MURR V. WISCONSIN AND THE INHERENT LIMITS OF REGULATORY TAKINGS

LYNDA L. BUTLER*

I. INTRODUCTION

Long before the development of the regulatory takings doctrine, courts discussed claims of uncompensated confiscatory practices in the language of substantive due process and physical takings. Judicial opinions even mixed both narratives in reaching conclusions that did not provide a clear basis for the decision.[1] As the degree of permanence, directness, and physicality of the government act diminished, discussions of the claims included consideration of the impact of the government act on use value, the substantiality of interference, and foreseeability.[2] These factors were important to distinguish between regular torts like trespass and nuisance, on the one hand, and physical takings and substantive due process deprivations, on the other.

 Lynda L. Butler. Chancellor Professor of Law and Director, Property Rights Project, College of William & Mary Law School. B.S. College of William & Mary; J.D. University of Virginia. I would like to thank the Law School for its summer research grant support. Much appreciation to Dakota Newton, Lindsey Whitlow, Andrea Gumushian, and Juan Abad for their superb research assistance, and Felicia Burton for her dedicated word processing support.

1. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (upholding for the first time a comprehensive zoning ordinance as a valid exercise of the police power, concluding that the ordinance did not unlawfully confiscate the affected property's value nor deprive the owner of property without due process of law); Hadacheck v. Sebastian, 239 U.S. 394, 413–14 (1915) (upholding a law prohibiting the manufacture of bricks within certain areas that had become residential despite the loss in value of a business begun lawfully); Mugler v. Kansas, 123 U.S. 623, 624, 671 (1887) (upholding a law prohibiting the manufacture or sale of alcoholic beverages, even though the business was begun lawfully, because the public health, safety, and morals required discontinuance of the use).

2. Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687, 1721–40 (2015) [hereinafter Butler, *Governance Function*].

Then, in 1922, the Court announced what is now called the regulatory takings doctrine, declaring that regulations could go too far by confiscating economically viable use. Writing for the Court, Justice Holmes explained that such regulatory confiscation was functionally equivalent to a physical taking.[3] It took over fifty years for the Court to flush out the meaning of this new doctrine with an ad hoc, multi-factor test.[4] Even now, significant questions remain about how to measure economic impact, how to balance relevant factors, how to handle nuisance-like impacts of property use, and whether compelling public interests ever could justify significant economic impact without payment of just compensation.[5] Two themes underlying these issues involve the importance of the reasonable expectations of property owners and the role of state property law.

The 2017 decision by the United States Supreme Court in *Murr v. Wisconsin* has heightened interest in these questions about the regulatory takings doctrine. In *Murr,* the Court concluded that the relevant property interest to consider in resolving a regulatory takings claim was the owners' holdings in two adjacent lots.[6] The two lots were merged under state and local land use laws after coming under common ownership because of each lot's nonconforming size.[7] The logic of the majority opinion highlights the continuing tensions between substantive due process and takings analysis. That logic relies on a new multi-factor test to define the property affected by the government action for purposes of conducting regulatory takings analysis.[8] According to the Court, the test is designed to determine "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated" as one and not as separate parcels.[9] The Court cautioned, however, that a landowner's reasonable expectations should recognize that legitimate land use

3. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

4. Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978). The three-part test considers the economic impact on the property, interference with investment-backed expectations, and the character of the government action. *Id.*

5. *See*, *e.g.*, David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 43–45, 103–04 (2014) (discussing the past ten years of Public Use Clause interpretations, and the future of physical and regulatory takings jurisprudence).

6. Murr v. Wisconsin, 137 S. Ct. 1933, 1948 (2017).

7. *See id.*

8. The factors 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." *Id.* at 1945. *See also* Maureen E. Brady, Essay, *Penn Central Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 55–56 (2017) (discussing how *Murr* "poses a severe risk to constitutional property federalism," undermining the property law of individual states and replacing that law with "an analysis of reasonable property rules and expectations that is divorced from jurisdictional boundaries").

9. *Murr*, 137 S. Ct. at 1945.

restrictions may apply to the property and affect value or limit use in light of the physical characteristics of the property.[10] The majority opinion added that "reasonable land-use regulations do not work a taking," but rather are "a legitimate exercise of the government's police power"[11]—a statement that sounds remarkably like due process analysis.

This article examines the confusion surrounding constitutional protection of property under the substantive due process and takings clauses, using *Murr* as a springboard for reconsidering the substantive due process/takings distinction and asking whether the regulatory takings doctrine should remain a viable constitutional concept despite its muddled principles. While powerful reasons support treating as compensable economic regulations that are functionally equivalent to physical takings,[12] important differences between physical and regulatory takings need to be recognized as limits to the degree of equivalence possible and therefore to the regulatory takings doctrine. A look back at the evolutionary paths of substantive due process, physical takings, and regulatory takings reveals those differences and provides some answers to questions about the regulatory takings doctrine. Defining the scope of the regulatory takings doctrine in light of those differences, especially the forgotten history of regulatory takings, should provide more consistency, help to resolve constitutional property's denominator puzzle, and allow regulatory takings to remain a viable constitutional concept.

II. MURR V. WISCONSIN AND CONSTITUTIONAL PROPERTY'S DENOMINATOR PUZZLE

For decades the Supreme Court has generally agreed that regulations producing a total diminution in value should be compensated.[13] It has struggled, however, with identifying the point when a total economic loss occurs. Central to that struggle is the choice of the property benchmark or denominator. The Court's repeated attempts to define the benchmark reveal a basic unease with the question and with the choices before it. A look at the development of the denominator debate over the years and the Court's recent efforts in *Murr* to resolve it provides an important backdrop for exploring the inherent limits of regulatory takings.

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10. *See id.* at 1945–46.

11. *Id.* at 1947.

12. *See* Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean up Takings Law in* Murr v. Wisconsin, 11 N.Y.U. J.L. & LIBERTY 151, 184–89 (2017) (discussing some of those reasons).

13. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026–29 (1992).

A. The Puzzle

From the very beginning, the regulatory takings doctrine has had a denominator problem. In introducing the concept of regulatory takings in *Pennsylvania Coal Co. v. Mahon*, Justice Holmes used the remaining property as the benchmark—or denominator—for measuring the economic impact of the statute.[14] Once he chose the remaining coal that could not be mined under the statute as the basis for comparing the before and after effect of the challenged law, the outcome of the case was determined. All of the remaining property could no longer be mined, producing a 100% loss.[15] The dissenting opinion by Brandeis, on the other hand, focused on the property as a whole in measuring the economic impact of the law on the property.[16] According to Brandeis, the appropriate approach is to compare the value of the affected property—the coal kept in place—with the value of the property as a whole. Brandeis explained that "[t]he sum of the rights in the parts can not [sic] be greater than the rights in the whole."[17]

Cases decided after *Mahon* have, for the most part, taken the approach of Justice Brandeis, comparing the value of the affected property to the value of the property as a whole in determining the extent of the diminution in value caused by the government act.[18] In *Penn Central Transportation Co. v. New York City*, for example, the Court concluded that the owner of Grand Central Terminal could not vertically segment the property and treat the owner's interests in developing above the historic property as the whole property impacted by the government's denial of a development application.[19] The landowner had argued that the government's decision not to allow development of the air space above the terminal totally took the owner's air rights.[20] In rejecting this vertical severance argument, the Court explained that "'[t]aking[s]' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[21] Rather the Court's focus is on rights in the property "as a whole."[22]

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14. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413–15 (1922). Epstein disagrees that *Mahon* is the source of the denominator problem, instead attributing the origins of the problem to *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104 (1978). *See* Epstein, *supra* note 12, at 162–63.

15. *Mahon*, 260 U.S. at 414.

16. *See id.* at 416, 419 (Brandeis, J., dissenting).

17. *Id.*

18. *See*, *e.g.*, Concrete Pipe & Prods. v. Constr. Laborers Pension Tr., 508 U.S. 602, 644 (1993); Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 130–31 (1978).

19. 438 U.S. 104, 117, 130–31 (1978).

20. *Id.* at 130.

21. *Id.*

22. *Id.* at 130–31.

Soon after deciding *Penn Central*, the Court rejected use of a conceptual severance argument in *Andrus v. Allard*.[23] Endorsing the "aggregate" or "as a whole" approach, the Court held that a regulation prohibiting the sale of lawfully acquired eagle feathers and other covered bird parts was not a taking.[24] After observing that the law did not result in a physical invasion or forced surrender of possession, the Court explained that "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."[25] Although the regulation did not allow the most profitable use of their property, diminution in value was not enough to find a taking. In *Andrus* the owners still retained the rights to possess, enjoy, donate, and devise the property.[26]

The Court's decision in *Lucas v. South Carolina Coastal Council*[27] did more than any other case to highlight the outcome-determinative nature of the denominator question. In *Lucas* the Court decided that a government law denying all economically viable use was categorically a regulatory taking without any "case-specific inquiry into the public interest advanced in support of the restraint."[28] Writing for the majority, Justice Scalia offered a number of justifications for this categorical rule. In addition to being functionally equivalent to a physical appropriation, a law that deprived the property owner of all economically viable use could not simply be "adjusting the benefits and burdens of economic life" to promote the public good in ways that would provide the owner with "average reciprocity of advantage."[29] The Court acknowledged, however, that its decision in *Lucas* was not providing guidance on the appropriate property benchmark because the record before it assumed a total loss.[30] Instead the Court indicated that resolution of the benchmark question "may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land" allegedly taken by government regulation.[31] Because of the Court's adoption of

23. Andrus v. Allard, 444 U.S. 51, 65–66 (1979).

24. *See id*. at 64, 67–68.

25. *Id.* at 65–66.

26. *See id.* at 66.

27. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

28. *Id.* at 1015.

29. *Id.* at 1017–18 (first quoting Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978), then quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)) (internal quotation marks omitted).

30. *Id.* at 1016 n.7.

31. *Id.*

the per se approach, the choice of denominator became even more critical. If the regulated property interest was also the benchmark, then the diminution in value would always be total and therefore a per se taking unless the restriction was inherent in the owner's title, part of the background principles of common law property and nuisance.[32] The public interest, no matter how compelling, could not be considered if the per se approach applied.

Then, in *Palazzolo v. Rhode Island*, the Court rejected a landowner's horizontal severance argument, concluding that the government's denial of a permit to fill eleven acres of wetlands on an eighteen-acre tract was not a regulatory taking.[33] The Court explained that the landowner could still develop on the upland portion of the tract.[34] Despite expressing some "discomfort" about the denominator issue, the Court continued to look at the property as a whole in evaluating the economic impact of the regulatory decision.[35] Development of a residence on the upland area provided sufficient economically viable use to avoid a regulatory taking even though the denial deprived the owner of the ability to pursue a use of potentially greater value—a private beach club.[36]

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court similarly concluded that the appropriate focus in evaluating the economic impact of a law was on the property as a whole.[37] Landowners had argued that temporary moratoria delaying economic use of their land denied them all economically viable use for the moratoria period and therefore was a regulatory taking.[38] The regional planning agency had adopted the moratoria to give the agency time to develop a plan for protecting the water quality of Lake Tahoe.[39] The Court rejected the effort to "disaggregate[] . . . property into temporal segments corresponding to the regulations at issue" and held that the temporary prohibition of economic use was not per

32. *See id.* at 1029.

33. Palazzolo v. Rhode Island, 533 U.S. 606, 615, 631–32 (2001).

34. *See id.* at 616.

35. *Id.* at 630–32.

36. *See id.* (describing the denominator problem as a "difficult, persisting question" but noting that the landowner failed to challenge the denominator test prior to reaching the Supreme Court, and instead accepting how the case came to the Court – on "the premise that petitioner's entire parcel serves as the basis" for the takings claim).

37. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002).

38. *See id.* at 320.

