
ESSAY

PENN CENTRAL SQUARED: WHAT THE MANY FACTORS OF *MURR V. WISCONSIN* MEAN FOR PROPERTY FEDERALISM

MAUREEN E. BRADY[†]

In *Murr v. Wisconsin*, a five-justice majority of the Supreme Court issued another opinion undertaking the Sisyphean task of interpreting the federal Takings Clause. This time, the object of the Court’s interest was the “property” protected from confiscation; *Murr* provides a new framework for courts to use in defining that term when analyzing whether a regulation takes property without just compensation in violation of the clause.¹ Surely, the multifactor approach to this question outlined in *Murr* is unlikely to please those who have criticized the Court’s other takings decisions as “indeterminate” or “ad-hocery.”² But as this Essay explains, *Murr*’s careless treatment of the federalist structure of constitutional property law should make the decision disconcerting not just to takings obsessives, but also to all proponents of federalism and secure property rights.

The “property” problem confronted by *Murr* originates in the Court’s past precedents. To assess whether a regulatory taking has occurred, courts are asked to examine the extent to which a regulation diminishes the value of some property—the numerator—against the value of the property as a

[†] Associate Professor of Law, University of Virginia. Thanks to Jack Brady, Kate Klonick, Alexander Snowdon, James Stern, and Robert Thomas for helpful conversations during the drafting of this Essay, and special thanks to Julia Mahoney and Rich Schragger for detailed comments on an earlier draft. Rachel Gallagher provided expert last-minute research assistance. I am especially grateful to Greg Bischooping and Ben Weitz of the *University of Pennsylvania Law Review* for their edits and suggestions.

¹ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944-45 (2017). The Takings Clause provides that property shall not “be taken for public use without just compensation.” U.S. CONST. amend. V.

² See Mark Fenster, *The Stubborn Incoherence of Regulatory Takings Law*, 28 STAN. ENVTL. L. REV. 525, 528 (2009); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

whole—the denominator.³ Different units of property—a particular right or combination of rights, an individual lot, a particular legal estate, or all of an owner’s holdings—can generate vastly different denominators. A regulation that completely extinguishes the value of a single lot may barely make a dent if the relevant baseline unit is an entire development. In *Murr*, the Court issued a three-factor test for courts to use in approaching this problem.⁴ To determine the unit of property for the subsequent takings analysis, courts should, under *Murr*, examine: (1) the treatment of the property under state and local law, (2) the physical characteristics of the property, and (3) the effect of the regulation burdening one portion on the value of unregulated portions.⁵ Overall, the aim of this test is to “determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, separate tracts.”⁶ While the ruling discusses the denominator problem in terms of owners holding multiple lots, it will no doubt be used in resolving other controversies about what counts as constitutional property: for example, when an owner claims the relevant unit is a servitude held in conjunction with ownership of other property, or any property incident or set of interests that is not a full fee simple in land.⁷

At oral argument, it became clear that the Court was inclined toward this sort of multifactor test. In response, Wisconsin’s lawyer cautioned against turning the denominator analysis into “*Penn Central* squared.”⁸ This is a reference to *Penn Central Transportation Co. v. City of New York*, which famously articulated a three-part test for assessing whether a regulation takes property, giving litigants a concrete framework for asserting federal takings claims.⁹ *Penn Central* has been maligned by property scholars and the Court

³ See *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987) (noting that “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”).

⁴ The challenge of determining the underlying unit of property for the takings analysis is sometimes called the “denominator problem.” See Danaya C. Wright, *A New Time for Denominators: Toward A Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 190 (2004); see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967) (“Is it the preexisting value of the affected property, or is it the whole preexisting wealth or income of the complainant?”).

⁵ *Murr*, 137 S. Ct. at 1945. The dissent calls the test a four-factor test, including “background customs and the whole of our legal tradition” as the fourth factor. *Id.* at 1951 (Roberts, C.J., dissenting) (quoting the majority). However, the majority opinion does not apply this as a separate factor, using only the three. *Id.* at 1948-49 (majority opinion).

⁶ *Id.* at 1945.

⁷ Cf. Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 694-707 (1996) (discussing different forms of denominator problems caused by “severance” of property interests, including but not limited to owners holding multiple parcels).

⁸ See Transcript of Oral Argument at 35, 46, 48, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214) (“[T]he point is . . . there are two different questions. What is property and whether there’s been a taking.”).

⁹ 438 U.S. 104 (1978).

alike; it has been called a source of “confusion,”¹⁰ the cause of “protracted litigation and arbitrary outcomes,”¹¹ and even “disastrous.”¹² In part, that is because each of the three prongs of the *Penn Central* test has spawned its own set of confusing cases.¹³ *Murr* creates “*Penn Central* squared” by requiring courts to do a three-part analysis to calculate a variable—“property”—that is then plugged into a second, equally complex, three-part test. And to think, many lawyers entered the profession to avoid math.¹⁴

If the scholarly reaction to *Penn Central* is any guide, the three-factor test articulated in *Murr* is not likely to be well received in the coming months. Even as it was issued, the three dissenting justices noted the blurriness and unpredictability of the Court’s new factors,¹⁵ and those concerns are likely to be amplified by scholars and jurists in countless law review pages and reported decisions to come.¹⁶ However, it is important at the outset to note the significant way in which *Murr* is a more radical shift in takings law than it may at first appear. *Murr* poses a severe risk to constitutional property

¹⁰ Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1089 (1993) (“[C]onfusion only worsened in 1978 with *Penn Central Transportation Co. v. New York City*, in which the Court . . . forswore the pursuit of general principles to resolve takings cases and held that judges must instead engage in ‘essentially ad hoc, factual inquiries.’” (footnote omitted))

¹¹ See Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 605 (2014) (“*Penn Central* doctrine, with its lack of objective criteria, does not impart knowledge of the legal rights and obligations of either property owners or public officials.” (footnote omitted)).

