

# Reasonable Expectations: An Unreasonable Approach to the Denominator Question in Takings Analysis

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*In Murr v. Wisconsin, the U.S. Supreme Court confronted the “denominator problem” that arises when defining the baseline unit of property for assessing a regulatory taking. That problem was particularly complex in light of Wisconsin’s merger provision, an increasingly common zoning tool that treats adjacent, commonly owned lots as a single, merged property barred from separate sale or development. Despite the Court’s already “muddled” regulatory takings jurisprudence, the Court adopted yet another multifactor test to determine the denominator in the context of the Murrs’ two, adjacent waterfront lots. The Court found that in light of the lots’ uneven topography, their location along a heavily regulated river, and the state merger provision, the Murrs should have reasonably expected their two lots to be considered merged for purposes of the takings analysis. This Note questions both the Court’s new multifactor test and its application to the Murrs’ complex circumstances. A deeper dive into the Murrs’ case illustrates how the Court’s purportedly objective focus on property owners’ reasonable expectations ignores the inherent ambiguities in deriving expectations from physical land characteristics and regulatory notice. It also highlights how the test’s unwieldy application further disadvantages property owners in an already convoluted area of the law.*

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DOI: <https://doi.org/10.15779/Z38GF0MW71>

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\* J.D. 2018, University of California, Berkeley, School of Law. Many thanks to Professor Holly Doremus and Giulia Gualco-Nelson for their insightful comments and constant encouragement, and to Professor Bob Infelise and the members of the Environmental Law Writing Seminar for their thoughtful advice.

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## INTRODUCTION

Since *Penn Central Transportation Co. v. City of New York*, a property owner's "distinct investment-backed expectations" or "reasonable expectations" have played a prominent, albeit unclear, role in the Court's regulatory takings analysis. In its 2017 decision, *Murr v. Wisconsin*, the Court did little to clarify that role while simultaneously elevating its importance. In *Murr*, the Court evaluated an alleged regulatory taking in the context of a local "merger provision," an increasingly common zoning tool used to eliminate substandard lots when adjacent parcels do not meet minimum lot size requirements. At issue in the Court's regulatory takings analysis was the so-termed "denominator

problem”<sup>1</sup>: whether the lots would be considered individually or as one, merged parcel.

The Court addressed the threshold denominator problem by adding yet another ambiguous, multifactor test to its already convoluted takings jurisprudence.<sup>2</sup> The Court framed its approach as an “endeavor [to] determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts”—that is, whether the owner would reasonably expect the lots to be merged under the relevant zoning regulations.<sup>3</sup> In its steadfast plea to the Takings Clause’s underlying purpose of fairness, the Court insisted on the “objectiv[ity]” of an expectations-centric approach, asserting that these expectations “derive from background customs and the whole of our legal tradition.”<sup>4</sup> But as the *Murrs*’ case shows, objectivity, though intuitively appealing in such a murky area of the law, may not adequately address principles of fairness in application. The Court, despite emphasizing the importance of owners’ expectations in its analysis, largely failed to address the *Murrs*’ expectations in its decision.

This Note argues that the reasonable expectations inquiry as applied to the *Murrs* contradicts the regulatory takings jurisprudence’s emphasis on fairness. The *Murrs*’ reasonable expectations were driven by what was feasible under the existing regulatory framework. But what was feasible in their “highly regulated” waterfront community<sup>5</sup> was difficult for the reasonable property owner to forecast. The Court found, with only a cursory analysis, that the physical and regulatory context of the property would lead a property owner to reasonably expect her lots to not only be heavily regulated, but merged and prohibited from separate development and sale. However, an inquiry into the *Murrs*’ circumstances highlights the inherent ambiguities in “objectively” deriving expectations from physical land characteristics and regulatory notice. Such factors demand an intrinsically subjective analysis with a deep dive into the facts—facts that can, as in the *Murrs*’ case, span decades. Without such, a property owner’s reasonable expectations are, in effect, what the Court commands.

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1. The Supreme Court acknowledged but did not decisively confront the “denominator problem” in *Lucas v. South Carolina Coastal Council*, where it noted that the “composition of the denominator in our ‘deprivation’ fraction is the dispositive inquiry” but “there is no ‘objective’ way to define what that denominator should be.” 505 U.S. 1003, 1054 (1992) (citation omitted); see also Stewart E. Sterk, *Dueling Denominators and the Demise of Lucas 15* (Cardozo Legal Studies Research Paper No. 523, 2017), <https://ssrn.com/abstract=3024093> (arguing that the denominator chosen “is likely to reflect the concern the court deems paramount”).

2. See John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006 (2003) (“If there is a consensus today about regulatory takings law, it is that it is highly muddled.”).

3. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

4. *Id.*

5. See Joint Appendix at 24–27, 38–44, *Murr*, 137 S. Ct. 1933 (No. 15-214).

This Note remedies the Court's oversight by offering a closer look at the on-the-ground facts in *Murr*, the accessibility of the state and local zoning provisions, and the Murrs' interactions with the local zoning board. Part I briefly outlines the evolution of "reasonable expectations" since the term's origins in *Penn Central* and discusses how the *Murr* decision further obfuscated its already unclear meaning by elevating its consideration to the threshold denominator question. Part II provides the factual backdrop largely lacking in the Court's analysis, delving into the history behind the regulation of the "unspoiled" St. Croix River on which the Murrs' property sits and the Wisconsin merger provision as it applied to their property. The application of the Court's new test to the Murrs illustrates how the Court's purportedly objective factors can be quite subjective in application. Part III then argues that the Court's inherently subjective test, coupled with a missed opportunity in lawyering, not only creates more ambiguity in an already ambiguous area of law, but also yields unpredictable results for property owners going forward.