39. *See id.* at 308–12.

se a taking.[40] The Court explained, "defining the property interest taken in terms of the very regulation being challenged is circular."[41]

The denominator question reflects both a potential for windfalls and a problem of manipulation. Under the "as a whole" approach, the government usually wins, able to achieve a regulatory goal without paying for diminution in value or sometimes even for a lost strand in the bundle of property rights.[42] This result should not matter when the regulation addresses a harmful use or otherwise holds property owners accountable for the impacts of their use. Nothing in our Constitution guarantees property owners protection from laws that force internalization of the costs of their land uses. The result might matter, however, when government is able to capture some of the property's value through regulation after manipulating the regulatory context to get a favorable "whole." Under the "regulated portion" or "remaining property" approach, however, the private property owner usually wins and may even capture some of the value provided by public goods or services or may harm those goods or services. The property owner now has the incentive to segment her property interests before pursuing development plans. While shaping the regulatory context allows manipulation by government actors, segmentation allows manipulation by property owners. When the opportunity for manipulation overlaps with the potential for windfalls (and the capture of value), the Court faces a no-win situation in resolving a regulatory takings claim. Regardless of the Court's choice of denominator, the decision often leads to unsatisfactory constitutional law. Identifying when both problems overlap in a regulatory context thus is critical to improving the Court's options and decision-making.

When, then, does a windfall arise in a regulatory takings context? A windfall generally exists when a party receives a benefit or advantage that it did not bargain for, invest in, or buy.[43] When both parties have faced a potential windfall and the situation did not involve manipulation or bad faith behavior on their part, some courts have resolved disputes involving this pure windfall situation by looking for ways to make each innocent party with a reasonable connection to the windfall better off. For example, in a case about a record-setting homerun baseball hit by Barry Bonds, the court split the baseball's value between the party who had the baseball in his glove before being mobbed by a group of fans and the innocent bystander

40. *Id.* at 331–32.

41. *Id.* at 331.

42. *Murr*, 137 S. Ct. at 1944–45 (explaining how the denominator question is "outcome determinative").

43. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1(b) (AM. LAW INST. 2011) (defining non-bargained-for benefits).

who picked up the ball after it rolled out of the melee.[44] When a windfall situation, on the other hand, involves bad faith or manipulation, common law courts have looked to principles of restitution and equity to rule against the wrongdoer and award the windfall to the innocent party having the closest or best connection to the property. In a case involving an egg washing machine, for instance, the court held that the wrongdoer who misappropriated the owner's egg washing machine had to disgorge all profits made from the wrongful use of the machine instead of just paying the fair rental value of the machine.[45] The wrongdoer had taken the machine out of the owner's storage area and used it after a labor shortage caused labor costs to rise above the costs of renting the machine.[46]

Whether windfalls, or non-bargained-for benefits, arising in a regulatory context involve manipulation through abuse of power or rights is a more complex question. Sometimes the answer may be tied to notions of fairness. Other times it may be tied to views on the allocation of power between government and property owners. Three opinions in *Palazzolo v. Rhode Island* illustrate different approaches to defining windfalls in the regulatory context.[47] Writing for the majority, Justice Kennedy described a windfall as arising when a state law "would work a critical alteration to the nature of property."[48] Declaring that government "may not by this means secure a windfall for itself," Justice Kennedy explained how the law being challenged removed the ability of "the newly regulated landowner . . . to transfer the interest which was possessed prior to the regulation."[49] In Justice O'Connor's concurring opinion, she described windfalls in regulatory takings cases as "an important indicium of fairness."[50] She explained how government could have too much power if existing regulations always dictated the reasonableness of a property owner's expectations, while property owners could "reap [unacceptable] windfalls" if existing regulations played no role in regulatory takings analysis.[51] She therefore rejected a per se approach that forever made the "temporal relationship between regulatory enactment and title acquisition"

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44. *See*, *e.g.*, Popov v. Hayashi, 2002 Cal. Super. LEXIS 5206 (Dec. 18, 2002) (applying the principle of equitable division); *see also* Keron v. Cashman, 33 A. 1055 (1896) (holding that because each boy had an equal legal claim to the property, they each had an equal entitlement to the property).

45. *See* Olwell v. Nye & Nissen Co., 173 P.2d 652, 653–54 (Wash. 1946).

46. *See id.*

47. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

48. *Id.* at 627.

49. *Id.*

50. *Id.* at 635 (O'Connor, J., concurring).

51. *Id.*

determinative in a partial regulatory takings case.[52] Instead, both the time of a regulation's enactment and the time of title acquisition would remain material to the analysis.[53] Justice Scalia, on the other hand, would always award the windfall to the property owner instead of the government, "which not only did not lose something it owned, but is . . . the cause of the miscarriage of 'fairness.' "[54] In his concurring opinion in *Palazzolo*, he explains how there is nothing unlawful or unfair about buying land subject to a development restriction and then developing the land to its full value after getting the restriction invalidated.[55]

If a government regulation promotes the common good while causing significant but not total diminution in value, has the government unfairly received a windfall or benefit? Those who do not believe that government regulation should be able to cause a significant diminution in value without providing compensation when no direct harm results from the property's use would probably conclude that government has wrongfully and unconstitutionally taken some of the owner's property interests.[56] Those who believe that the boundaries of a tract of land existing at the time of acquisition are inviolate would also likely conclude that a regulation depriving the landowner of economically viable use of part of the tract results in an unconstitutional windfall. Such a situation would arise, for instance, when a local government imposed front and side setback requirements on the development of land for residential purposes.

This thinking, however, ignores government's role in adjusting the benefits and burdens of economic life, including the spillovers of private land use borne by third parties, the costs to public goods and services, and the interaction of the parts (here the individual tracts) making up the whole.[57] If a regulation adjusts the benefits and burdens of economic life or provides average reciprocity of advantage, the property owner is not likely being singled out or treated unfairly. If instead a regulation imposes a disproportionate share of the costs on a landowner, then the regulation probably produces an inappropriate windfall for government. When government extracts a public benefit from a few, the government action raises concerns that the action is

52. *Id.* at 632.

53. *Id.* at 632–35.

54. *Id.* at 636–37 (Scalia, J., concurring) (emphasis omitted).

55. *Id.* at 635–37.

56. *See, e.g.*, Epstein, *supra* note 12, at 183–84 (concluding that "there is no obvious tipping point . . . when compensation is suddenly required" for significant diminution in value caused by regulation).

57. This interaction can produce cumulative harm and stress on the whole. *See* Lynda L. Butler, *Property as a Management Institution*, 82 BROOKLYN L. REV. 1215, 1252–53, 1260–62 (2017) [hereinafter Butler, *Property as Management*].

unfairly redistributing wealth from the private property owner to the government.[58] An unfair windfall also could occur if government appropriates resources for a uniquely public function in a way that denies an owner economically viable use[59] or if government alone defines when expectations are reasonable.[60] Because the focus of the compensable takings inquiry is on what the property owner has lost, not on what may generally be gained by others, a windfall received by government should not, in and of itself, be enough to find a regulatory taking as long as that gain has not been acquired unfairly or from the abuse of power.[61]

An important step in identifying problematic situations in the regulatory takings context thus involves understanding the source of a potential windfall and determining whether the windfall has been wrongfully acquired by manipulation, whether by abuse of rights or abuse of power. Sometimes the source of the windfall is self-created. The property owner, for example, might have speculated that a shift in the market or a change in land use regulations would occur. If that shift does not occur and government then benefits after applying the existing regulations to the property, the property owner assumes the risk of this type of loss. Other times the regulatory context has been shaped by the failure or limitations of the property system in handling the harmful impacts and costs of private land use. This failure may be due to the exclusion-based strategy that the conventional property system uses in managing the exercise of property rights or to the economics-based incentive structure of the system. The management strategy and incentive structure are owner-centric, limit consideration of third-party interests, and sometimes experience difficulty responding to changing conditions, technological advances, or new

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58. *See* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 123–24 (1978) (noting that the Court "has been unable to develop any 'set formula' for determining when . . . economic injuries caused by public action [should] be compensated . . . rather than remain disproportionately concentrated on a few persons"); Armstrong v. United States, 364 U.S. 40, 49 (1960) (describing how "[the] Fifth Amendment guarantee . . . [is] 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. . . .").

59. United States v. Causby, 328 U.S. 256, 261–62, 264–67 (1946) (holding that low-lying military flights over private land directly caused a taking by preventing use as a chicken farm and is just "as much an appropriation of the use of the land as a more conventional entry upon it").

60. *See Palazzolo*, 533 U.S. at 632, 635 (O'Connor, J., concurring) (arguing that the state "wields far too much power" when "existing regulations dictate the reasonableness of [investment-backed] expectations in every instance").

61. *See* Brown v. Legal Foundation of Wash., 538 U.S. 216, 234–36 (2003) (concluding that a law requiring attorneys to put client funds that could not otherwise earn interest in accounts earning interest for programs providing indigent legal services did not require compensation because the owner did not lose any interest).

knowledge.[62] Regardless of the reason for the failure, the property system needs to address its limitations so it can respond effectively to new conditions and crises. Finally, government's decision-making process or its execution of laws might have played a role in shaping a landowner's expectations by inviting or authorizing the development that is now being constrained by new regulations.

Consider, for example, a landowner who owns a ten-acre tract, one acre of which consists of wetlands that cannot be developed under a wetlands law already in effect. If government prevents the development of the wetlands, the owner has lost all economically viable use of that one acre—a taking under *Lucas* if the benchmark is the affected portion but not if the ten-acre tract is viewed as a whole. Either option allows one party to manipulate the situation. Suppose further that the owner submits a plan to subdivide the tract into ten lots, with one of the lots consisting of the wetlands. Even under the "as a whole" approach, the owner has lost all economically viable use of the wetlands lot and has suffered a taking unless the whole is defined as the original, undivided ten-acre tract or unless knowledge or foreseeability of the wetlands law legitimately shaped reasonable investment-backed expectations.[63] The possibility of subdivision allows the owner to manipulate the situation to the owner's advantage unless the entire original tract is the whole. If, instead, the government had approved the subdivision as the owner proposed but later denied the owner's application for a permit to fill the wetlands under a law already in effect at the time of subdivision, government has failed to regulate effectively. Government had control over the subdivision process, allowing the subdivision of the one acre of wetlands, and could have prevented or avoided the strategic manipulation by the owner. By approving the subdivision, the locality has helped to shape the owner's expectations, which could matter under takings analysis.

Now suppose that the owner subdivides the ten-acre tract, with the one acre of wetlands constituting one lot. After the subdivision, the

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62. *See* Butler, *Property as Management, supra* note 57, at 1217–18, 1220–22, 1226–28, 1239–41. Earlier in time, for example, waterfront businesses and localities discharged untreated wastewater into navigable waters. After the harmful impact of the discharges became better understood, governments began regulating these discharges and protecting public rights in navigable waters. *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court of Alpine Cty., 658 P.2d 709 (Cal. 1983) (using the public trust doctrine to restrict the withdrawal of water from Mono Lake when the withdrawals threatened the integrity of the Lake). For a discussion of how a governance strategy provides greater analytical capacity to resolve constitutional issues involving shared resources subject to complex property arrangements, see Butler, *Governance Function*, *supra* note 2, at 1757–67.

63. Because of the Court's decision in *Palazzolo*, notice of regulations in effect at the time of acquisition of property cannot be determinative of a takings claim. *See Palazzolo*, 533 U.S. at 626–28, 631 (discussing the notice issue and describing how framing the wetlands parcel as separate and distinct from the uplands parcel could change the denominator and potentially present a total deprivation of value, depending on the approach taken).

government passes a wetlands law preventing development of the one acre of wetlands in response to new studies about the importance of wetlands to ecological integrity and public welfare. The government in this third scenario is likely to make a *Murr*-type argument, asserting that the ten-acre tract should be viewed as a whole. The situation now could resemble *Lucas,* depending on the degree of development of the surrounding area and the condition of the ecological resources being protected by the new law. In *Lucas*, the development of the surrounding beaches was too far along for a prohibition on development of two noncontiguous lots to be effective.[64] Whether changing conditions or new knowledge about those conditions led to the adoption of the wetlands law would matter. But the current degree of development in the area and the potential effectiveness of the law also would matter.

