions by requiring the compensation be paid in cash, so that the air rights in question can then be accurately valued in an arm's length transaction with third parties. Putting it all together, the case is easy: the correct result in *Penn Central* is for the government to purchase the air rights at market value, obviating all the complications that have been introduced under current law. Politically, it is an open question whether the government would have been prepared to

¹¹⁰ See RESTATEMENT (SECOND) TORTS, § 840(C)-(D). For one influential statement of the rule, see also *Sturges v. Bridgman*, 11 Ch. D. 872 (1879) (allowing an injunction after a short delay to let defendant remove his equipment). The key to understanding the doctrine involves the tolling of the statute of limitations. Thus, when the initial party creates a nuisance that harms no one, the injunction is not available at that time. But in order to guard against the creation of a prescriptive easement, the statute of limitations is tolled until the actual conflict emerges. This set of rules maximizes wealth over all relevant periods of time. For a more extended discussion, see RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD 202-06 (1998).

¹¹¹ *Monongahela Navigation Co.*, 148 U.S. at 326.

collect the revenues needed to block construction of a tower, given that the views up Park Avenue were already blocked by the preexisting Pan Am building. But the appropriate lesson to learn is that the just-compensation clause has its greatest value in *preventing* government actions that should *not* take place to begin with.

It is also clear from this analysis that Justice Brennan played fast and loose with the key case of *Armstrong*, in which Justice Hugo Black closed his opinion with this correct categorical statement: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar 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."¹¹²

The facts of *Armstrong* put bones on the basic proposition. The plaintiffs were subcontractors who held materialmen's liens against boats owned by the United States on which they had performed repair work. These liens were valid because the general contractor had neither paid for the work done, nor obtained lien waivers. Any private boat owner would have to satisfy these liens. The United States, however, chose to sail its boats into international waters, effectively dissolving the liens. Justice Black noted that as the naval boats supplied protection to the public at large, the public should have to pay for the work rather than foisting a disproportionate burden on the government's hapless subcontractors. There was obviously no question of police-power justification, public use, or just compensation to compensate the inquiry. All that was needed was a judgment that a lien is an interest in private property, even though it does not become possessory until foreclosure. Justice Brennan protested in *Penn Central* that the courts could not develop

¹¹² *Armstrong*, 364 U.S. at 49.

any principled account as to when to apply this rule. But the exact opposite is true. The taking of the air rights over Grand Central Terminal was for public benefit, and should have been caught by the same rule given that the police power, public use, and just compensation questions were easy to resolve.

The same approach allows for a rational reexamination of all the earlier cases that Justice Brennan used to justify his *Penn Central* approach. On this view, it is clear that the decision in *Euclid, v. Ambler*, which I have discussed at length on other occasions,¹¹³ is the source of much of this mischief. The decision to take a compact 68-acre plot of land with good access to markets by railroad and highway, and divide it into three parallel plots of lands for both manufacturing and different zones for single-family and multi-family residences is the height of folly. The resulting reduction in value of about seventy-five percent was not offset by any identifiable gains to outsiders, which reveals the allocative losses of a regulatory-takings regime. Indeed, the arbitrarily mandated usage divisions within a once-coherent plot of land create externalities where none existed; the plot's single owner had every incentive to make sure that the uses over the entire plot were compatible with each other, given that he would internalize the harms of any self-inflicted nuisances in the form of lower sale prices. Justice George Sutherland sought to justify zoning in general by talking about the need for health and safety for children on public streets, without once relating those abstract concerns to the particular scheme in question. Nor at any point in time did he go through the four separate questions, which lead to the inexorable conclusion that, without payment of

¹¹³ See, e.g., RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS* 117 (Oxford 2008).

compensation, this particular zoning scheme fails, even if other zoning schemes might succeed.