¹² See Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON. J. WATCH 223, 226-27 (2011) (criticizing the decision because its “position was that the option to develop property, however valuable in the private market, counted for zero in eminent domain calculations so long as the underlying operations were not kept under water”).

¹³ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (describing “vexing subsidiary questions” raised by each of the *Penn Central* factors). The three factors of the test are (1) the character of the government action, (2) the extent of the diminution in value, and (3) the extent of interference with reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 124. For a discussion of the ambiguities in each of these factors, see Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1317-27 (1989).

¹⁴ See Lisa Milot, *Illuminating Innumeracy*, 63 CASE W. RES. L. REV. 769, 769 (2013) (“Tales of lawyers who chose the profession over business or medicine at least in part because of discomfort with math are legion, as are reports of math avoidance by lawyers once in the profession.”).

¹⁵ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1956 (2017) (Roberts, C.J., dissenting) (“[T]oday’s decision knocks the definition of ‘private property’ loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis.”).

¹⁶ For some early reactions, see Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in Murr v. Wisconsin?*, Jul. 22, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007166 [<https://perma.cc/LF3P-ZJZ9>] (arguing that lower courts have devised more appropriate vehicles for examining denominator problems); Ilya Somin, *A Loss for Property Rights in Murr v. Wisconsin*, WASH. POST, June 23, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/?utm_term=.677d2720328b [<https://perma.cc/7SXY-RTXT>] (criticizing the unpredictability of *Murr* and describing the case as a “full-employment act for experts in this field”); Gideon Kanner, *Murr—SCOTUS Meets Dick Babcock’s Ghost*, Gideon’s Trumpet, June 23, 2017, <http://gideonstrumpet.info/2017/06/murr-a-legal-mish-mash-meets-dick-babcocks-ghost/> [<https://perma.cc/M5X9-MB6D>] (describing the case as “an intellectual mess”).

federalism: the idea that the Constitution protects different interests in different jurisdictions, depending on the content of state-specific law. Constitutional property federalism has generally been perceived as desirable, encouraging beneficial competition and innovation in property forms.¹⁷ However, the Court's new test undermines the guarantee that the Constitution will protect this panoply of interests. *Murr* invites courts and litigants to define protected constitutional property by reference to the law and regulation of other states, undermining the security of interests that would otherwise appear stable under a single jurisdiction's rules.

This Essay proceeds as follows. Part I briefly recounts the opinions in *Murr*. Part II overviews both the Court's past rulings and dominant strands of constitutional property theory, explaining the value of constitutional property federalism and its embrace by courts and scholars. Part III then demonstrates how *Murr* gives individual states' positive law of property short shrift, replacing the inquiry into the form and content of property within a single jurisdiction with an analysis of reasonable property rules and expectations that is divorced from jurisdictional boundaries. This aspect of *Murr* has been neglected in early reactions to the case, but as scholars, lawyers, and judges labor to give the *Murr* factors meaning—or to replace them entirely—it deserves more attention. Constitutional property federalism is an important feature of takings law, and the way *Murr* homogenizes the range of protected interests is one of the most troubling parts of an already problematic decision.

I. MURR'S MANY FACTORS

Murr arose from a straightforward fact pattern. The Murr parents owned two neighboring tracts on the St. Croix River in Wisconsin, one held by the family business, the other by the parents themselves.¹⁸ While the lots were held by the parents and the business, environmental regulations were passed at both the state and local level that would have rendered the lots too small to be separately sold or built upon.¹⁹ However, so long as they remained under

¹⁷ See Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 92-101 (2005) (describing the value of state competition in property forms); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 954 (2000) (noting that because the Constitution does not "require that constitutional property be created in any particular form," it "permits substantial experimentation and evolution of property institutions over time"); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 310 (1993) ("[I]t is a commonplace of Our Federalism that [rules of property] are left for definition by bodies of state law that the States are free to shape as they severally choose."); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 217-18, 222-26 (2004) (noting scholarly inattention to this aspect of takings law and overviewing how states differently define constitutional property).

¹⁸ *Murr*, 137 S. Ct. at 1940.

¹⁹ *Id.*

separate ownership, they were grandfathered in and thus not subject to the rule. In 1994 and 1995, in two separate transactions, the parents transferred the properties to their children.²⁰ Bringing the lots under common ownership triggered a merger provision in the regulation so that the lots no longer enjoyed grandfathered-in status, and could no longer be separately sold or developed.²¹ Because the children desired to sell the one undeveloped lot to make improvements on the developed one, they sued the state and local governments, claiming a regulatory taking.²² The children sought to use the lot not yet built upon as the relevant unit for the takings analysis; the governments, however, collectively argued that the environmental regulation meant the two lots should be treated as one lot, a unit which would make the economic effect of the regulation far less significant.²³

In resolving the denominator problem in *Murr*, the Court issued its new three-factor analysis for determining the appropriate unit of property for takings purposes. The first factor is the treatment of the property under state law, including lot lines and reasonable restrictions affecting use and disposition of the property;²⁴ second, the physical characteristics of the property, including its topography, the surrounding environment, and whether it is in an area “likely to become subject to, environmental or other regulation”;²⁵ and finally, the property’s value under the challenged regulation, specifically, whether the burden on one portion increases the value on another portion or the two portions taken together, suggesting multiple units are in a “special relationship” and thus should be treated as one.²⁶

The majority then applied the test to the Murrs’ property. First, despite the fact that the lots were separately demarcated in the recording office, because the Murrs voluntarily brought the lots under common ownership they subjected them to the merger provision.²⁷ In light of the “long history of state and local merger regulations that originated nearly a century ago,”²⁸ this environmental regulation was a reasonable restriction of which most owners would have been aware, dictating that the parcels be treated as one under state and local law.²⁹ On the second factor, the physical characteristics, the property was contiguous but narrow, meaning that its uses were already

²⁰ *Id.* at 1941.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1941-42.