The above scenarios identify several categories of regulatory settings that could involve overlap of potential windfalls and problematic manipulation. In the first scenario involving a law already in effect at the time of development, the property owner could gain a windfall by manipulating his rights under existing law. The landowner had subdivided the wetlands portion of the tract into a separate lot, hoping to prevail with a *Lucas* takings claim if the fill permit were denied. The landowner intentionally pursued ecological segmentation of his property yet could have foreseen denial of the permit under an already existing law protecting wetlands. Surely an unhealthy manipulation of rights exists when a landowner segments the property to try to fit under *Lucas* and overcome application of a law protecting against environmental harms of land use. In the second scenario involving an existing law, one unit of government approved the subdivision even though the wetlands law was in effect, but then another denied the fill permit. The narrow economic incentives of the property system help to explain this management failure. The mainstream property system generally ignores the true scales of private land use and instead promotes the owner's economic incentives and the maximization of social welfare. The system is unable to respond effectively to certain serious problems involving high transaction costs, collection action problems, and difficult-to-measure spillovers like diffused or cumulative harms. The limitations of the economics-based property system thus make the development of solutions within in the current system difficult to achieve.[65]

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64. William A. Fischel, *Lucas v South Carolina Coastal Council*: A Photographic Essay (Feb. 1995), http://www.dartmouth.edu/%7Ewfischel/lucasessay.html [https://perma.cc/D9GM-TBKA].

65. The economics-based incentive structure of the property system contributes to the development of investment-backed expectations that do not account for serious external harms. *See* Butler, *Property as Management, supra* note 57, at 1257–59. For example,

The third scenario involves new knowledge or changing conditions not specifically attributable to either party and therefore less likely to involve an overlap of windfalls and the potential for manipulation. For instance, when technological advances eventually allowed the removal of most of the coal in a mine's support columns without jeopardizing miners' safety, the Supreme Court concluded, in *Pennsylvania Coal Co. v. Mahon*, that a law passed to prevent surface subsidence went too far and took all commercially practical use of the coal.[66] According to the Court, the law was, in effect, confiscating the remaining mineral estate of the coal company for the benefit of the surface owners contrary to their private property transactions.[67] What further strengthened the coal company's position was the distinct recognition given to mineral estates under Pennsylvania law.[68] A closer call may well involve the development of new technology that allows the withdrawal of oil or gas from shale deposits through the use of deep horizontal drilling, sometimes beginning miles away.[69] When the development of new technology or scientific understandings leads to new ways to exploit natural resources, reforms to traditional laws governing property rights in those natural resources should be allowed to address issues raised by the new technology without necessarily having to pay just compensation. Conceptual segmentation of interconnected resources should not control regulatory takings analysis, especially when the new use causes harm to interests in connected resources that was not foreseen at the time of the private transactions.

A discussion of the *Murr* decision will now address the complexities of windfall and regulatory situations that have led to the unsatisfactory denominator choices before the Court.

Manhattan developers are clamoring to build along the southwest edge of Central Park, dubbed "Billionaire's Row." These apartments and condominiums will cast shadows on portions of the park, dropping the temperature by twenty degrees and harming vegetation. *See* Jenna McKnight, *Wave of super-tall towers in Manhattan sparks protests over shadows*, DEZEEN, (Nov. 11, 2015), https://www.dezeen.com/2015/11/11/supertall-skinny-skyscrapers-towers-manhattan-new-york-shop-architects-robert-stern-rafaely-vinoly-jean-nouvel-portzamparc-controversy-protest/ [https://perma.cc/LQD9-LPDH].

66. Pa. Coal Co. v. Mahon, 260 U.S. 393, 394–95 (1922).

67. *Id.* at 415.

68. *Id.* at 414–15.

69. For a discussion of issues surrounding hydraulic fracturing, or fracking as it is more commonly known, *see* David L. Callies & Chynna Stone, *Regulation of Hydraulic Fracturing*, 1 J. INT'L & COMP. L. 1 (2014); Tim Flannery, *Fury over Fracking*, N.Y. REVIEW OF BOOKS, (Apr. 21 2016), https://www.nybooks.com/articles/2016/04/21/fury-over-fracking/ [https://perma.cc/V6KB-UP6P]; Amy Goodman, *Shale-Shocked Citizens Fight Back*, TRUTHDIG (Sept. 20, 2012), https://www.truthdig.com/articles/shale-shocked-citizens-fight-back [https://perma.cc/ET7W-XDDT].

B. The Murr Opinion

The controversy in *Murr* involved land use regulations that prevented the separate development or sale of adjoining lots held under common ownership when the lots were substandard in size.[70] The tracts were located in an area covered by the Wild and Scenic Rivers legislation limiting development to protect "the wild, scenic and recreational qualities of the river for present and future generations."[71] One of the protective devices used under the law was a building lot law that prevented separate development of a lot having less than one acre of land suitable for development.[72] A grandfather clause, however, allowed a lot substandard at the effective date of the regulation to be used as a distinct building site.[73] But if another substandard adjacent lot subsequently came under common ownership, a merger provision prevented the adjacent lots from being developed or sold separately.[74]

The lots at issue in *Murr* each had less than one acre suitable for development due to their topography.[75] Petitioners' parents had purchased their non-conforming lots at different times before the building lot restriction took effect.[76] After the lots came under common ownership, the merger provision treated the non-conforming lots as one parcel for purposes of use and development, blocking the landowners from selling one of the lots to finance new development on the other.[77] When the local government denied their variance application, the landowners sued in state court, claiming a regulatory taking of the lot they planned to sell due to their near total loss of economically viable use.[78] Petitioners' evidence of the loss included appraisals of $771,000 for the lots if separately developed, $698,300 for the lots as regulated, $373,000 for the lot they wanted to retain and redevelop, and $40,000 for the lot they were not allowed to sell separately.[79] The state courts ruled for the government, concluding that the landowners still could use and enjoy both tracts of land together and that the

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70. Murr v. Wisconsin, 137 S. Ct. 1933, 1941 (2017).

71. Under the Federal Wild and Scenic Rivers Act, the St. Croix River acquired federal protection by 1972. *See* 16 U.S.C. §§ 1274(a)(6), (9) (2012). This designation meant that Wisconsin was required to develop a management program for the river. *See* WIS. STAT. § 30.27 (2019) (regarding Lower St. Croix River preservation).

72. *Murr*, 137 S. Ct. at 1940.

73. *Id.*

74. *See id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1940–41.

78. *Id.* at 1941. Flooding on one of the lots apparently motivated the decision to build a new cabin on that lot. *See* Murr v. St. Croix Cty. Bd. of Adjustment, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011).

79. *Murr*, 137 S. Ct. at 1941.

diminution in value was not significant.[80] The Wisconsin Court of Appeals further explained that regulatory takings analysis focuses "on the Murrs' property as a whole[.]"[81] The appellate court stressed that the landowners "could not reasonably have expected to use the lots separately because they [should have known about] existing zoning laws[.]"[82]

Writing for the majority, Justice Kennedy began his takings analysis with a brief review of the development of regulatory takings jurisprudence. After discussing the origins of the doctrine in *Mahon*, Justice Kennedy identified two guidelines relevant to the *Murr* controversy: the categorical rule that a regulation denying all economically viable use generally would be a regulatory taking and the "complex of factors" that must be considered when a regulation restricts use but does not deprive all economically viable use.[83] Even the categorical rule, however, had a "caveat recognizing the relevance of state law and land-use customs": if the challenged restrictions reflected background principles of the state law of property and nuisance, a total loss of economically viable use would not be a regulatory taking.[84] The Court's regulatory takings jurisprudence reflected, in Justice Kennedy's words, a "central dynamic" of flexibility that was important to "reconcil[ing] two competing objectives" at play in regulatory takings cases: protection of individual property rights fundamental to an individual's freedom and the government's promotion of the public good through the adjusting of rights and interests.[85]

The Court then turned to the question critical to determine whether a regulatory takings had occurred: "What [was] the proper unit of property against which to assess the effect of the challenged governmental action?"[86] If the choice of denominator was the portion of property that was affected, then "that portion is always taken in its entirety."[87] Justice Kennedy justified the need to avoid this circularity by distinguishing between a regulatory taking and a physical taking.[88] While a regulatory taking focuses on the impact of the challenged law on the value of the owner's property, a physical taking examines the

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80. *Id.*

81. *Id.* (internal quotations omitted).

82. *Id.* at 1942.

83. *Id.* at 1942–43 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)) (internal quotation marks omitted).

84. *Id.* at 1943.

85. *Id.* at 1937.

86. *Id.* at 1943.

87. *Id.* at 1944 (quoting Concrete Pipe & Prods. v. Constr. Laborers Pension Tr., 508 U.S. 602, 644 (1993)).

88. *Id.* at 1944.

normally evident effect of the physical invasion or appropriation.[89] The Court then rejected two "unduly narrow" approaches to the property denominator.[90] One would limit the denominator to that portion of property regulated by the law, which would "overstate the effect of the regulation" on the value of the property, turning even a delay into a total loss.[91] The second would allow state law to control the choice, defining the relevant property coextensively with state laws delineating and affecting the property.[92] Such an approach would give the states "unfettered authority to 'shape . . . property rights and reasonable investment-backed expectations' " and allow government to "fortify the state law against a takings claim." [93]

To help answer the critical question, the majority opinion outlined a new set of factors that courts "must consider" in determining the denominator.[94] The first factor concerned how land is handled under state and local laws, especially "how it is bounded or divided."[95] The reasonable expectations of a purchaser "must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property."[96] The timing of the enactment of a law would not be determinative, though a preexisting restriction could shape an owner's reasonable expectations.[97] Significantly, "a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations."[98] As the dissent points out, this first factor appears to be blending—or perhaps confusing—the question of whether a taking exists with the choice of denominator.[99]

Justice Scalia's opinion in *Lucas* may have stimulated Justice Kennedy's confusing analysis by tying the choice of denominator to the degree to which the reasonable expectations of the property owner have been shaped by state law. There Justice Scalia mentioned in a footnote that the choice of denominator "may lie in how the owner's reasonable expectations have been shaped by . . . whether and to what degree the [s]tate's law has accorded legal recognition and protection to the particular interest in land" claimed to have been taken by

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1944–45 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001)).

94. *See id.* at 1945.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.* at 1950, 55–56 (Robert, J., dissenting) (explaining how the majority approach confuses the "traditional touchstone for spotting a taking" with "defining private property").

the diminution in value.[100] Justice Scalia's remarks focused on how state law recognizes and defines the property interest, not on how restrictions on use may affect the exercise of the interest. In *Pennsylvania Coal Co. v. Mahon,* for example, Pennsylvania law had long recognized the mineral estate as a separate estate in land.[101] In *Murr*, however, Justice Kennedy's discussion of the first factor, treatment under state law, appears to expand the analysis to include how the use restriction being challenged shapes an owner's reasonable expectations for purposes of determining the denominator. Though the economic impact of the restriction should be considered in conducting regulatory takings analysis, Justice Kennedy brought the discussion of economic impact into the determination of the denominator before the Court considered whether a regulatory taking existed. Yet, in choosing the property benchmark in *Murr*, a court should focus on whether state law typically treats two substandard, contiguous lots as one or instead as separate tracts.

The second factor focused on the physical characteristics of the land.[102] The tract's topography, physical relationship with other tracts, and the surrounding environment all would be relevant considerations.[103] For example, a court could consider whether the property is "an area that is subject to, or likely to become subject to, environmental or other regulation."[104] As support, Justice Kennedy quoted from his concurring opinion in *Lucas* where he noted: "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."[105]

The third factor involved assessing the value of the property affected by the regulation, "with special attention to the effect of burdened land on the value of other holdings."[106] Diminution in value of the regulated land, for example, could be "tempered if the regulated land adds value to the remaining property."[107] Added value could result from greater recreational space, increased privacy, or preserved natural spaces.[108] The "absence of a special relationship" between the different tracts, however, would weigh against viewing the tracts as

100. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

101. 260 U.S. 393, 414 (1922).

102. *Murr*, 137 S. Ct. at 1945.

103. *Id.*

104. *Id.* at 1945–46.

105. *Id.* at 1946 (quoting *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) (internal quotations omitted)).