The test of success for these zoning schemes comes from the application of this basic framework, given that some zoning ordinances could function as nuisance-prevention devices or supply needed in-kind compensation. The point is illustrated by two schemes that Justice Brennan discusses in *Penn Central*. *Gorieb v. Fox*,¹¹⁴ decided by Justice Sutherland one year after his decision in *Euclid*, involved a local setback ordinance for each city block, which prevented any new construction in residential areas from taking place closer to the street than the overall setback levels of current housing. Gorieb applied for a permit to build a brick store building next to his own home, and wished to locate it closer to the street in violation of the pre-established setback line. The restriction in question counts as a *prima facie* taking, for which compensation is owed equal to the loss in value of the property if no police power justification or in-kind compensation exists. In this case, both the police-power and the in-kind compensation doctrines are in play. The safety features of the setback do matter because of the residential area, and it is always an open question whether the uniform setback line improves the value of all properties along the street from the *ex ante* perspective, which, if found, establishes Holmes's average reciprocity of advantage. In this spirit, Justice Sutherland accepted the contention of the city council that

front yards afford room for lawns and trees, keep the dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing

¹¹⁴ *Gorieb v. Fox*, 274 U.S. 603 (1927).

a greater distance between houses on opposite sides of the street, reduce the fire hazard; that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles.¹¹⁵

But he does not estimate the safety benefits, which are hard to determine, given that other neighborhoods may have no setbacks at all. In this case, a helpful benchmark would be the setbacks that are imposed by developers as part of a planned unit development, and if these setbacks fall within that range, there is a strong reason to uphold them on a joint rationale: there is both a health and safety purpose, and a high level of in-kind compensation. But the hard question is whether this issue is so obvious, as Sutherland insists, that there is no reason to take evidence on the question, or whether matters are sufficiently complex that some more specific evidence gathered on remand might help put the matter in perspective. I think that this case is close—certainly far closer than *Penn Central*—but I would be inclined to ask courts to take a closer look before signing off on the regulations. In other contexts, that closer look might easily lead to a different result, if for example the setback line for new housing were located further from the public streets than for preexisting homes.

A similar analysis applies to a case on which *Gorieb* relied, *Welch v. Swasey*,¹¹⁶ in which Justice Rufus Peckham upheld for a unanimous Supreme Court a Massachusetts statute that specified, first, a general height limitation of 125 feet above street grade for all buildings, but which was subject to a broad exception that allowed local

¹¹⁵ *Id.* at 609.

¹¹⁶ *Welch v. Swasey*, 214 U.S. 91 (1909).

commissioners in Boston (and elsewhere) to designate by commission a lower limit of 80 to 100 feet over large parts of the city (except for some commercial districts). It was conceded – too quickly in my view – that the general height limitation was constitutional, but the Court determined that the selective reduction in certain Boston areas was both unreasonable and arbitrary. The decision did not discuss the question of whether a property interest had been taken, but the answer to that question is surely in the affirmative: the *ad coelum* rule, even in its most limited formulation, cedes to the owner of the soil the right to all air space over which he can exercise “effective possession.”¹¹⁷ The case therefore turns on the question of whether there is either a police-power justification for the limitation, or some implicit in-kind compensation for the surface owner. In *Welch*, Justice Peckham chose not to address this question de novo, but instead showed enormous deference to the Massachusetts Supreme Judicial Court, which given its knowledge of the facts on the ground was, although not conclusive, entitled to “the very greatest respect,”¹¹⁸ a form of deference that was not invoked in Justice Peckham’s earlier decision to strike down a state maximum-hours law in *Lochner v. New York*.¹¹⁹

That deference mattered in *Welch*. The property owner’s argument was that the ordinance in question was passed solely for aesthetic purposes, and thus did not meet the health and safety objectives required by the police power justification for takings.

¹¹⁷ *Swetland v. Curtiss Airports Corp.*, 41 F.2d 929, 937 (N.D. Ohio 1930). For a general discussion of the difficulties of the transition, see Eric R. Claeys, *On the Use and Abuse of Overflight Column Doctrine*, 2 BRIGHAM-KANNER PROP. RIGHTS CONF. J. 61 (2013). In my view, the implicit in-kind compensation doctrine applies to upper airspace even if it does not apply to the overflights in *Causby*. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 49-51 (1985).