²⁴ *Id.* at 1945.

²⁵ *Id.* at 1945-46.

²⁶ *Id.* at 1946.

²⁷ *Id.* at 1948.

²⁸ *Id.* at 1947.

²⁹ *Id.* at 1945 (noting that “most landowners would reasonably consider” “[a] reasonable restriction that predates a landowner’s acquisition”).

naturally limited.³⁰ And its riverfront location should have led the Murrs to “anticipate[] public regulation” similar to the environmental restrictions that were put in place.³¹ Finally, the Court observed that the value of the remaining lot might actually be enhanced by the regulation on the burdened lot, since it would provide extra recreational space and visual beauty to the built one.³² Taken together, these three factors counseled in favor of treating the two lots as one property for the subsequent takings analysis.³³

The main dissent,³⁴ authored by Chief Justice Roberts and joined by Justices Thomas and Alito, criticized the majority’s “elaborate test,” alleging that it “knocks the definition of ‘private property’ loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors.”³⁵ The dissenters criticized the majority for blending factors traditionally relevant to determining whether something has been “taken” and the amount of “just compensation” into the separate constitutional question of what counts as “property.”³⁶ In addition, the dissenters pointed out that the announced test gives regulators two bites at the apple in all takings litigation: existing regulations are taken into account both in constructing the relevant property and in examining whether a taking has occurred, allowing the same regulations to limit the constitutional claim at two stages.³⁷ Finally, the dissenters were clearly troubled by the unmooring of takings claims from established state property law through the creation of a “litigation-specific definition of ‘property,’”³⁸ although they did not much elaborate on the consequences of that approach. Picking up on what was left unsaid, the next two Parts discuss just how divergent the majority’s approach to state property law is, given the historical relationship between federal constitutional property and the positive law of the state.

³⁰ *Id.* at 1948.

³¹ *Id.*

³² *Id.* at 1948-49.

³³ *Id.* at 1949.

³⁴ In a separate dissent, Justice Thomas questioned the legitimacy of recognizing regulatory takings from an originalist perspective—although he found no one else to sign on. *See id.* at 1957 (Thomas, J., dissenting) (“In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.”).

³⁵ *Id.* at 1950, 1956 (Roberts, C.J., dissenting).

³⁶ *See id.* at 1954 (“Allowing that strategic approach to defining ‘private property’ would undermine the balance struck by our regulatory takings cases.”).

³⁷ The *Penn Central* test examines whether a taking has occurred by examining whether a regulation has interfered with the owner’s reasonable investment-backed expectations. The content of those expectations, and their reasonableness, is informed by existing regulations. *See Murr*, 137 S. Ct. at 1955, 1957 (arguing that the government will always ask courts to aggregate properties into one parcel, and will then get two chances to win the case by arguing that the regulation was reasonable).

³⁸ *Id.* at 1954-55.

II. CONSTITUTIONAL PROPERTY BEFORE *MURR*

In defining the “property” covered by the Takings Clause, the Supreme Court has repeatedly reaffirmed that state law is the definitive source of the property interests the Constitution protects.³⁹ This axiom carries with it two corollaries. First, there is a positivism corollary: the “property” protected by the Constitution has its source in some existing state law, be it state cases or statutes conferring rights or creating legal relationships. Second, there is a federalism corollary: because the federal Constitution protects property interests created by the state, there is the possibility of variation among the states in the interests recognized and protected in different jurisdictions.

The role of positivism in takings protection turns out to be quite complex. The Supreme Court sometimes ignores positive state law when it leads to protecting “too little” property: if property for federal purposes is just what positive state law affirmatively recognizes at the time of the taking, the Constitution will not do enough to protect against confiscation.⁴⁰ In particular, the Court has been skeptical about declining constitutional protection to an interest when some positive state law declares that it is *not* property, even though other positive state law seems to treat it as such.⁴¹ Thus, the Court has found constitutional property when positive state law has declared formerly private property to be public or has otherwise invalidated the interest: “[A] State, by *ipse dixit*, may not transform private property into public property without compensation This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.”⁴² And in another case: “a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.”⁴³ To put it another way, while the Supreme Court has always suggested that state-law

³⁹ *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (“Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’” (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972))); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (same); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (same).

⁴⁰ See DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 63 (2002).

⁴¹ This problem is not unique to federal takings law. In the federal tax lien context, the Court has also recognized for federal purposes more property than states recognize as a matter of positive law. See *United States v. Craft*, 535 U.S. 274, 279 (2002) (“[W]e must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property that may be attached by a federal tax lien.”); *Drye v. United States*, 528 U.S. 49, 52 (1999) (“The Internal Revenue Code’s prescriptions are most sensibly read to look to state law for delineation of the taxpayer’s rights or interests, but to leave to federal law the determination whether those rights or interests constitute ‘property’ or ‘rights to property’ within the meaning of [the tax code].”)

⁴² *Webb’s Fabulous Pharmacies*, 449 U.S. at 164.