106. *Id.*

107. *Id.*

108. *Id.*

one, indicating a possible taking.[109] A special relationship could exist, though, if a restriction on one tract protects or enhances use of the other tract.[110]

After setting forth its new three-factor test for determining the denominator, the Court explained why it was rejecting the suggested approaches of both the government and the property owners. "Neither proposal . . . capture[s] the central legal and factual principles that inform reasonable expectations about property interests."[111] The government's approach would link the choice of denominator to state law in a way that allows the government to avoid having to justify a regulation in light of its impact on the legitimate expectations of property owners.[112] Though state law is an important consideration, courts must consider whether the regulation is consistent "with other indicia of reasonable expectations about property."[113] The approach of the property owners, on the other hand, would have had the Court presume that lot lines or boundaries define the relevant parcel.[114] Noting that lot lines are also "creatures of state law," the Court rejected the petitioners' idea of choosing state law principles that favor their position while ignoring other legal principles.[115] Those overlooked principles included the merger provision, which was adopted as part of a regulatory scheme to allow development in areas protected under wild and scenic river legislation while preserving open space.[116] Local building lot laws set minimum lot sizes for development and then use the merger concept to decrease the number of non-conforming lots when adjacent substandard lots come under common ownership.[117] "The merger provision . . . balanc[es] the legitimate goals of regulation with the reasonable expectations of landowners."[118] Treating lot lines as determinative would incentivize landowners expecting future regulation to adjust their boundaries and engage in manipulation or "gamesmanship."[119]

The Court then applied its new multi-factor test for the property benchmark and concluded that the two adjacent lots should be viewed as one parcel.[120] The majority explained that state and local law

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1946–47.
114. *Id.* at 1947.
115. *Id.*
116. *Id.* at 1940, 1947.
117. *See id.*
118. *Id.*
119. *Id.* at 1948.
120. *Id.*

supported this conclusion because the merger provision kicked in after the petitioners voluntarily became owners of both lots and reflected "the widespread understanding that lot lines are not dominant or controlling in every case."[121] The merger of two substandard, adjacent lots applied after the lots were acquired by the same owner and balanced the public interest in developable lots and the landowners' interests, thus shaping the owners' reasonable expectations.[122] The physical characteristics of the lots also supported the Court's decision to treat them as one. Their adjacency, rough terrain and narrow shape, and location next to a river designated as wild and scenic all indicated that use of the lots would be limited.[123] Finally, the prospective value from using the two lots as an integrated whole exceeded the aggregate value of each of the lots used separately, suggesting a "complementarity" between the two.[124]

Viewing the property as a whole, the Court concluded that economically viable use existed and therefore no total *Lucas* taking had occurred.[125] Nor could the Court find a partial regulatory taking under the *Penn Central* test.[126] The economic impact was not severe enough, and the petitioners' reasonable expectations did not include the expectation of selling or developing substandard lots that had come under common ownership.[127] Finally, the merger provision was part of a reasonable land use regulatory scheme shaping the expectations of the property owners.[128]

Joined by Justices Thomas and Alito in dissent, Chief Justice Roberts initially admitted that the majority's "bottom-line conclusion does not trouble [him]," stating, "the majority presents a fair case that the Murrs can still make good use of both lots and that the ordinance is a commonplace tool to preserve scenic areas."[129] He disagreed, however, with the "elaborate" test used by the majority, preferring instead to follow the traditional approach to defining property rights.[130] Under that approach, "[s]tate law defines the boundaries of distinct parcels of land, and those boundaries should determine the 'private property' at issue in regulatory takings cases."[131] The Takings Clause, in other

121. *See id*.
122. *Id.*
123. *Id.*
124. *Id.* at 1949.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1949–50.
129. *Id.* at 1950 (Roberts, J., dissenting).
130. *Id.*
131. *Id.*

words, protects property rights as "*established*" by state law.[132] Whether a regulatory taking exists is a question distinct from the choice of the property benchmark.[133] Resolving that overriding takings question can involve other considerations like the adjacency and common ownership of two lots—considerations that the majority swept up in its new factor approach to identifying the property denominator.[134]

In introducing the Court's basic principles of regulatory takings, Chief Justice Roberts accepted the logic of regulatory takings as laid out by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[135] That logic stressed that, though regulatory takings are more indirect than physical takings, the Court must also protect private property against regulation that goes too far.[136] Otherwise the "natural tendency of human nature" would take over, extending regulation "until at last private property disappears."[137] The Chief Justice also accepted that regulatory takings are not generally defined by per se rules, though "a few fixed principles" do exist.[138] One of those principles is that regulatory takings analysis "must be conducted with respect to specific property."[139] A second provides that a regulation denying all economically viable use constitutes a taking.[140] Other than these fixed rules, the regulatory takings doctrine uses a more flexible approach to determine whether the government regulation forces an owner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[141]

Recognizing that a narrow approach to defining the relevant property would "threaten[] the careful balance between property rights and government authority" struck by the Court's regulatory takings doctrine, the Chief Justice reaffirmed the "as a whole" test for identifying the denominator.[142] Under state law the whole of a tract of land generally was defined by the boundaries of the tract absent "the most exceptional circumstances."[143] He explained that property rights exist

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132. *Id.* (emphasis in original).

133. *Id.*

134. *See id.*

135. *Id.* at 1951.

136. *Id.*

137. *Id.* at 1951 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (internal quotation marks omitted)).

138. *Id.*

139. *Id.* (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (internal quotation marks omitted)).

140. *See id.* at 1951–52.

141. *Id.* at 1952 (quoting Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 123 (1978) (internal quotation marks omitted)).

142. *Id.*

143. *Id.* at 1953.

in a particular thing—here a tract of land that is "horizontally bounded;" that "thing[]" should not vary according to the purpose or issue.[144] By looking to state law to define the boundaries of the whole, his approach removed the "risk of strategic unbundling," preventing an owner from successfully claiming a single strand has been taken.[145]

An inquiry into the reasonableness of the owners' expectations about developing each lot was not, in the Chief Justice's view, an appropriate part of defining the relevant parcel.[146] Rather those expectations, as well as other factors identified by the majority's new test, related to the question of whether a regulatory taking of the relevant parcel had occurred.[147] Otherwise "the effectiveness of the Takings Clause as a check on the government's power to shift the cost[s] of public life onto private [property]" would be undermined.[148] According to Chief Justice Roberts, the majority approach allows greater consideration of government interests by shifting the definition of the relevant property from state law considerations to the reasonableness of the government's regulatory interests.[149]

Though many hoped that the Court in *Murr* would settle the denominator question definitively and satisfactorily, the opinions of Justices Kennedy and Roberts fail to achieve those results.[150] The majority opinion continues the trend of mixing substantive due process and takings analysis,[151] and, in the process, heightens the federalism dimension of constitutional property.[152] At one point in his opinion, Justice Kennedy affirmatively states that the Court's case law "recognizes that reasonable land-use regulations do not work a taking."[153] He then points as support to the Court's decision in *Agins v. City of*

144. *Id.*

145. *Id.* at 1953–54.

146. *Id.* at 1952–53.

147. *Id.* at 1954.

148. *Id.*

149. *See id.* at 1955.

150. Indeed, reform legislation has already been enacted in at least one jurisdiction to ban use of a common land use tool—the merger doctrine—for contiguous lots owned by one party without permission. *See* Lost Tree Vill. Corp. v. United States, 92 Fed. Cl. 711, 722 (2010) (remitting the determination of relevant parcel to the trial court, due to the fact-intensive nature of the inquiry); Michael M. Berger, *Ruminations on Takings Law in Honor of David Callies*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. 17, 28–29 (2018); James W. Ely, Jr., *Governmental Forbearance: Myth or Reality?*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 125, 125 (2014).

151. *Accord* Brady, *supra* note 8 (arguing that *Murr*'s new three-factor test is problematic, complicating takings analysis and ruining constitutional property federalism, and will inevitably lead to inconsistent outcomes).

152. *See* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 205 (2004) (discussing how takings jurisprudence is shaped by federalism concerns).

153. *Murr*, 137 S. Ct. at 1947.

Tiburon, describing *Agins* as upholding zoning regulations against a takings challenge "as a legitimate exercise of the government's police power."[154] Justice Kennedy acknowledged that a later case, *Lingle v. Chevron*, limited *Agins*—because of *Agins*'s use of a "substantially advance" test—to ensure that a heightened review standard was not used to evaluate the effectiveness of laws.[155] He, however, stressed that *Agins* survived the *Lingle* decision even though the *Agins* test was "imprecise."[156] Then, in applying its multi-factor denominator test to identify the property benchmark, he speaks in terms of the central "purposes of this takings inquiry" and the legitimacy of treating the lots as one parcel under the merger doctrine.[157] As Chief Justice Roberts observed, the majority shifts the definition of the relevant property interest from state law considerations to the legitimacy of government interests.[158]

The dissenting opinion, on the other hand, allows state law to control the choice of denominator and, therefore, in many situations, resolution of the takings inquiry.[159] Using only the state's approach to defining boundaries, however, would ignore the fact that lot or boundary lines generally were drawn before development plans or subdivisions were made. Those boundaries typically do not reflect the suitability of the tract or lot for development. The lot lines were established under state law for the purpose of determining ownership, not for the purpose of evaluating the development potential of the lot.

The mixing of substantive due process and takings analysis and the evolution of regulatory takings from physical takings have led to the untethering of a number of legal concepts that defined and limited takings analysis. Those concepts involved notions of unjust enrichment, foreseeability, and windfalls that were tied to the *in rem* nature of the Takings Clause, captured through the use of the term "property." The next section discusses the evolutionary path from physical to regulatory takings and the legal concepts that have gotten lost in the translation.

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154. *Id.* (discussing Agins v. City of Tiburon, 447 U.S. 255 (1980)).

155. *Id.*

156. *Id.* (quoting Lingle v. Chevron, 544 U.S. 528, 545–48 (2005)). In *Agins* the Court held there was no taking when a zoning ordinance limited, without completely eliminating, development on the land. *Agins,* 447 U.S. at 262–63. In *Lingle* the Court narrowed *Agins*, holding that the validity of a law under a substantially advances formula was a matter of due process and did not address whether a compensable taking existed. *Lingle*, 544 U.S. at 548.

157. *Murr*, 137 S. Ct. at 1950.

158. *Id.* at 1955–56.

159. *Id.* at 1954.

III. THE ROAD FROM PHYSICAL TO REGULATORY TAKINGS

Even before Mahon established a constitutional basis for declaring as confiscatory laws that went too far in restricting economic use, the courts had mixed the language of confiscation and takings with due process deprivations. This mixed narrative is understandable when considered in light of the early practice of handling federal takings claims brought against states under the Due Process Clause of the Fourteenth Amendment as part of the first principles of universal law captured in that Clause.[160] Early on, the Court construed the Due Process Clause as including a compensation requirement, "founded in natural equity," for the taking of property.[161] Claims of uncompensated takings initially required a physical occupation or invasion to be successful.[162] As the degree of permanence, directness, and physicality of the interference declined, courts would also consider the impact of the government act on use value, the foreseeability of the impact, and its substantiality.[163] Ultimately, as the scope of government regulations grew, courts became concerned about the seemingly limitless reach of government regulation over property and decided to recognize the concept of a regulatory taking. The separation of the regulatory takings concept from physical takings enabled courts to find a taking when no government-induced physical occupation or appropriation existed. The separation also allowed the courts to break from the deferential substantive due process review accorded legislative acts affecting property and impose more limits on government regulation of property.

A. Police Power Regulation of "Property Clothed with a Public Interest"

The Court's oversight of economic regulation of property has gone through a number of phases. When the young country needed more settlement and westward expansion, land distribution laws played a major role in promoting and regulating growth, agricultural production, and economic development.[164] Government's authority to promote the public good—the public health, welfare, and safety—was broad.

160. *See* Chi., Burlington & Quincy R.R. Co. v. City of Chi., 166 U.S. 226, 236 (1897)*; see also* Robert Brauneis, *The Foundation of Our "Regulatory Takings" Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L. J. 613, 667–68 (1996).