¹¹⁸ *Welch*, 214 U.S. at 106-08.

¹¹⁹ *Lochner v. New York*, 198 U.S. 45 (1905).

Justice Peckham's response was that this statute could serve both aesthetic and safety concerns, and hence was saved under the police power because of the second of its two motivations. Most notably, the Massachusetts court had spoken of the "risk of falling walls in the case of fire."¹²⁰ At this point, the obvious question is why the statute tolerated higher buildings in dense commercial areas, where these fire risks are, if anything, greater. The limp response to the point was:

It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that in this limited commercial area the high buildings are generally of fireproof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women or children are found there in the daytime and very few people sleep there at night.¹²¹

At this point, Justice Peckham concedes that the Court is "not familiar" with the facts, but then shows no interest in learning what they might be. Why not when it helps to develop a record? Think of some variations. It is surely easy to argue that the higher density commercial districts pose greater dangers than sparsely populated residential areas, and that it is easy to deal with most of these risks by requiring tall buildings in noncommercial areas to meet the same safety and construction standards as those which are located

¹²⁰ *Welch*, 214 U.S. at 107.

¹²¹ *Id.*

elsewhere, and perhaps by special assessment to pay for any additional fire protection needed in the given area.

Justice Peckham also made a passing reference to the fact that the ordinance was passed with a view towards advancing the “comfort [and] convenience” of the citizenry,¹²² which is an oblique way of making the argument that there is in-kind compensation shared by the plaintiff. But again, the disproportionate impact is evident if the scheme is measured at the time that the statute is enacted, for only this landowner was targeted. If all plots of land increased in value, then the compensation requirement is satisfied. If not, so that some persons win and some lose, it is a hard question whether the difficulties in calculating losses are so pervasive that it is better to let the inequity run than to try to correct it. As a general matter, the less likely overall social gain, the more likely that some compensation will be required, but it is difficult to generalize.¹²³

That difficulty does not arise in all height cases, so, even if *Welch* is accepted as good law, cases like *Haas v. City and County of San Francisco*¹²⁴ reveal the critical necessity of properly defining the police power. This case was decided shortly after *Penn Central* when the abuses of selective land use restrictions were at their height. At issue was a decision by San Francisco to downzone a lot such that its owner could not build a high-rise structure similar to those that surrounded it “on the ground that the project would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood.”¹²⁵ The downzoning had taken place

¹²² *Id.* at 106.

¹²³ See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447 (1882) (imperative necessity excludes the need for compensation in case where the enormous system-wide gains excused small losses that were hard to isolate or value).

¹²⁴ *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979).

¹²⁵ *Id.* at 1119.

after Haas had obtained a final permit to construct an apartment complex up to 300 feet in height. The local Russian Hill Improvement Association raised an environmental challenge to the permit, which was then revoked, after which the City Planning Commission adopted a 40-foot height limitation applicable to Haas's project, reducing the value of his property from about \$2,000,000 to \$100,000. That ordinance had no effect on the surrounding properties that were already built at a higher level. No matter, by this time aesthetic justifications were recognized as part of the police power, so there was no need to conduct a charade on safety to sustain the ordinance. Judge Shirley Hufstедler paid lip service to the view that excessively onerous regulations could be struck down, but held that this principle did not apply in this case because the regulation was general in form and did not single out Haas for special treatment, even though it was well known that "Haas appears to have suffered a disproportionate impact because no other affected landowner has as large a parcel of undeveloped land as does Haas."¹²⁶ Judge Hufstедler should have added that everyone in government knew of that exact imbalance so the outcome was not an incidental byproduct of some general improvement or environmental scheme, but rather a conscious and focused effort to force a huge wealth transfer to existing owners from Haas. A simple rule that requires the planning commission to treat latecomers on the same terms as early arrivals would go a long way towards stopping the abuse, which is now institutionalized under the flawed *Penn Central* approach. Does anyone believe that these same neighbors would have paid \$1,900,000 in compensation to Haas to procure the supposed social benefits of halting construction? Or doubt that the seeds of the