⁴³ *Phillips*, 524 U.S. at 167.

definitions of property control the scope of federal protection, it has rejected pure positivism when the government has manipulated regulations in order to eliminate the interest. (This is usually the alleged constitutional violation.)

To make sense of this treatment, scholars have often conceptualized the relationship between positive state law and federal constitutional property as follows. The federal Constitution seems to protect as “property” a set of legal interests meeting certain criteria; positive state law creates the rights and other legal relationships that meet those criteria.⁴⁴ Even before *Murr*, it was hard to determine any consistent, identifiable criteria from the Court’s decisions.⁴⁵ And scholars have long debated what these federal criteria normatively should be.⁴⁶

By comparison, the federalism corollary—the fact that “property” for federal constitutional purposes might mean different things in different states—has been far less controversial.⁴⁷ The freedom of the states to recognize different property interests is far older than regulatory takings doctrine. In the late nineteenth century, a number of states began recognizing new forms of “easement[s] of access” through common and statutory law in order to protect property owners from local government actions harming their interests.⁴⁸ In the same period, a number of states rejected the existence

⁴⁴ See Merrill, *supra* note 17, at 952 (describing this as the “patterning-definition” understanding of constitutional property). See generally James Y. Stern, *Property’s Constitution*, 101 CAL. L. REV. 277 (2013).

⁴⁵ See generally Merrill, *supra* note 17, at 934-42 (trying to make sense of the Court’s pronouncements about property in takings law).

⁴⁶ Compare Merrill, *supra* note 17, at 969-81 (proposing “property-as-ownership” definition of constitutional property for the Takings Clause only) with Stern, *supra* note 44, at 325 (proposing uniform definition of property for multiple constitutional provisions) and D. Benjamin Barros, Note, *Defining “Property” in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1882 (1995) (arguing that “because expectations are so indefinite, they cannot serve as a source of the definition of property” and term “must be defined by state property law”).

⁴⁷ See Merrill, *supra* note 17, at 954 (noting that because Constitution does not “require that constitutional property be created in any particular form,” it “permits substantial experimentation and evolution of property institutions over time”); Michelman, *supra* note 17, at 310 (“[I]t is a commonplace of Our Federalism that [rules of property] are left for definition by bodies of state law that the States are free to shape as they severally choose.”); Sterk, *supra* note 17, at 217-18, 222-26 (noting scholarly inattention to this aspect of takings law and overviewing how states differently define constitutional property). Much of the work on the takings clause and federalism focuses not on state variations in what “property” means, but rather on the separate issue of whether policing takings should fall primarily to the state courts. *E.g.*, Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 (2009) (“In my view, state courts, not federal courts, should be centrally responsible for limiting eminent domain abuses by state and local agencies.”); Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 301 (2006) (noting that “the Supreme Court’s takings doctrine effectively delegates much enforcement of the Takings Clause to the state courts”).

⁴⁸ See Maureen E. Brady, *Property’s Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1187 (2016) (“By the end of the nineteenth century, Kansas, Michigan, Minnesota, and Mississippi courts had also held that there was a ‘right of access’ and that the right was compensable when taken, pursuant to the constitutions of those states.”).

of those easements, leading to clear state-by-state variation in the forms and content of property recognized.⁴⁹ For a more modern example, think of the “right of publicity”; a person has a property interest in her distinctive voice in the state of California, but not in West Virginia.⁵⁰ There are many other examples.⁵¹

A famous illustration of unique state property rights comes from the regulatory takings holy grail itself: *Pennsylvania Coal Co. v. Mahon*, the case in which Justice Holmes famously held that a coal company’s “support estate”—the right to cause surface subsidence by removing all of the coal—was confiscated by coal regulation, giving rise to modern regulatory takings doctrine.⁵² The support estate was invented in *Pennsylvania Coal* to resolve chain-of-title problems: coal companies sometimes transferred both the surface estate and the mineral estate to one or more parties, and the courts were tasked with resolving whether under the deeds, the coal extractor had the right to extract as much coal as would cause subsidence (and conversely, whether the surface owner had the right to support of the surface by virtue of some subsurface coal left in place).⁵³ In order to resolve that question, the courts began recognizing a “third estate”—the support estate—that belonged to the original transferor unless transferred in one of the deeds to the surface or mineral estate.⁵⁴ In *Pennsylvania Coal*, Pennsylvania’s recognition of the support estate was critical to Holmes’s determination that constitutionally protected property existed; the fact that the support estate was rendered worthless led to the majority finding that property had been taken by the regulation.⁵⁵ In contrast, in dissent Justice Brandeis would have looked at the entirety of the coal company’s ownership to perform the takings analysis, which made the extent

49 See *id.* at 1189 (“In 1860, it appears that only five states had laws (or contained cities with laws) that could be interpreted to require compensation for changes in grade; by 1888, this increased to eleven; by 1900, sixteen; and by 1909, twenty.” (footnotes omitted)).

50 For an up to date list of state laws on the right of publicity, see RIGHT OF PUBLICITY: STATUTES & INTERACTIVE MAP, <http://rightofpublicity.com/statutes> [<https://perma.cc/TX5N-BFGU>].

51 See generally Bell & Parchomovsky, *supra* note 17, at 82 (describing the “variety of options offered by different states” in both forms and content of property and intellectual property rights).

52 260 U.S. 393 (1922).