161. Chi., Burlington & Quincy, 166 U.S. at 236.

162. *See* Butler, *Governance Function*, *supra* note 2, at 1689-90, 1721–23.

163. *See id.* at 1709–16, 1721–23.

164. *See, e.g.*, LYNDA L. BUTLER & MARGIT LIVINGSTON, VIRGINIA TIDAL AND COASTAL LAW ch. 8 (Michie Co. 1988) (discussing Virginia's land distribution laws).

The Court recognized that each citizen "necessarily parts with some rights or privileges" in order to enable the government to adopt laws to further the public good.[165] Further, this power included regulation of the manner in which owners used their property and could abate harmful or noxious uses.[166] But the Court recognized that there are "limits beyond which legislation cannot rightfully go."[167] If a statute had "no real or substantial relation" to the public health, welfare, or safety or was "a palpable invasion of rights secured by the fundamental law," then the statute had exceeded those limits.[168] At the time, the key constraints imposed on the states' police power regulation of property were the Due Process and Contracts Clauses.[169]

This approach to police power regulation became problematic once the Court broadened the scope of the police power through its property "affected with a public interest" doctrine.[170] Formulated in the 1876 decision *Munn v. Illinois*,[171] the doctrine justified regulation of certain

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165. Munn v. Illinois, 94 U.S. 113, 124 (1876); *see also* ERNST FREUND, THE POLICE POWER § 16, at 12 (1904) (noting that sometimes individual interests must yield to the public welfare).

166. Mugler v. Kansas, 123 U.S. 623, 658, 663–64 (1887); *Munn*, 94 U.S. at 125; *see also* FREUND, *supra* note 165, §§ 511–517 (discussing the difference between valid police power regulation and eminent domain). The 1887 decision *Mugler v. Kansas* reflects the early approach of the Supreme Court to police power regulation. In *Mugler,* the Court concluded that government's lawful exercise of its police power to prevent a public nuisance caused by private property was not subject to the just compensation principle even though the government action destroyed or significantly diminished the value of the property. The power to prohibit harmful uses was not subject to the condition that government pay just compensation for pecuniary losses suffered by property owners because, according to the Court, property owners were not permitted to conduct a noxious use. In *Mugler,* the state legislature had enacted a statute prohibiting the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes. Prior to the adoption of the law, Mugler had built and operated a brewery. Enforcement of the statutory prohibition meant a material diminution in value of the property. When Mugler was arrested for violating the ban on the sale and manufacture of intoxicating liquors and for maintaining a public nuisance, he challenged the law on due process grounds, arguing that the law had in effect taken his property without payment of just compensation by materially diminishing its value and thus had deprived him of due process. In explaining why no constitutional violation had occurred, the Court declared that a state's police power included the power to prohibit uses injurious to the public. *Mugler*, 123 U.S. at 664–65, 668–69, 671.

167. *Mugler*, 123 U.S. at 661.

168. *Id.*

169. *See* JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016); *see also* GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE, AND CONTROL OF PRIVATE PROPERTY 20–26 (1998).

170. *See generally* FREUND, *supra* note 165, §§ 372–401; William M. Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L .J. 813, 836 (1998). For a discussion of the origins of the doctrine, *see* Harry N. Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSP. AM. HIST. 329 (1971). For a different perspective, see CHARLES M. HAAR & DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS (1986) (exploring use of a common law duty to serve in addressing problems of inequality in providing essential services to the public).

171. 94 U.S. 113, 113 (1876).

property to protect the public interest. In *Munn* the Court upheld the regulation of rates charged by grain elevator operators against a due process challenge.[172] The case involved a state law regulating elevators or warehouses when grain was stored in bulk and the grain of different owners was mixed or otherwise stored in a manner that made preservation of the separately owned lots impossible.[173] Among other requirements, the law mandated that the owner, lessee, or manager of the warehouse obtain a license to operate as a public warehouse, file a bond, and charge no more than the maximum rate allowed by law.[174]

In analyzing the validity of the government's regulation of privately owned elevators and warehouses, the Court declared that an owner who devotes his property to a use affecting the public is "in effect, grant[ing] to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[175] The Court explained that property becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."[176] Businesses that have monopoly power over a product or use impacting the public welfare would qualify as such property.[177] The grain warehousemen fell into this category because of the immenseness of their grain market, the absence of public grain warehouses, and the great demand for grain.[178] In the words of counsel quoted by the Court, the warehousemen stood at the "gateway of commerce."[179]

An important factor in *Munn* and other early property affected with a public interest cases was the monopolistic character of the business. In some of these cases, the monopoly arose from natural conditions. In other cases, economic conditions tended to create the monopoly.[180] Regardless of the origin, the monopolistic conditions meant that "the common regulating factor, competition . . . [was] absent"[181] and therefore would not limit the profits of the business. Further, the importance of the business to the public meant that the business would be able to exploit its monopoly power in the absence of rate

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172. *Id.* at 135–36.

173. *See id*. at 115–16.

174. *See id*. at 116–17.

175. *Id*. at 126.

176. *Id.*

177. *See id*. at 127–28. The Court ultimately decided that the existence of monopoly power is not a necessary condition. *See* FREUND, *supra* note 165, §§ 376–377 (discussing the role of the monopoly factor).

178. *See Munn*, 94 U.S. at 130.

179. *Id.* at 132 (quoting counsel) (internal quotation marks omitted); *see* HAAR & FESSLER, *supra* note 170, at 146–47 (discussing *Munn*).

180. *See* FREUND, *supra* note 165, § 377, at 387–88.

181. *Id.* at 387.

regulation.[182] Although later cases clarified that monopoly power was not a necessary condition, it still helped to identify situations where the public could be subject to "exorbitant charges and arbitrary control."[183]

The Supreme Court case law defining "property affected with a public interest" failed to provide a consistent or coherent definition.[184] Among other problems, the case law did not identify a common, defining characteristic capable of explaining, in a predictable and principled manner, when property was affected with a public interest.[185] Some justices preferred to limit the category of property affected with a public interest to property that was dedicated by the owner to public use or for which the government granted a special privilege or use.[186] Others included a wide range of businesses within the category.[187] Though the courts disagreed about the scope of property affected with a public interest, courts generally agreed that rate regulation of businesses affected with a public interest was allowed, even without a showing of an actual threat posed by high rates, as long as the regulation did not deny a reasonable or fair rate of return.[188]

Perhaps the most comprehensive definition of property affected with a public interest was announced by the Court in *Charles Wolff Packing Co. v. Court of Industrial Relations*.[189] According to that decision, three general classes of property affected with a public interest existed. One category included businesses "carried on under the authority of a public grant of privileges" that expressly or impliedly imposed an "affirmative duty" to perform a public service.[190] Businesses falling within the first category were "created for public purposes."[191] Examples included public utilities, railroads, and other common carriers.[192] A second category involved certain "exceptional" businesses to which the public interest had attached.[193] Inns, ferries,

182. *See generally id.* §§ 376–377, at 385–88 (discussing the monopoly factor).

183. Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 538 (1923); *see* FREUND, *supra* note 165, § 376, at 386.

184. *See* HAAR & FESSLER, *supra* note 170, at 145–54 (discussing how the concept differed among courts and changed over time).

185. *See* FREUND, *supra* note 165, § 373, at 382; HAAR & FESSLER, *supra* note 170, at 145–51 (discussing "clothed with a public interest" as an "expanding conception of a public utility").

186. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 136, 139 (1876) (Field, J., dissenting).

187. *See, e.g.*, *Wolff Packing*, 262 U.S. at 535–36.

188. *See* Treanor, *supra* note 170, at 838–39.

189. *Wolff Packing*, 262 U.S. at 535. *See* HAAR & FESSLER, *supra* note 170, at 153–54 (discussing *Wolff Packing*).

190. *Wolff Packing*, 262 U.S. at 535.

191. Smyth v. Ames, 169 U.S. 466, 544 (1898).

192. *Wolff Packing*, 262 U.S. at 535.

193. *Id.*

cabs, and grist mills seemed to fall within this category.[194] The third category involved businesses that were "not public at their inception" but had "risen to be such" status because the owner had devoted his business to the public use.[195] Such a change in status required "more than that the public welfare [was] affected by continuity or by the price at which a commodity is sold or a service rendered."[196] Rather the circumstances must indicate that "a peculiarly close relation" existed between the public and the business—a relation that suggests the existence of "an affirmative obligation . . . to be reasonable in dealing with the public."[197] The key characteristics of businesses in the third category were "the indispensable nature of the service" and the potential exploitation of a dependent public by exorbitant prices and arbitrary control.[198] Examples of businesses in the third category included grain elevators,[199] fire insurance,[200] water works,[201] and telegraph and telephone companies.[202] Judicial use of the "property affected with a public interest" doctrine probably reached its peak under *Wolff Packing*.

B. The Rise of Substantive Due Process Constraints and Development of Takings Theories

The property affected with a public interest doctrine lost its dominance in the 1890s as jurists and commentators concerned about the breadth of the holding in *Munn* and of police power regulation more generally searched for theories to limit the reach of the police power.[203] One result of this search was the transformation of the due process principle into substantive protection of property.[204] For a time the Due Process Clause became a powerful substantive check on economic regulation of property.[205] Another result was the application of a just compensation principle, based on Fourteenth Amendment due process

194. *See id.*; Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 255 (1916).

195. *Wolff Packing*, 262 U.S. at 535.

196. *Id.* at 536.

197. *Id.*

198. *Id.* at 538.

199. *See* Munn v. Illinois, 94 U.S. 113, 114 (1876).

200. German All. Ins. Co. v. Lewis, 233 U.S. 389, 405–15 (1914).

201. *See* Spring Valley Water Works v. Schottler, 110 U.S. 347, 348 (1884).

202. *See* Hockett v. State, 5 N.E. 178, 182 (Ind. 1886).

203. *See* Chi., Milwaukee & St. Paul Ry Co. v. Minn., 134 U.S. 418, 456–57 (1890) (holding that the railroad was deprived of its property without due process when the railroad commission set prices that were not subject to judicial review); SKOURAS, *supra* note 169, at 26.

204. *See Chi., Milwaukee & St. Paul Ry Co.,* 134 U.S. at 456–57; SKOURAS, *supra* note 169, at 26.

205. *See* SKOURAS, *supra* note 169, at 129 n.52; ARNOLD M. PAUL, CONSERVATIVE CRISES AND THE RULE OF LAW: ATTITUDES OF BENCH AND BAR 1887–1895, at 2 (1960).

analysis, to limit the regulation of property affected with a public interest. In its 1898 decision *Smyth v. Ames*, the Court clarified that the regulation of rates charged by a business affected with a public interest must allow a fair or reasonable rate of return.[206] A rate regulation that denied a fair return would deprive the property owner of due process and equal protection of the law contrary to the Fourteenth Amendment and therefore require payment of just compensation.[207] *Smyth* thus imposed some limits on the property affected with a public interest doctrine, providing a fair or reasonable return test for distinguishing between legitimate and confiscatory rate regulations.[208]

Reaction to *Munn*'s broad approach to interpreting property affected with a public interest helped to set the stage for the development of the regulatory takings doctrine.[209] As discontent with government regulation of property grew, the influence of jurists and commentators supporting stronger protection of contract and property rights increased.[210] The emergence of substantive due process provided some fairly immediate but relatively short-lived relief from government regulation of property.[211] By the late 1930s, substantive protection of property under the due process clause had run its course.[212] The fair or reasonable return limitation on police power regulation of property affected with a public interest proved more durable. It provided a foundation for the regulatory takings doctrine, establishing that deprivation of a fair return on property affected with a public interest could, by itself, be a constitutional violation requiring just compensation. Expansion of this principle beyond the context of property affected with a public interest required, however, that the courts overcome the conceptual constraints of traditional takings law. Those constraints, which arose from the early focus on physical takings, concerned how the courts defined not only the scope of takings liability but also the types of recoverable damages through the consequential loss doctrine.

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206. *See* 169 U.S. 466, 546–47 (1898). *But see* Fed. Power Comm'n v. Nat. Gas Pipeline Co., 315 U.S. 575, 599, 601–06 (1942) (Black, J., concurring) (explaining the havoc caused by the *Smyth* decision and how the Court has subsequently limited *Smyth* to clarify the difference between the power of eminent domain and rate regulation).