¹²⁶ *Id.* at 1121.

current housing shortage in San Francisco have their origins in the *Penn Central* doctrine?¹²⁷

The same defects that corrupt the takings analysis in land-use-regulation cases also carry over to the takings of mineral rights in both *Pennsylvania Coal* and *Keystone*. In both cases, the loss of mineral rights, coupled with any increased costs in operating the respective mines, is the result of the taking of the support estate that lies between the surface owner and the miner. There is no need to frame the inquiry as if the dispositive question is whether this regulation goes “too far” — questions of degree should always be avoided in making binary determinations about *whether* compensation should be paid, in contrast to *how much* compensation is owed.¹²⁸ Instead, the relevant point here is that there is no police-power justification because the surface owners had consented to the subsidence risk when they purchased their properties, and there is no threat to third parties who are protected under the nuisance law against subsidence of their lands should that happen to occur. The public-use requirement is also satisfied, given that the broad group of surface

¹²⁷ See, e.g., Matt Weinberger, *This is Why San Francisco's Insane Housing Market Has Hit the Crisis Point*, BUSINESS INSIDER, June 15, 2016, <http://www.businessinsider.com/san-francisco-housing-crisis-history-2016-6/#san-francisco-is-the-second-densest-city-in-the-us-after-new-york-city-with-about-18451-people-per-square-mile-packed-into-about-47-square-miles-1>. The full explanation of the situation is very complex because the increased demand for housing is coupled with all sorts of restrictions on supply, as applied to both new construction and rent-controlled units. Higher prices in response to the change in demand are welcome; those in response to supply constriction are not. For an illustration of how the rational-basis test allows for affordable-housing mandates that reduce supply, see *California Building Industry Association v. City of San Jose*, 351 P.3d 974 (Cal. 2015). For a generally glum assessment of the California real-estate market, see Richard A. Epstein, *California's Needless Housing Crisis*, HOOVER DEFINING IDEAS, (November 21, 2016), <http://www.hoover.org/research/californias-needless-housing-crisis>.

¹²⁸ See Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On Sharp Boundaries and Continuous Distributions*, 78 BROOK. L. REV. 589 (2013).

owners is not in a position to bargain for itself. But the statutory schemes in both cases founder because there is neither cash nor in-kind compensation for the loss of the mineral estate.

Similarly, the situation in *Causby* is easy enough. The loss of the easement to overflight is the taking of a property right even under current law. There is no police-power justification because the surface owners are just victims of the nuisances created by overflights authorized by the government. And, under *Monongahela*, the owners do not get special compensation from the general availability of aviation services that are equally enjoyed by the public at large. Hence in-kind compensation is not properly supplied for their losses.

Penn Central also cited the Court's 1962 decision in *Goldblatt v. Town of Hempstead, N.Y.*¹²⁹ without bothering to comment on its interesting facts. There, the town had passed an ordinance that regulating dredging and pit excavation on any property within town limits. The plaintiffs claimed that the ordinance prevented them from continuing with their business of mining sand and gravel on their property, which they had started in 1927. They thus argued that the regulation constituted a taking without due process under the Fourteenth Amendment. The more accurate account of the case is that the loss of excavation rights was a taking of a traditional incident of property, namely a *profit a prendre*.¹³⁰ Deny that incident and all mineral rights are worthless. The case itself did not turn on any purported distinction between physical and regulatory takings. Instead the town defended itself on the ground that the ordinance

¹²⁹ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

¹³⁰ A *profit a prendre* enables a person to take part of the soil or product of land that someone else owns. It is a right to take from the land, as in the mining of minerals and is therefore distinguishable from an easement, which is a nonpossessory interest in land generally giving a person a right of way on the property of another." THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Profit+a+prendre>.

constituted a valid exercise of the police power. The grounds for the police power claim rested on the fact that the excavation had created a man-made lake that covered 20 acres of property to a depth of 25 feet.¹³¹ In the interim, population centers had moved closer to the defendant's property.