53 See James English Blackwood, *Mine Subsidence Legislation in Pennsylvania and the Developing Concept of the Police Power*, 27 U. PITT. L. REV. 835, 837 (1966) (“Whether the language in conveyances of mineral rights or of the right of surface support was bargained for, the courts have enforced these clauses according to their terms.”); Hugh G. Montgomery, *The Development of the Right of Subjacent Support and the “Third Estate” in Pennsylvania*, 25 TEMP. L.Q. 1, 7-11, 21 (1951) (explaining the decisions in various cases on the ability to sell various mining rights)

54 Montgomery, *supra* note 53, at 11.

55 *Pennsylvania Coal*, 260 U.S. at 414 (“[T]he extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs.”); see also Sterk, *supra* note 17, at 213-14 (noting the importance of Pennsylvania law to outcome in *Pennsylvania Coal*).

of the regulation's interference look far less significant.⁵⁶ Justice Brandeis would have found no compensable taking, because even though the support estate was rendered valueless, the coal company retained the right to mine most of the coal through ownership of the mineral estate.⁵⁷

Some critiques have been leveled at state variations in property coverage. Typically, these critiques are related to the positivism issue; the argument is that the federal Constitution should not offer protection when states are recognizing "too much property" relative to some ideal.⁵⁸ For one thing, states may recognize flatly undesirable forms of property that seem unworthy of federal protection, like the extreme example of property in slaves.⁵⁹ Alternatively, a state may recognize as property something that is so trivial or insignificant that protection from uncompensated takings would lead to other undesirable consequences, like the inundation of state and federal forums with inconsequential federal takings claims.⁶⁰ Of course, both these problems might be better addressed by making persuasive arguments about what limits constitutional property should have, rather than calling for the elimination of constitutional property federalism—particularly because state constitutional law could continue to protect undesirable forms of property even if federal law does not.⁶¹ A final critique suggests that states might defensively grant to citizens new forms of property interests specifically to interfere with and increase the cost of federal regulation.⁶² It is worth noting that this last possibility remains hypothetical; in reality, states might be disincentivized from

⁵⁶ *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting) ("If we are to consider the value of the coal [required to be] kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal [unable to be mined] alone, but with the value of the whole property.").

⁵⁷ *Id.*

⁵⁸ See DANA & MERRILL, *supra* note 40, at 64.

⁵⁹ See Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637, 644-51 (2000) (citing slavery as one of the dangers of "privileging state law over federal law" in defining constitutional property); Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1104 (1981) ("Does the Constitution's category of protected property automatically encompass *whatever* entitlements respecting external objects state law may at a given moment officially establish and sanction, regardless of their nature? In *Dred Scott v. Sandford*, Chief Justice Taney for the Supreme Court at least suggested an affirmative answer to that question." (emphasis in original)).

⁶⁰ Merrill, *supra* note 17, at 935.

⁶¹ See Brady, *supra* note 48, at 1221 (noting that "a federal definition [of property] also does nothing when state courts find a right exists and has been taken as a matter of state constitutional law")

⁶² DANA & MERRILL, *supra* note 40, at 64 (describing a hypothetical example of a state creating "the privilege to clear cut forests" as property in order to insulate a powerful timber industry from federal regulation).

that sort of behavior because of the risk that their own regulation of that property could unintentionally trigger the compensation requirement.⁶³

These concerns notwithstanding, there are numerous countervailing reasons for welcoming property federalism and state variation in forms of constitutionally protected property. Our social and economic systems benefit from competition and innovation in constitutional property forms.⁶⁴ Competition and innovation are democracy-enhancing, because constituents of a jurisdiction can use political control mechanisms to obtain forms of property reflecting their preferences (and be sure the Constitution will protect them).⁶⁵ Competition and innovation may also be welfare-enhancing, in that some new forms of property have specifically been deployed to give marginalized groups the ability to combat abuses of authority by bringing constitutional claims.⁶⁶ Lastly, competition and innovation allow for beneficial experimentation, enhancing efficiency. Stable property rights enable secure investment and economic growth.⁶⁷ If a unique property form in one state carries with it significant benefits, other states can follow on and adopt it.⁶⁸ The guarantee of constitutional protection is a mechanism by which new property rights are stabilized.⁶⁹

In addition to these affirmative reasons for encouraging property federalism within constitutional law, there are features of the Takings Clause that make the downsides of new and varied property forms less significant. Takings doctrine is flexible enough to permit courts to avoid imposing the compensation requirement without ignoring state-specific property law if requiring compensation for certain interferences with that property would have negative consequences. For example, the courts have been able to evade the “too much property” problem in the Due Process context by accepting many seemingly trivial forms of property recognized under state law, but “screening out insubstantial claims under the deprivation and due process requirements.”⁷⁰ Especially given the breadth of existing Takings Clause tests,

⁶³ Sticking with the timber hypothetical, a state might want to protect the powerful timber industry from federal environmental regulation, but might recognize that creating such a property interest would also prevent run-of-the-mill land use regulation from being passed without compensating all affected timber interests.

⁶⁴ See Bell & Parchomovsky, *supra* note 17, at 98-100.

⁶⁵ *Id.* at 99 (noting that “competition places constant pressure on local legislatures to design or adopt new property regimes that are consistent with the preferences of local residents”).

⁶⁶ Brady, *supra* note 48, at 1208 (describing how courts “used the creation of a constitutional property interest” to protect groups marginalized by political processes).

⁶⁷ See Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 488 (2011) (noting how “the fear of arbitrary and oppressive interference with expectations of legal stability” has shaped arguments for recognizing property rights).

⁶⁸ Bell & Parchomovsky, *supra* note 17, at 78-79.

⁶⁹ Cf. Michelman, *supra* note 4, at 1214 (noting that some of the costs of uncompensated takings are “impaired incentives”).