207. *See Smyth*, 169 U.S. at 525–27, 546; Treanor, *supra* note 170, at 837–38.

208. *See* Treanor, *supra* note 170, at 837–38; Patrick C. McGinley, *Regulatory "Takings": The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. 10369 (Sept. 1987), reprinted in 1988 ZONING AND PLANNING LAW HANDBOOK 337, 344, 352 (1988).

209. *See* Treanor, *supra* note 170, at 836–39, 861–71 (discussing the transition from property affected with a public interest to a takings revival).

210. *See* HAAR & FESSLER, *supra* note 170, at 152.

211. *See* JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS § 2.03 (3d ed. 2019).

212. *See* DAVID A. SCHULTZ, PROPERTY, POWER AND AMERICAN DEMOCRACY 50–54 (1992).

Until the regulatory takings concept emerged, property owners seeking just compensation under the Takings Clause had to establish an actual physical invasion, occupation, or appropriation of property directly caused by government.[213] Even when a court occasionally voiced concerns about the economic impact of regulatory interference, the courts generally refused to find a taking based on regulatory interference alone as long as substantial enjoyment or profitable use remained.[214] The courts stressed that diminution in value or pecuniary loss resulting solely from regulatory interference was incidental to the proper exercise of government power and therefore not recoverable under the Takings Clause.[215] Lawful police power action thus could not result in a taking absent a physical invasion or direct appropriation of a property interest.

A core part of the Court's justification for denying compensation for diminution in value resulting from regulatory interference was the common law consequential damages or loss doctrine.[216] Based on the distinction between general and consequential damages, this doctrine varies in meaning and scope according to the legal context. The basic idea of the doctrine is that recovery of damages generally is limited to injury that arises naturally as a direct result of wrongful action.[217] Consequential or special damage instead refers to loss that occurs more indirectly as a consequence of injury to plaintiff's property or asset.[218] Consequential damage can include lost profits or income, out-of-pocket expenses incurred to deal with the loss of the property, diminution in value of the remaining property caused by the use of adjacent property, and emotional distress and other personal, nonmonetary losses resulting from the tort, breach of contract, or taking.[219] General damage, in contrast, measures the diminution in the owner's net worth caused by the loss of the actual asset.[220] In a takings situation, government must pay just compensation for the value of the taken property typically measured as the difference

213. Butler, *Governance Function*, *supra* note 2, at 1689–90, 1721–23.

214. *See supra* notes 23–38 and accompanying text.

215. *See* Transp. Co. v. Chi., 99 U.S. 635, 637 (1878); Knox v. Lee, 79 U.S. 457, 551 (1870); FREUND, *supra* note 165, § 509, at 544; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 71–73 (1992).

216. *See* United States v. Petty Motor Co., 327 U.S. 372, 377–78 (1946); FREUND, *supra* note 165, § 509.

217. *See* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1011 (1964 & Supp. 1999); 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §§ 111–13 (8th ed. 1891).

218. *See* 1 DAN B. DOBBS, LAW OF REMEDIES § 3.2, at 289, § 3.3(1), at 293 (2d ed. 1993) [hereinafter DOBBS, REMEDIES].

219. *See generally id*. § 3.3 (1), (4), § 5.15(1); LAITOS, *supra* note 211, § 18.03[D].

220. In contracts and torts actions, courts measure general damages as the difference between the market value of the property before and after the tort or breach as of a particular time. *See* DOBBS, REMEDIES, *supra* note 218, § 3.3(3), (4).

between the fair market value of the entire property before the taking and the remaining portion after the taking.[221] The differences between general and consequential damages thus center on what is being compensated. General damages compensate for the loss of or injury to the actual asset, while consequential damages involve losses occurring because the injured asset can no longer produce income or avoid losses.[222]

In the physical takings context, consequential loss arises when a property owner incurs damage in addition to the actual loss of the property resulting from the forced transfer or physical invasion of the property by government. As a general matter, the Supreme Court has strictly adhered to the consequential loss doctrine in physical takings cases, denying just compensation for damages not directly related to the property that is taken.[223] Just compensation cases have invoked the doctrine on two levels: first, in defining the scope of takings liability and, second, in measuring just compensation.[224] In the *Legal Tender Cases*, the Court explained the role of the doctrine in defining the scope of the Takings Clause, noting that the Clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[225] The Clause "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."[226] As examples, the Court pointed to a "new tariff, an embargo, a draft, or a war [which] may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless;"[227] yet surely no one expected that these exercises of lawful power would be barred or inhibited by the Takings Clause.[228] More than one hundred years later, the Supreme Court commented on the role of the doctrine in measuring just compensation. The Court noted that just compensation normally is measured by the fair market value of the appropriated property and that fair market value does not include consequential damages.[229]

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221. *See* LAITOS *supra* note 211, § 18.03[C], at 18–22 to 18–24.

222. *See* DOBBS, REMEDIES, *supra* note 218, § 3.3(4), at 304.

223. *See* United States. v. Fifty Acres of Land, 469 U.S. 24, 33 (1984); United States v. Petty Motor Co., 327 U.S. 372, 378 (1946); Transp. Co. v. Chi., 99 U.S. 635, 641–42 (1878); 2A NICHOLS ON EMINENT DOMAIN § 6.08[2] (rev'd 3d ed. 2000). *See generally* JACQUES B. GELIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN § 2.4(B) (1982); LAITOS, *supra* note 211, § 17.03 (discussing general principles and issues relating to the calculation of just compensation).

224. *See generally* SEDGWICK, *supra* note 217, § 114.

225. Knox v. Lee, 79 U.S. 457, 551 (1870).

226. *Id.*

227. *Id.*

228. *See id.*

229. *See* United States. v. Fifty Acres of Land, 469 U.S. 24, 33 (1984).

The origin of the consequential loss doctrine is far from clear. Morton Horwitz, in his influential work *The Transformation of American Law, 1780–1860*, attributed the initial development of the doctrine to "the need to reduce the burden of damage judgments and to make economic planning more coherent."[230] He explained that the courts began by "redefin[ing] the scope of legal injury"[231] to exclude certain injuries because they either were trivial or already included in the compensation paid.[232] Further, regardless of the legal context, courts traditionally have been suspicious of consequential loss claims. Early on, American courts accepted the principles set forth in *Hadley v. Baxendale*[233] in defining recoverable breach of contract damages.[234] Those principles include the notion that the injured party may recover for all general damages "as may fairly and reasonably be considered . . . arising naturally . . . according to the usual course of things" from the breach of contract.[235] Although *Hadley* also allowed recovery of special or consequential damage, such recovery could only occur when it could "reasonably be supposed to have been in the contemplation of both parties . . . as the probable result of the breach" and the damage was reasonably certain.[236] In tort actions the courts similarly restricted recovery of special damages to those that proximately resulted from the wrongdoer's act. Those damages that fail the proximity test were viewed as too remote to be recoverable.[237]

In the common law and constitutional property contexts, traditional courts took an even stronger position. The courts precluded, for example, recovery for indirect injuries to land resulting from action taken on neighboring land when the actor committed no trespass or physical invasion. As early as 1815, the Massachusetts Supreme Court announced that a landowner who "does what he has a right to do upon his own land, without trespassing upon any law, custom,

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230. HORWITZ, *supra* note 215, at 71.

231. *Id.*

232. *See, e.g.*, Steele v. W. Inland Lock Navigation Co., 2 Johns. 283, 286 (N.Y. Sup. Ct. 1807) (holding that there is no recovery for damages that must have been taken into consideration in awarding just compensation for the taking); Palmer v. Mulligan, 3 Cai. R. 307, 314 (N.Y. Sup. Ct. 1805) (holding that there is no recovery for "trifling inconvenience or damage to others").

233. 156 Eng. Rep. 145 (1854).

234. The Uniform Commercial Code continues this approach in section 1–305. It provides that "neither consequential or special nor penal damages may be had except as specifically provided in [this Act] or by other rule of law." U.C.C. § 1–305; *see also* 2 DOBBS, REMEDIES, *supra* note 218, § 12.17(1).

235. *Hadley*, 156 Eng. Rep. at 151; *see also* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 547 (1998).

236. 156 Eng. Rep. at 151; *see also* CALAMARI & PERILLO, *supra* note 235, at 547, 553.

237. *See* DAN B. DOBBS, THE LAW OF TORTS § 379, at 1056 (2000) [hereinafter DOBBS, TORTS]; SEDGWICK, *supra* note 217, §§ 113, 142–143.

title, or possession," is not liable for "injurious consequences,"[238] "only for the natural and necessary consequences of his acti[ons]."[239] The Massachusetts court explained that a landowner "ought to foresee the probable use" of the adjoining lands[240] and "to have taken better care" of his property.[241] By the early 1820s, state courts already were distinguishing between direct and consequential injuries in resolving takings claims.[242] As economic activity increased in frequency and scope, judicial protection of businesses from liability for indirect injuries began to impact resolution of takings claims in federal courts. Eventually, courts used the consequential loss doctrine to justify liability exemptions in both the takings and the common law property contexts.[243] Just as consequential injuries resulting from the exercise of a lawful private right were not part of the risk assumed by the right holder and were therefore not recoverable, consequential losses resulting from the exercise of lawful government action normally were not compensable.[244]

The courts have offered a number of justifications for exempting consequential losses from the government's takings liability. In one of the early state cases,[245] the Massachusetts Supreme Court suggested several possible rationales: foreseeability, unjust enrichment, and a concern for windfalls.[246] As the court explained, landowners should take into account the risk of consequential injury when they agree to a purchase price, especially when their land adjoins a public good like a road.[247] As voluntary purchasers, landowners could choose either to "indemnify themselves in the price" or to take the risk of future improvements and injury.[248] Landowners are "presumed to foresee the changes which public necessity [and] convenience may require," and to "avoid or provide against a loss"[249] Property owners who suffer consequential injuries should have known about the possibility of future development and "guarded against a future loss."[250]

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238. Thurston v. Hancock, 12 Mass. 220, 226–27 (1815); *accord* Panton v. Holland, 17 Johns. 92, 99 (N.Y. Sup. Ct. 1812) (holding that a landowner is not liable for consequential damages caused to adjoining land absent negligence or maliciousness).

239. *Thurston*, 12 Mass. at 229.

240. *Id.* at 226.

241. *Id.* at 229.

242. *See, e.g.*, Callender v. Marsh, 18 Mass. (1 Pick.) 418 (1823).

243. *See supra* notes 170–76 and accompanying text.

244. *See generally* SEDGWICK, *supra* note 217, §§ 110–69 (discussing consequential damages).

245. *See Callender*, 18 Mass. (1 Pick.) 418.

246. *See id.* at 431–32; *see also* Thurston v. Hancock, 12 Mass. 220, 225, 228 (1815).

247. *See Callender*, 18 Mass. (1 Pick.) at 431.

248. *Id.*

249. *Id.*

250. *Id.* at 432.

Compensation for consequential injuries thus could unjustly enrich landowners. Other courts have offered similar explanations. In a 1984 decision, for example, the United States Supreme Court expressed the fear that compensation for consequential damages would result in a windfall if the damages were not used to rebuild or reacquire the lost asset.[251] In deciding not to award compensation for harm from development projects on adjacent property, the Court noted that the owner of the damaged property should have foreseen the future development.[252]

Other justifications for excluding consequential losses from compensation awards exist. A New York state court, for instance, relied on the importance of the public interest to justify the doctrine. In *Lansing v. Smith*, the court explained that "every great public improvement must, almost of necessity, more or less affect individual convenience and property; and where the injury sustained is remote and consequential, it is . . . to be borne as a part of the price to be paid for the advantages of the social condition."[253] Important public improvements would not take place if government had to compensate property owners for indirect or consequential losses.[254] Additionally, courts have noted that consequential damages are too uncertain and subjective to be awarded.[255] Focusing only on fair market value provides an objective way to measure just compensation: transferable value has built-in external validity checks.[256] The textual language of the Just Compensation Clause also provides justification. As the Court explained in a 1946 decision, the Fifth Amendment compensates for the "value of the interest taken. . . . [Therefore] evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings."[257] Because of the Clause's reference to the property taken, courts have stressed the *in rem* nature of the just compensation principle, noting that the Clause protects the taking of property and not the

251. *See* United States v. Fifty Acres of Land, 469 U.S. 24, 34–35 (1984).