The key question here is whether this regulation is necessary to protect the health and safety of the community. Hempstead did not allege any risk of flooding or subsistence. The most that it could claim was the possibility that the lake would operate as an attractive nuisance—for which a strong fence should be sufficient protection, as is the case for other attractive nuisances. At this point, the Court, speaking through Justice Tom Clark, undertook a meandering discussion that failed to identify the particular harm against which the ordinance was intended to guard, let alone offer an explanation as to whether the total prohibition was excessive relative to any risk posed. Instead, Justice Clark lamely concluded that there was not enough evidence in the record to make an independent determination on the merits. He therefore upheld the ordinance on the worst of all possible grounds, by noting that the landowner bore the burden of proof on the question of "reasonableness."¹³² The private-law rule is of course the opposite; the parties who seek to impose restrictions on another's use of his land bear the burden of proof on the choice of ends and means. The best that can be said for the decision is that it isolates the police-power question from the other issues in takings cases. But at the very least the case should have been remanded to decide the impact of the ordinance both on the operations of the landowner and its purported public benefit. But the last thing that the case shows is the need to further a dubious

¹³¹ *Id.* at 591.

¹³² *Id.* at 596.

takings analysis by moving to some diffuse *Penn Central* standard. The traditional account of the police power works well and points in favor of the invalidation of this ordinance unless compensation for the loss of the mining rights is provided.

The next of the cases cited by Brennan, *United States v. Central Eureka Mining Co.*,¹³³ involved Eureka's challenge to a 1942 order of the War Production Board that shut down the operation of all nonessential gold mines after other measures intended to limit the labor and the machinery used in the mine had failed to reduce output. The opinion of Justice Harold Burton first anticipated *Penn Central* when it stated "that the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them."¹³⁴ Thereafter he concluded that "[t]he mere fact that [the Limitation Order] L-208 was in the form of an express prohibition of the *operation* of the mines, rather than a prohibition of the use of the scarce equipment in the mines, did not convert the order into a 'taking' of a right to operate the mines."¹³⁵

Once again it is helpful to examine the facts of the case in light of the four questions set out above. On the first point, the limitation of the development rights is a temporary taking of property. Although the language in *Loretto* stressed the word "permanent"¹³⁶ (with respect to a cable box that was doubtless obsolete in a short time), Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego*¹³⁷ correctly observed that "[t]he fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.'

¹³³ *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958).

¹³⁴ *Id.* at 165–66.

¹³⁵ *Id.* at 166 (emphasis added).

¹³⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

¹³⁷ *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

Nothing in the Just Compensation Clause suggests that ‘takings’ must be permanent and irrevocable.”¹³⁸ The same argument applies here. The uncertain duration of the ban on production only goes to the level of compensation owing, not the basic existence of some compensable event. The former inquiry encourages continuous distributions that are always appropriate in valuation cases. Next, there is the question of whether wartime necessity counts as a police power justification for this action, for which the correct answer is no. No one doubts that the war would not excuse the confiscation of gold from the mine to pay for the war effort; the costs of collective goods must fall upon the general public under *Armstrong*. Therefore, the decision to ban the mining to improve the lot of the public at large satisfies the public-use requirement but not the police-power test. Nor is there any compensation offered either in cash or in-kind for the restriction in question. To be sure, valuation does raise tricky questions because the temporary prohibition does mean that the gold not mined today is worthless: after all, it can still be mined once the prohibition is lifted. Hence the correct measure of damage is for the anticipated deferment, which after the war is over means a three-year delay in the utilization of the gold. There are further complications given the interim costs needed to keep the mine safe, and still other complications with possible systematic shifts in market prices. The overall level of compensation should not be that great, but there is nothing in the logic of the basic takings framework that allows the government pay nothing for the imposition of these restrictions.

The purpose of going through all these variations is to make clear just how easy a case *Murr* is once the correct framework is established. There is of course no police-power justification, nor any cash or in-kind compensation, so that the taking, evidently for a

¹³⁸ *Id.* at 657.

public use, is complete with the adoption of the regulation. The hard question is the measure of compensation for the loss of these development rights, which should be fully compensable for the duration of the restriction. The correct view here is to give the government the choice to keep the restrictions in place, at which point it has to pay full value, or to allow them to rescind the regulation, at which point the correct measure of damages is the interim loss of development rights over the period in which the restrictions were in place. Again, the only hard questions are those of valuation. The conceptual framework thus holds.