⁷⁰ Merrill, *supra* note 17, at 933.

it is not hard to imagine how a court might find that a person with a trivial interest lacks the “investment-backed expectations” typically necessary to mount a successful claim.⁷¹ Even if that is not possible, one of the virtues of the Takings Clause is the flexibility it gives governments to shift and redraw entitlements. The Takings Clause is unlike other areas of law in that the compensation mechanism is a built-in safety valve for eliminating property interests later determined to be undesirable.⁷² This may be another reason why the federalist structure of constitutional property has been fairly uncontroversial.

III. HOW *MURR* THREATENS PROPERTY FEDERALISM

Murr’s changes to property federalism begin when the Court establishes its authority to create a new multipart definition for constitutional property. Early in the decision, the Court asserted that earlier decisions “expressed caution [about] the view that property rights under the Takings Clause should be coextensive with those under state law.”⁷³ For this principle, the Court cited *Palazzolo v. Rhode Island*, another majority decision authored by Justice Kennedy.⁷⁴ The key holding in *Palazzolo* was this: a takings action is not barred simply because the offending regulation predated the owner taking title (or in other words, just because the owner was on notice of the offending regulation).⁷⁵ According to that decision, regulations that are “unreasonable or onerous . . . do not become less so through passage of time or title.”⁷⁶ Thus the constitutional claim can survive transfer to a buyer with knowledge of potentially confiscatory legislation.⁷⁷ *Palazzolo* was a case about whether a pre-existing regulation would bar a subsequent acquirer of property from bringing a takings claim. There was no question about whether the property owner had property under state law to use as the basis of a takings action; the questions were (1) how to interpret the “investment-backed expectations” prong of *Penn Central*

⁷¹ Penn Cent. Transp. Co. v. City of New York 438 U.S. 104, 124 (1978).

⁷² Cf. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (noting that Takings Clause “permit[s] the government to do what it wants so long as it pays the charge”); Maureen E. Brady, *Defining “Navigability”: Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1468 (2015) (noting that unlike areas of law where remedy for constitutional violation is invalidation of the offending act, compensation requirement allows for “making changes [to entitlements] that would be possible and even desirable”).

⁷³ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017).

⁷⁴ See 533 U.S. 606, 626 (2001) (“The theory underlying the argument that post enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State.”).

⁷⁵ See generally *id.*

⁷⁶ *Id.* at 627.

⁷⁷ See *id.* (“The State’s rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.”)

when a relevant regulation predates ownership, and (2) whether a regulation predating ownership could be a “background principle[] of state property law,” a defense to the claim that the regulation “took” by depriving the owner of all economically beneficial use.⁷⁸ There is a fine distinction between these inquiries being located under the “taken” portion versus the “property” portion of the Takings Clause, but it is an important one. In *Palazzolo*, no one claimed that because a regulation predating ownership forbid a particular use of property, the state of Rhode Island recognized no property interest on which a takings claim could be based.⁷⁹ The Court’s holding thus has nothing to do with how federal “property” should be defined.

Even if *Palazzolo* did hold that federal law may protect a wider range of interests than positive state law affirmatively recognizes, it would simply be another blow to the positivism corollary. As previously discussed, there is a long line of cases recognizing that courts should not merely accept the state’s assertion that there is no property based on the state’s own regulations depriving the owner thereof.⁸⁰ One could read these cases to establish that federal constitutional property is a floor: the Constitution will recognize as property certain interests, even when the state would try to wriggle out from them through invoking dubious positive law. There is another precedent that suggests federal constitutional property also acts as a ceiling: in other words, there are some property interests that states may recognize but the federal Constitution will not. Sixty years after *Pennsylvania Coal*, the Supreme Court again took up Pennsylvania coal interests in a very similar takings case: *Keystone Bituminous Coal Association v. DeBenedictis*.⁸¹ There, the Court declined to use the old Pennsylvania “support estate” as the unit of property for the takings analysis, reasoning that the support estate should be viewed as a non-compensable “part of the entire bundle of rights possessed by the owner” rather than a compensable separate unit.⁸² Putting aside the wisdom of that holding,⁸³ the blow was again

⁷⁸ *Palazzolo*, 533 U.S. at 626-27 (citing both *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) and *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)).

⁷⁹ *Id.* at 626 (describing the regulation as relevant to these two tests for whether a taking has occurred); *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 714-17 (R.I. 2000) (same).

⁸⁰ See *supra* notes 39-42 & accompanying text.

⁸¹ 480 U.S. 470 (1987).

⁸² *Id.* at 501.

⁸³ Like the dissenters, see *id.* at 518-20 (Rehnquist, J., dissenting), I have serious questions about whether this was the right analysis, given that servitudes have widely been recognized as a form of constitutionally protected property. See e.g., *Goodyear Farms v. United States*, 241 F.2d 484, 486 (9th Cir. 1957) (“Easements for ditches, for flow of water thereon and the right to payment therefor must be compensated if the evidence show these exist.”); *Lynn v. United States*, 110 F.2d 586, 589 (5th Cir. 1940) (“An easement is property which when taken must be compensated, if in itself valuable.”); *Donnell v. United States*, 834 F. Supp. 19, 24, 26 (D. Me. 1993). Pennsylvania courts have held that the support estate is a form of servitude. *Coxe v. Lehigh Vallley R. Co.*, 158 A.2d 782, 785 (Pa. 1960). The Court did state as an alternative basis for its holding that the record

more to positivism than to federalism. Again, the decision might be read as evidence that the federal courts will decline to protect state property failing to meet some federal criteria.⁸⁴ But it is beyond dispute that Pennsylvania law and Pennsylvania law alone determined whether those criteria were met.⁸⁵ The Court did not decry support estates or the owners thereof as trivial or unworthy of protection in light of the rules of other states.