252. *See* Campbell v. United States, 266 U.S. 368 (1924); *see also* GELIN & MILLER, *supra* note 223, § 2.4, at 71–72.

253. 8 Cow. 146, 149 (N.Y. Sup. Ct. 1828).

254. *See generally* THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 476 (5th ed. 1998); 2A NICHOLS, *supra* note 223, § 6.08[2], at 6–131 to -132.

255. *See* United States v. Petty Motor Co., 327 U.S. 372, 377–78 (1946); *see also* GELIN & MILLER, *supra* note 223, § 2.4, at 84–85.

256. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949).

257. *Petty Motor Co.*, 327 U.S. at 377–78.

personal interests of the owner.[258] In its 1893 decision *Monongahela Navigation Co. v. United States*, the Court explained the *in rem* nature of takings protection:

> And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. . . . Instead of continuing that form of statement . . . the personal element is left out, and the "just compensation" is to be a full equivalent of the property taken.[259]

Whether a type of consequential loss is recoverable thus depends in part on the legal context of the case. While the courts in tort and breach of contract actions might compensate for consequential damage that meets the foreseeability or proximate cause tests, courts in takings actions traditionally did not allow recovery of consequential losses.[260] The courts regularly have rejected takings claims for diminution in value of remaining land when the diminution in value is caused by the use of adjacent land.[261] The courts also do not allow recovery of lost profits in takings actions, reasoning that the government did not actually take the business producing the income.[262] Nor do the courts

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258. The precise meaning of the consequential loss concept has varied according to the legal and factual context and according to the type of consequential injury involved in a case. Consequential loss cases typically involve one of three key legal contexts: breach of contract, torts, and takings. In a breach of contract action, courts allow recovery of consequential damage that should have been foreseeable or reasonably anticipated by the parties as a probable result of the breach and that can be established with reasonable certainty as resulting from the defendant's breach. DOBBS, REMEDIES, *supra* note 218, § 12.4(4)–(7); E. ALLAN FARNSWORTH, CONTRACTS § 12.14, at 912 (2d ed. 1990). In a tort action, a plaintiff must establish that the consequential damage was the proximate and natural result of the wrongdoer's act or failure to act. *See* DOBBS, REMEDIES, *supra* note 218, § 3.4; SEDGWICK, *supra* note 217, §§ 110–13, 142–43. If consequential damages are so unusual or unforeseeable that no one could have reasonably anticipated them, they are not recoverable. *See* DOBBS, TORTS, *supra* note 237, § 379, at 1056; SEDGWICK, *supra* note 217, § 142, at 201. Finally, in takings actions courts generally conclude that "non-physical damage . . . suffered by a property which is neither invaded nor appropriated" is nonrecoverable consequential damage. NICHOLS, *supra* note 223, § 6.08[2], at 6–121. Different types of consequential loss include the diminution in value of the remaining portion of the owner's property caused by use of adjacent land, loss of profits or business opportunities, additional expenses incurred to deal with the aftermath of the breach, tort, or taking, and personal, nonmonetary injuries indirectly resulting from the wrong. *See* GELIN & MILLER, *supra* note 223, § 2.4.

259. 148 U.S. 312, 326 (1893); *see also* GELIN & MILLER, *supra* note 223, § 2.4, at 79.

260. *See Monongahela Navigation*, 148 U.S. at 326; DOBBS, REMEDIES, *supra* note 218, § 3.4, at 318; GELIN & MILLER, *supra* note 223 at 78–79; LAITOS, *supra* note 211, § 18.03[D].

261. In *Campbell v. United States*, 266 U.S. 368, 372 (1924), for example, the Court held that the owner of land taken for the construction of a nitrate plant was not entitled to compensation for diminution in value of the portion of the owner's land not taken because the diminution was caused by the acquisition and use of adjacent lands owned by others for the same project.

262. *See, e.g.*, Mitchell v. United States, 267 U.S. 341, 345 (1925); Omnia Co. v. United States, 261 U.S. 502 (1923). Voters in some states have approved state constitutional provisions that expand the measure of just compensation to include some consequential losses. *See, e.g.*, VA. CONST. art. I, § 11.

allow recovery of out-of-pocket expenses incurred to deal with the loss of the taken property.[263] According to one scholar, the courts reason that such expenses would not be recoverable in actions involving voluntary sales and therefore should not be compensable in takings situations.[264] Finally, courts generally do not award compensation for emotional distress and other personal, nonmonetary damages relating to the taking. Otherwise government would be discouraged from taking any land for beneficial purposes.[265]

Eventually, as physical takings analysis brought in regulatory aspects, the courts introduced several theories and principles of liability that would become important to modern takings analysis. One theory involved an extension of the functional equivalence concept seen in some traditional physical takings cases. As Justice Holmes explained in *Pennsylvania Coal v. Mahon*, depriving regulated property of commercially viable use "has very nearly the same effect for constitutional purposes as appropriating or destroying it."[266] Another theory advanced in *Mahon* focused on the limited public interest furthered by the statute. Though Justice Holmes admitted that "there is a public interest even in this" case of the purchase of a single private house, he stressed that the public interest in ordinary private affairs usually does not warrant much government interference.[267] In *Mahon*, the harm to the private house was "not common or public."[268] Nor did it raise a public safety issue; notice of the impeding subsidence had been given to the surface property owner.[269] Under Holmesian analysis, the public interest thus was relegated to a threshold inquiry into the basic legitimacy of the legislative act but was not relevant to evaluating the economic impact of the act on the property owner. A third theory involved the concept of average reciprocity of advantage. As Justice Holmes explained, the statute did not secure the "average reciprocity of advantage" needed to justify police power regulation of property.[270] According to the majority opinion, the regulated property owner in *Mahon* did not receive benefits as well as burdens from the act.[271] A

263. *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 338–39 (1893).

264. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 55 (1985).

265. *See* LAITOS, *supra* note 211, § 18.03[D].

266. 260 U.S. 393, 414 (1922).

267. *Id.* at 413.

268. *Id.*

269. *See id.* at 414.

270. *Id.* at 415–16.

271. *See id.* at 414–15. *But see id.* at 422 (Brandeis, J., dissenting) (declaring that reciprocity of advantage is not a consideration when the purpose of police power regulation is to prevent public harm from private land use). Some have interpreted the average reciprocity of advantage test narrowly to require tangible benefits for the regulated property owner.

"strong public desire to improve the public condition" was not enough, in Justice Holmes's opinion, to justify taking property without payment of just compensation when no average reciprocity of advantage existed.[272] A fourth justification for the decision was assumption of risk. Holmes explained that when parties voluntarily "take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants . . . giving . . . them greater rights than they bought."[273]

The Court in *Mahon* thus announced several key principles that now form the foundation of regulatory takings jurisprudence. The Court clarified that a property owner has a constitutionally protected right to conduct an economically viable use and therefore the government could not deprive a property owner of all commercially viable use without payment of just compensation. This idea is implicit in Justice Holmes's statement that a law that made the mining of certain coal commercially impracticable was functionally equivalent "for constitutional purposes . . . [to] appropriating or destroying" the regulated property.[274] Justice Holmes also subtly introduced a quantitative test for resolving regulatory takings claims through his reliance on diminution in value. [275] Instead of following the traditional approach of focusing on whether a physical invasion or direct appropriation existed, Justice Holmes looked at the quantity or degree of interference with the property.[276] His approach allowed courts to consider the severity of the impact of the regulation on the property's value when no permanent physical invasion or appropriation existed.

In addition to bringing regulatory action within the scope of the Takings Clause, Holmes's more pragmatic approach shifted the focus of the takings inquiry from clear benchmarks like direct physical invasions to utilitarian considerations, defined in part by the "daily experience[] of people."[277] This approach eventually allowed the Court to address the problem of unfairness resulting from the combined effect of the traditional approach's refusal to award compensation unless a physical invasion existed and its refusal to allow recovery for consequential loss. Under Holmes's solution to the problem of

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Others have read the principle more broadly to include benefits to the community as a whole or to the landowner over time. *See, e.g.*, *id.* at 419, 422 (Brandeis, J., dissenting) (explaining that the value of the mine should be viewed as a whole); *see* SKOURAS, *supra* note 169, at 32; *see also* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 744, 803 (1999) (describing reciprocity of advantage as a theory of social responsibility involving offsetting benefits).

272. *Mahon*, 260 U.S. at 416.

273. *Id.*

274. *Id.* at 414.

275. *Accord* SKOURAS, *supra* note 169, at 31.

276. *See supra* notes 213–15 and accompanying text.

277. SKOURAS, *supra* note 169, at 29, 31–32.

unfairness, serious regulatory interference became functionally equivalent to a physical taking. By freeing regulatory interference claims from the requirement of a physical invasion, the Court allowed recovery of general damages even when no physical invasion existed.[278] Neither private rights nor public interests were absolute. Instead, Justice Holmes preferred a functionalist approach over a formalistic approach, fact- and context-based analysis over categorical reasoning, balancing over precise line drawing, and a pragmatic, relativist approach over an absolutist approach.[279] Although earlier cases had discussed the importance of economically viable use and generally had observed that government action could not deprive property owners of all such use, *Mahon* actually gave life to the idea—allowing it to stand on its own without a physical invasion. Much of the source of that life came from Justice Holmes's willingness to subordinate the public interest when the economic impact of government regulation was great. Over time the ultimate effect of Justice Holmes's paradigm shift was the development of a doctrine that limits government's ability to regulate property under the Takings Clause.

The evolution of regulatory takings thus reflects some important conceptual and theoretical connections to physical takings. Those ties are captured through the functional equivalence logic and include the *in rem* basis of takings liability, unjust enrichment and the concern for windfalls, the importance of the public interest and promotion of the public good, and limitations on liability imposed through foreseeability and the consequential damage doctrine. Over time, as the regulatory takings doctrine has taken on a life of its own, the defining theories and concepts have become unmoored. Without an adequate connection to its own history, it is no wonder that modern regulatory takings analysis is riddled with inconsistencies, perplexing results, and the continued mixing of due process and takings analysis. It is no wonder that the regulatory takings doctrine has lost sight of its inherent limits.

IV. THE INHERENT LIMITS OF REGULATORY TAKINGS

Because of the lost connection between regulatory takings and its defining concepts, modern regulatory takings decisions have produced unexpected and confusing results. New forms of takings, for example, have emerged that circle back to the earlier substantive due process analysis of confiscatory practices. Nexus reviews conducted in evaluating regulatory takings challenges have demanded an "essential nexus" between a legitimate state interest and a government condition

278. For an in-depth discussion of how *Mahon* came to be viewed as a regulatory takings case, see Treanor, *supra* note 170, at 861–71.

279. *See id.* at 854-55, 860–61.

imposed on a property owner, as well as "rough proportionality" between the condition and the projected impact of the proposed use.[280] That the Court announced the nexus reviews in cases involving required transfers of easements to the public suggests that the circling back was intentional.[281] The Court could have simply found a physical taking but chose to say more. When the Court in *Koontz v. St. Johns River Water Management District* extended the nexus review, as a guiding principle, to situations involving permit denials, the right to just compensation was protected even in the absence of an actual taking.[282] The Court in *Koontz* explained that the essential nexus and rough proportionality tests applied regardless of whether government approves the permit or instead denies it after the applicant refused to meet the condition.[283] Otherwise government could evade these limitations on its regulatory powers "by phrasing its demands for property as conditions precedent to permit approval." [284] As the Court explained, the absence of an actual taking misses the point. "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[285] However, because the permit was denied after the unconstitutional condition was refused, no actual taking occurred, and therefore the Fifth Amendment's remedy of just compensation could not apply.[286]

The decision in *Koontz* is confusing and perplexing. How could the Fifth Amendment right to just compensation be violated when no compensation could be paid under the federal Constitution because of the absence of an actual taking? Is a constitutional right without a constitutional remedy really a right? The decision also sends mixed messages about the role of substantive due process analysis in the land use regulatory context. Without conducting any nexus review of its own, the *Koontz* Court extended the takings nexus review tests to monetary exactions in spite of the Court's earlier decisions in *Eastern Enterprises v. Apfel*[287] and *Lingle v. Chevron U.S.A.*[288] In *Eastern Enterprises* a majority of justices agreed that a government-imposed

280. Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994).