CONCLUSION

In the course of this article, I have used the occasion of yet another takings case before the Supreme Court, *Murr v. Wisconsin*, to comment on the structure of the takings law as it is, and as it ought to be. On the former count, it is quite clear that the entire structure of the modern law of physical and regulatory takings tends to fixate on the ratio of the value of property rights taken to the value of the full bundle of rights before the regulation was put into place. Once that major premise is accepted, it becomes necessary to determine the appropriate parcel over which that ratio is calculated. In *Penn Central* there was no dispute that the air rights were over the same parcel on which the station was built. In *Murr*, there was a titanic puzzle over whether two adjoining parcels of land become one when both parcels were held for a time by the same persons, even though the titles remained separate on the books. On this question, Justice Kennedy revealed his intellectual predilection to turn every situation into a hard case and hence defended a fact-and-circumstances test that is all too malleable in individual cases and gives no guidance to landowners as to which regulations can be imposed without compensation. On this point, at least, the Chief Justice's view that the deeds should control for constitutional purposes makes eminently good sense even if it would marginally increase the number of

instances in which the government has to provide compensation under the now regnant *Penn Central* test.

The larger question is why the ratio between numerator and denominator should *ever* be relevant in any regulatory takings context. What is so disappointing about *Murr* is that neither Justice Kennedy nor Chief Justice Roberts thought it necessary to explain why this ratio has any significance at all. Hence, they never addressed the question of why the standard rule in physical-takings cases—that the fair market value of the rights taken affords the correct measure of compensation—is not serviceable in the regulatory takings area. That test does not exhaust the takings analysis, for it is also critical to consider separately whether a police justification eliminates the need for any compensation or, if not, whether the taking is for a public use for which compensation is then required. Within this peculiar framework, it is a mistake to make the right of compensation for the loss of development rights under the Wisconsin ordinance turn on the technicalities of the chain of title to a particular plot. This seems a uniquely inappropriate reason to deny compensation for the loss of development rights.

Any multi-factorial analysis of *Murr* is inherently messy, and it leaves open the endless challenge of reconciling this case with a wide range of other cases that cannot decide whether two contiguous parcels held by different titles can be a collective denominator in takings cases. The second part of the analysis shows that the muddle and confusion of the current law is largely obviated by the simple proposition that, *prima facie*, the more the government takes, the more it pays.

That rule applies both to the outright taking of any given parcel of land and to the taking of a divided interest in property. In all of these cases, the shifts in what is taken do not create odd and indefensible discontinuities. To the contrary it is the only rule that controls the risk of strategic behavior by government that the Chief Justice overlooked in this treatment of the subject. In the end, the correct approach only leaves for judicial determination the valuation

questions as to the size of the loss, taking into account any return benefits that a property owner may receive when the taking is part of some comprehensive scheme. But those issues are routinely encountered in all physical-takings cases. In all instances, police-power justifications, tied closely to the law of nuisance, may be invoked, and in cases of comprehensive regulation, courts must be alert to determine whether the scheme that takes rights away also affords compensation in-kind from the parallel restrictions on others in the scheme. Under this view, the full range of divided interests, be they air rights, mineral rights, liens, covenants, or easements, are fully compensable. The untenable discontinuities under current doctrine disappear. The requirement of compensation thus forces governments to internalize the costs of their actions on individual property owners, which should lead to more efficient and responsive decisions.

In looking at *Murr*, it is deeply disappointing that at no point did either Justice Kennedy nor Chief Justice Roberts look at the incentive effects created on both private and government actors; nor did they consider the social welfare consequences of their decision. The result is that the Court has doubled down on a constitutional loser, one which unambiguously embolden governments to take private property at bargain prices by strategically regulating the use and disposition of property within their respective domains.