Murr represents a new and different threat to property federalism than these previous rulings. From the assertion that state property law and federally protected interests are not “coextensive,”⁸⁶ the test then derived by the majority permits courts applying federal takings law to incorporate the property law of other jurisdictions to determine the scope of the interests protected. Before *Murr*, we could imagine the states as an uneven topographical map, in which the Constitution recognized more and different constitutional property in some jurisdictions than in others. *Murr*, on the other hand, flattens those differences in ways not hinted at in past precedent. The majority opinion does this by defining property through “reasonableness” without jurisdictional boundaries in multiple spots: at a minimum, in the test’s first factor, which measures the property owner’s interest in part by “reasonable” state law and regulation, and in the test’s overall ambition to discover “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.”⁸⁷ As the remainder of this Part demonstrates, this has the effect of homogenizing and destabilizing constitutional property across state lines.

The first factor of *Murr* invites courts to examine the treatment of the property under “reasonable” state and local law.⁸⁸ This factor appears to incorporate law and regulation specific to the state in which the owner holds property. But the *Murr* decision makes clear that courts should assess the reasonableness of a regulation by reference to other states’ regulatory schemes. In assessing the “reasonableness” of Wisconsin’s law merging the *Murr* parcels, the Court noted that merger provisions were “consisten[t] with a long history of state and local merger regulations that originated nearly a century ago” in faraway jurisdictions.⁸⁹

did not produce evidence about how significantly the challenged act affected the value of the support estate, *Keystone*, 480 U.S. at 501-02, which would have been a better basis for the holding.

⁸⁴ See *DANA & MERRILL*, *supra* note 40, at 65.

⁸⁵ *Keystone*, 480 U.S. at 500 (“The Court of Appeals, which is more familiar with Pennsylvania law than we are, concluded that as a practical matter the support estate is always owned by either the owner of the surface or the owner of the minerals.”).

⁸⁶ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017).

⁸⁷ *Id.* at 1945.

⁸⁸ *Id.* at 1947.

⁸⁹ *Id.*

By incorporating the laws of other states into this analysis, the first factor can render nearly any new regulation limiting property rights reasonable if it already exists in other states, regardless of the preexisting rules within the specific jurisdiction. In past cases, a majority of the Court has always suggested that the constitutionality of a regulation or other change in state law must be measured against prior law from that jurisdiction only. In *Lucas v. South Carolina Coastal Council*, for example, the Court stated that governments do not have to compensate when a regulation causes a total diminution in value if “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership” apply.⁹⁰ The “background principles” of all states’ laws are not used to measure the scope of permissible regulatory activity; only the law of the specific state is relevant. Likewise, in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, the plurality opinion authored by Justice Scalia contended that state judicial decisions violate the Takings Clause if prior law within the jurisdiction conferred “property entitlements” eliminated by subsequent state-court rulings.⁹¹ No opinion in that case would have determined the owner’s entitlement in one state by examining whether other states’ courts had eliminated it.⁹²

In contrast, by inviting courts to use “reasonable” law and regulation to construct compensable property interests, the first factor of *Murr* demands that sort of cross-state comparison. Even if a new regulation is sprung on a property owner in one jurisdiction, that regulation can be made to look reasonable by invoking the laws of other jurisdictions. The Supreme Court majority manipulated the law of other jurisdictions even in the *Murr* opinion: it sure makes the Murrs look less savvy and reasonable to note that merger provisions have been in effect somewhere in the United States “for a century,” as opposed to noting that the Murrs themselves inadvertently merged the property eighteen years after the Wisconsin merger provision went into effect.⁹³ Years of court opinions have encouraged property owners to form expectations based on the law of the jurisdiction in which the property is located. Now, a property owner in California may find that a newly enacted

⁹⁰ 505 U.S. 1003, 1029 (1992).

⁹¹ 560 U.S. 702, 727 (2010) (“It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so. And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right.”).

⁹² *But see* Brady, *supra* note 72, at 1466 (borrowing from retroactivity doctrines to note that “how common or uncommon [a] rule is in other jurisdictions” might be one way to measure whether state judicial rule changes are unconstitutional).

⁹³ *See* *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017) (noting that the regulation took effect in 1976 and the Murr children acquired the property in 1994–95).

regulation can reduce his or her constitutional property interests because a similar regulation has existed for a long time in Great Neck, New York.⁹⁴

Similar problems are also embedded in the overall goal of the *Murr* test, which is to assess the owner's "reasonable" expectations about property ownership. The second factor of the test, "physical characteristics," professes to approach this goal by assessing whether "the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation."⁹⁵ Although the *Murr* Court did rely only on federal, Wisconsin, or local law to illustrate that riverfront land like the Murrs' is often regulated, one could also view this factor as an invitation to bring in the law of other states. Imagine that fictional Western State recognizes the right to have unobstructed sunlight fall on one's land as a tradable form of property. No other state recognizes such a right.⁹⁶ Western State decides to pass a zoning regulation authorizing skyscrapers all around an owner's home, completely obstructing light and airflow. If an owner sues, how will the courts apply this factor? If California, Utah, and Arizona do not recognize the right to light, could Western State turn around and assert that owners should have been on notice that their property was at risk, given the dominant trend in other jurisdictions? Again, this incorporation of multistate norms against property owners is inconsistent with the Court's past rulings, which cabin the law on which property owners form expectations to the law of a single jurisdiction.