281. *See, e.g.*, *Dolan*, 512 U.S. at 396 (requiring the dedication of a public greenway); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (requiring a public easement to walk along the beach).

282. 133 S. Ct. 2586, 2602–03 (2013).

283. *Id.* at 2595.

284. *Id*.

285. *Id*. at 2589–90.

286. *Id*. at 2597.

287. 524 U.S. 498 (1998).

288. 544 U.S. 528 (2005).

obligation to pay money could not provide the basis for a taking when it "does not operate upon or alter an identified property interest."[289] In *Lingle* the Court stated that a means/ends nexus review normally belonged under the Due Process Clause and that the substantially advance means/end review was "not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."[290] As the Court in *Lingle* explained, the means/end review "probes the regulation's underlying validity" and "reveals nothing about the *magnitude or character of the burden* a regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed."[291] The review thus "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property."[292]

Then, in the 2015 *Horne v. Department of Agriculture* decision, the Court applied physical takings analysis to a regulatory setting.[293] In *Horne* the Court concluded that a physical taking occurred because an agricultural law required raisin growers to reserve a percentage of their crop for their regulatory body to manage and control in years when market conditions necessitated government intervention to stabilize the raisin market.[294] The Court explained that the law effectuated both a physical surrender and a transfer of title.[295] The reserve requirement thus deprived the growers of their "entire 'bundle' of property rights . . . 'the rights to possess, use and dispose of'" the reserved raisins.[296] It did not matter whether economically viable use remained,[297] nor whether participation in the regulated market was voluntary.[298] That the raisin growers were in a protected market, receiving windfalls under the government program, was irrelevant to determining whether a physical taking existed.[299] The Court refused to consider any windfall received by the grower for the sale of the crop not subject to the reservation requirement under its physical takings analysis—not even if the price far exceeded what it would have been

289. *Apfel*, 524 U.S. at 540 (opinion concurring in judgment and dissenting in part); *see id*. at 554–56 (Breyer, J., dissenting) ("The 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property").

290. *Lingle*, 544 U.S. at 545.

291. *Id.* at 542–43.

292. *Id*. at 542.

293. 135 S. Ct. 2419 (2015).

294. *Id.* at 2428.

295. *Id*.

296. *Id*. (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

297. *Id*. at 2429.

298. *Id.* at 2430–31.

299. *See id.* at 2429–32.

without regulation—because "the value of the interest [in the reserved raisins] depends on the discretion of the taker."[300] Nor did the fungible nature of the property matter in considering whether the property was physically taken. Each raisin apparently counted in *Horne*. The government's requirement of physically setting aside a certain percentage of raisins constituted a physical taking even though actual separation was the only way to keep track of different batches of fungible property and even though the only economically viable use of tangible, fungible, perishable property was a timely sale.[301] Nor did the Court view the relationship between growers and their regulatory body more like a trust arrangement, with enough of a legal interest being transferred to the regulatory body to enable the trustee to fulfill the purpose of the trust to stabilize the raisin market.

The role of the consequential damages doctrine in physical takings analysis also has been overlooked. The doctrine highlights the relevance of foreseeability, a concern for unjust enrichment and windfalls, and the *in rem* nature of takings protection. Courts feared that property owners would receive windfalls if consequential damages were awarded, defeating the public interest in important public works and public improvement projects.[302] Even when a condemnation or physical taking has occurred, diminution in value is not generally recoverable as long as substantial enjoyment and use remain.[303] This tolerance for some adverse economic impact in the interest of promoting important public interests is slowly being eroded through the adoption of per se rules (where consideration of the public interest is not even allowed), the strengthening of the takings nexus review (requiring greater precision than normally required under substantive due process in the land use regulatory setting), and the expansion of physical takings analysis in regulatory settings (circumventing the inability of property owners to recover for partial regulatory takings). This erosion ignores the *in rem* nature of protection under the Takings Clause—which became part of regulatory takings through the logic of functional equivalence used to recognize regulatory takings. That *in rem* nature limits just compensation to the actual property taken and does not include related but personal interests of the owner.

Regulatory takings differ from physical takings in some ways that, if ignored, would expand protection from regulation to the point where the public good would suffer. The eminent domain clause was ratified

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300. *Id*. at 2429.

301. Lynda L. Butler, *The* Horne *Dilemma: Protecting Property's Richness and Frontiers,* 75 MD. L. REV. 787, 799–800 (2016). For further discussion of the *Horne* decision, compare *id.* with Mark Kelman, *Untangling* Horne; *Resuscitating* Nollan, 104 CORNELL L. REV. ONLINE 50 (2018).

302. *See supra* note 251 and accompanying text.

303. *See* Trans. Co. v. Chi., 99 U.S. 635 (1878).

at a time when the nation's resources, conditions, and public needs were much different than today's. The economy was still developing and many threats to survival existed. State governments used land distribution laws to promote economic development, settlement and westward expansion, agricultural production, military service, and many other core needs.[304] Those conditions have changed—so much so that the public good now requires regulatory policies that address the costs of relentless land development and resource use. Allowing the scope of regulatory takings to expand without consideration of the logic and nature of takings protection would undermine the public good. The logic of function equivalence provides a compelling reason for recognizing regulatory takings, for economic regulation can ruin the value of a person's property. Yet government must be able to regulate land use to promote important public health, welfare, and safety interests in response to changing social and natural conditions. Under our social contract, property owners have long accepted some diminution in value, some interference with economic expectations, and some inconvenience.

The differences between regulatory and physical takings attest to why the regulatory takings doctrine must remain limited in scope. Those differences arise because the functional equivalence logic first used to extend takings protection to regulatory settings does not fit perfectly. Without an appreciation for that logical context, regulatory takings analysis becomes unmoored from its history—a history that helps to keep the analysis grounded and the implications of the differences in check. In contrast to physical takings, regulatory takings settings generally do not involve an affirmative use but rather promotion of a legitimate public purpose through limitations on use.[305] Once courts were willing to find a regulatory taking from a legal restriction without worrying about public use, it was only a matter of time before the meaning of public use became synonymous with public purpose.[306] A regulatory taking also requires substantial or total interference with a property right.[307] Inconvenience or minor interference is not enough to find a regulatory taking because otherwise government could not improve the public condition. Even a minor but permanent physical invasion, however, is a per se physical taking no matter how important the public interest. When that minor physical taking becomes part of a complex regulatory program developed to protect the property owners' agricultural business (for example, the raisin market),

304. *See* BUTLER & LIVINGSTON, *supra* note 164, ch. 8 (discussing the roles of Virginia's land distribution laws).

305. *See* LAITOS, *supra* note 211, § 13.04[A][1].

306. *See* Haw. Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers.").

307. *See* LAITOS, *supra* note 211, §§ 12.02, 12.06.

minor economic impact suddenly becomes compensable through the physical taking concept. Eventually, the logic underlying the regulatory takings doctrine is overlooked or misunderstood, and the doctrine takes on a life of its own.

The denominator problem provides a powerful example of the confusion that can result from continuing expansion of the regulatory takings doctrine. The choice of denominator could be used to further expand the doctrine well beyond its defining concepts. If the denominator is only the affected property, any regulation preventing use of a portion of the property owner's rights would effect a regulatory taking, and important police power action could become too costly to pursue. Yet no property owner has a reasonable expectation of receiving maximum profits from each part or from the whole. The moral outrage over losing the right to mine support columns when subsidence would harm public goods or another's surface property should not be that great if the coal already mined produced sizable returns. The outrage over losing the right to sell the reserved raisins in the primary market surely would not compare to the pain of losing the value of an entire crop in an unprotected market that has far too many raisins. Receiving less than full value for each reserved raisin would produce a partial economic loss and could effect a taking unless the entire regulatory context is considered: the subsidized market existing for the growers as well as the public, the reasonable return received on the remaining crop, the voluntary participation in the market, and the economic value of the grower's whole crop. By choosing to protect the grower against the possibility of a glutted market, government should not find itself liable for controlling the supply of a perishable, fungible crop grown only for sale in that protected market.

Courts applying the regulatory takings doctrine thus need to recognize the doctrine's inherent limits. Ignoring those limits has led to much confusion and inconsistency in takings jurisprudence. Courts handling regulatory takings claims involving land need to think objectively and comprehensively about the property, considering how the regulated or proposed use adversely affects the land's connection to the surrounding ecosystem and community. Well-tailored laws that address adverse impacts generally should not pose a regulatory taking even if the regulations cause diminution in value, lower profits, or more restricted use. Laws governing property rights should not be locked in time in the sense of dealing with changing conditions and knowledge about adverse impacts. Nor should the legal system ignore the relationship between the whole and its parts—both in the physical and economic sense—simply because of how a lot line is drawn or a temporal space is defined. The whole never should be treated as less than the sum of the parts. If, for example, the interaction of the parts is being ignored in ways that threaten or undermine the whole, the

part should not serve as the benchmark for determining whether a law addressing that threat results in a total loss of economically viable use. Otherwise the property owner could unjustly receive windfalls at the expense of the whole. Similarly, in defining the economic whole, courts should ask whether contiguous parcels under common ownership form an integrated economic unit.[308] An important inquiry in conducting this analysis would be whether a legal principle being applied to define a tract's boundaries or dimensions has independent legal significance outside of the takings context.[309] In *Murr*, for example, the merger doctrine had routinely been applied in land use law to contiguous, non-conforming lots under common ownership.[310]

Another idea would be to borrow Justice Kagan's idea of using a risk calculus for determining when a heightened review or per se approach is in order for regulatory takings analysis. Justice Kagan raised the idea in her opinion in *Reed v. Town of Gilbert*—a free speech case involving a sign ordinance.[311] She objected to the "high bar" set by the content-based approach of the majority, which would impose the strict scrutiny standard on virtually all sign ordinances because they regulate according to specific types of subject matter.[312] Even historic signs, street addresses, speed limits, and other information-conveying signs would need to meet the stringent test.[313] Justice Kagan instead would apply "strict scrutiny to facially content-based regulations of speech" when "there is any 'realistic possibility that official suppression of ideas [the rationale for the strict scrutiny test] is afoot.' "[314] In the regulatory takings context, the key question would be to ask whether there is a realistic possibility that a regulation is functionally equivalent to a physical taking—raising the same types of risks and dangers posed by physical takings and speaking to the core purposes of the eminent domain clause. These core dangers include the risk of majoritarian exploitation or manipulation of property (for example, to lower the value of the property before condemnation), the risk of favoritism (indicating the absence of reciprocity of advantage or any

308. *See* LAITOS, *supra* note 211, § 18.03[D].

309. *See* Stuart Banner, Murr *and Merger*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. 185, 186, 190–98 (2018).

310. *See id*. at 186, 190–98 (explaining this practice). The doctrine also has routinely been applied under the common law of property to clean up title when an owner acquires, at separate points in time, what would amount to total ownership rights in a tract or what would make the existence of a use right unnecessary. *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY 223, 295 (3d ed. 2010) (explaining how merger is used to end easements or covenants when one party separately acquires both the benefitted estate and the burdened estate).

311. 135 S. Ct. 2218, 2236–39 (2015) (Kagan, J., dissenting).

312. *Id.* at 2236–37.

313. *Id.*

314. *Id.*

evening out of the benefits and burdens of economic life), and more generally the realistic possibility of outrage over an unfair distribution of regulatory burdens imposed on a property owner. The point is that regulatory takings analysis needs to be tied to the same core concepts, risks, and dangers as physical takings. Otherwise the corollary concept of regulatory takings will become much more expansive and unwieldy than the original defining concept of physical takings.