How do these factors affect property federalism? They undermine the stability of an owner's expectations by reducing the salience of local law. Because new and different forms of property may not be compensable, owners might decline to invest in them for fear of their instability, leading to missed opportunities and net losses. After *Murr*, if a state is an outlier in recognizing a new form of property, can an owner trust that it will be subject to constitutional protection? If other states start regulating a common form of property, can an owner in another jurisdiction where that form has long been recognized trust that his or her interest will remain compensable? The *Murr* test will encourage any good government lawyer litigating a regulatory takings claim to marshal evidence from across time and space to make new regulation seem reasonable and to make owner expectations look

⁹⁴ Great Neck apparently passed a merger provision in 1926. Brief of Amici Curiae Nat'l Ass'n. of Counties et al. at 9, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214). This Great Neck provision, along with some other early merger provisions, appears to have been the basis for the court's "century" assertion. *Murr*, 137 S. Ct. at 1947 ("The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago.")

⁹⁵ *Murr*, 137 S. Ct. at 1945-46.

⁹⁶ See Brady, *supra* note 48, at 1214 n.204 ("American courts did reject the related 'ancient lights' doctrine in nearly every other context, especially against private parties building on their own lots so as to obstruct a neighbor's sunlight.").

unreasonable. The benefits of constitutional property federalism—the democracy-enhancing, welfare-enhancing, and efficiency-enhancing effects of competition and innovation among the states—are blunted by the threat that the Constitution will protect only a uniform set of interests with the weight of multistate law and regulation behind them.

This effect of *Murr* on property federalism may seem insignificant in light of another aspect of federalism: state constitutions might come to the rescue where the federal Constitution fails to protect property interests. *Murr* could thus be another instance of federal courts relegating property owners' best chances of winning in land use and eminent domain law to the states and their constitutions.⁹⁷ But as this author is exploring, state institutions have given us little reason to trust them on this account. True, the aftermath of the Court's wildly unpopular decision in *Kelo v. City of New London*⁹⁸ on the meaning of "public use" did inspire some hope that state courts would interpret identical state constitutional language in ways that diverge from the Supreme Court's.⁹⁹ But taking the longer view, state courts often interpret their state takings clauses in lockstep with the federal Constitution, especially when the language is the same (but even when it may be materially different).¹⁰⁰ As an example, despite the widespread maligning of *Penn Central*, many states use the exact same three-factor test in defining what constitutes a regulatory taking under their own constitutions.¹⁰¹ It is possible that state courts will reject the *Murr* approach to the denominator and define "property" differently under state constitutional law, but the odds of that happening without strong pressure are slim.

CONCLUSION

The aim of this Essay has not been to propose a better test for denominators than the one outlined in *Murr*; I leave that to the judges, litigants, and law professors who will no doubt be working to supplement and

⁹⁷ Cases commonly cited as evidence of this trend are *San Remo Hotel v. City and Cty. of S.F.*, 545 U.S. 323, 338 (2005) (noting the preclusive effects of state court judgments in takings cases), and *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) (noting the requirements of pursuing state procedure first to remedy takings cases).

⁹⁸ 545 U.S. 469 (2005); see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2104 (2009) (describing unpopularity of and backlash to the decision).

⁹⁹ See, e.g., *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (rejecting economic or financial benefit alone as "public use" sufficient to permit exercise of eminent domain).

¹⁰⁰ See, e.g., Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. (forthcoming 2018) (detailing how state courts have interpreted clauses prohibiting property from being "taken or damaged" identically to federal takings precedents) (manuscript at 9), <http://ssrn.com/abstract=3028880> [<https://perma.cc/RY2Y-67N2>].

¹⁰¹ E.g. *Wild Rice River Estates v. City of Fargo*, 2005 N.D. 850, 856 (N.D. 2005) (citing *Penn Central*); *Commonwealth v. Stearns Coal Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984) (same).

replace the test in the coming months and years. Instead, my aim has been to illustrate how *Murr*'s resort to various forms of "reasonableness" weakens constitutional protections for varied state property interests. Although neither the dissenting justices nor any of the initial reactions to the case mention this aspect of *Murr*, it deserves a place alongside critiques alleging that the test is impossibly vague, unpredictable, and confused. Theorists and courts have long treated the prospect of different state interests receiving constitutional protection as a desirable feature of our system. Those who believe—as I do—that there is value in state variation should be concerned about the consequences of the *Murr* framework, and takings lawyers and property scholars should take federalism implications into account as they work on implementations of *Murr* or proposals for something to replace it.¹⁰²

By setting forth a new three-factor test for how to define the unit of property for the takings calculus, *Murr* is instantly important (and no doubt will be added to hundreds of first-year property courses). The *Murr* majority was not necessarily wrong to adopt a nuanced, flexible approach to the denominator problem; courts need flexibility to assess facts on the ground and to detect manipulation of property interests by both litigants and governments. But the factors chosen are perplexing and untried, and they have a particularly deleterious effect on constitutional property federalism. *Murr* may create "*Penn Central* squared," but by minimizing the state's individual property law, a bad variable is in the first step of the equation. Even the most math-averse lawyer would predict that this state of affairs will yield flawed and undesirable results.

Preferred Citation: Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean For Property Federalism*, 166 U. PA. L. REV. ONLINE 53 (2017), <http://www.pennlawreview.com/online/166-U-Pa-L-Rev-Online-53.pdf>.

¹⁰² There are many ways to imagine how federalism concerns might be better represented in denominator tests. For example, a lower court concerned about maintaining property federalism might establish evidentiary hierarchies within the *Murr* factors, giving greater weight to the state's common law of property than to recently enacted land use regulation, and even less weight to proposed or extant land use regulation from other states. But full treatment of any one approach is beyond the scope of this Essay.