I. *MURR* V. *WISCONSIN* ELEVATES THE ROLE OF PROPERTY OWNERS'  
REASONABLE EXPECTATIONS IN REGULATORY TAKINGS ANALYSIS

The Takings Clause of the Fifth Amendment "requires the payment of compensation whenever the government acquires private property for a public purpose."<sup>6</sup> Its aim is to "prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>7</sup> Originally applying only to physical appropriations of property, the Clause has since been extended to encompass regulations so burdensome as to effect a taking.<sup>8</sup>

There is no dearth of case law and literature on the convoluted state of the Supreme Court's regulatory takings jurisprudence.<sup>9</sup> The Court itself has acknowledged that its takings analysis depends "as much [on] the exercise of judgment as [on] the application of logic."<sup>10</sup> Leaving that critique to the many scholars and professors who have already written on the topic, this Part instead

6. U.S. CONST. amend. V; *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

7. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

8. See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

9. See, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 102 (1995) ("The regulatory takings doctrine has generated a plethora of inconsistent and open-ended formulations that have failed to make sense of the underlying constitutional impulse. . . . The Court itself readily admits that its doctrine lacks coherence."); Fee, *supra* note 2, at 1006; Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2016–2017 *CATO SUP. CT. REV.* 131, 133 ("Commentators have for years complained that the Supreme Court's regulatory takings doctrine is an indeterminate muddle.").

10. *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 349 (1986) (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)); see also *Lingle v. Chevron USA*, 544 U.S. 528, 539 (2005) (noting that the *Penn Central* factors have "given rise to vexing subsidiary questions").

focuses on one prong of the analysis—“distinct investment-backed expectations”—that originated in the Court’s 1978 decision, *Penn Central*, and has since evolved to “reasonable expectations.” While in *Penn Central*, the property owner’s expectations were just one prong in the three-prong analysis for assessing whether a regulatory taking occurred, in *Murr*, the Court elevates consideration of those expectations to the initial determination of the relevant parcel against which to perform the takings analysis. In doing so, the Court magnifies the role of an owner’s “reasonable expectations” without further defining the already convoluted term.

A. *From Distinct Investment-Backed Expectations to Reasonable Expectations*

Ill-defined at the time of *Penn Central* and perhaps even more ambiguous now, the term “reasonable expectations” has witnessed a number of iterations in the Court’s jurisprudence. While its original meaning seemed to refer to the property owner’s expectations surrounding the value of and investment in her property, it has since evolved to encompass matters of notice, such as whether a property owner should expect her property to be treated a certain way based on the existing or a future regulatory framework.

1. *Distinct Investment-Backed Expectations Informed by Property Values, Reserved Property Rights, and Other Holdings*

The Supreme Court introduced “distinct investment-backed expectations” as a factor relevant to regulatory takings analysis in its landmark decision, *Penn Central Transportation Co. v. City of New York*.<sup>11</sup> In *Penn Central*, the owner of Grand Central Terminal challenged the application of a landmarks preservation law to reject the owner’s proposal to build a high-rise office building above the terminal. In surveying the “essentially ad hoc, factual inquiries” necessary in regulatory takings analysis, the Supreme Court introduced a new multifactor balancing test that considered: (1) the “economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the governmental action.”<sup>12</sup>

The Court neither clearly defined the factor, nor adequately situated it in precedent. In attributing “particular significance” to the owner’s investment-backed expectations, the *Penn Central* Court relied on *Goldblatt v. Town of Hempstead*, a Supreme Court case decided nearly two decades earlier, in which the Court rejected a constitutional challenge to a city safety ordinance that prohibited the property owner from pursuing a sand and gravel mining

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11. 438 U.S. 104, 124 (1978).

12. *Id.*

business.<sup>13</sup> Notably, the term “expectations” does not arise once in the section of *Goldblatt* cited by the Court. The cited portion does, however, discuss the property’s “values before and after” the regulation as relevant to the “formula to determine where regulation ends and taking begins.”<sup>14</sup> This proved decisive to the outcome in *Goldblatt*: because there was no shown reduction in the lot’s value, there was “no indication” of an unconstitutional taking.<sup>15</sup>

Several paragraphs later, the *Penn Central* Court cited *Penn Coal Co. v. Mahon* as “the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”<sup>16</sup> In *Penn Coal*, the Court invalidated a statute as effecting a taking where it “had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land.”<sup>17</sup> Yet *Penn Coal*, like *Goldblatt*, did not discuss property owners’ expectations. But to the Court in *Penn Central*, *Penn Coal* suggested that “property owners have investment-backed expectations only when they possess formally reserved rights in property.”<sup>18</sup>

Armed with two explanations for the “distinct investment-backed expectations” prong of its analysis—diminution in value (*Goldblatt*) and reserved rights in property (*Penn Coal*)—the *Penn Central* Court held that the owner cannot establish a regulatory taking “simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.”<sup>19</sup> Instead of allowing the owner to “divide [their] single parcel into discrete segments,” the Court must analyze “the character of the action and . . . the nature and extent of the interference with rights in the parcel as a whole.”<sup>20</sup> In that analysis, property owners’ expectations will not be considered to the extent that they reflect the owners’ own “subjective intentions” not rooted in actual “rights in the parcel.”<sup>21</sup> Without explicitly tying it to the expectations discussion, the Court rejected the notion that the owners were denied “all use of even those pre-existing air rights” because they were transferable to adjacent parcels.<sup>22</sup>

Just a year after *Penn Central*, the Court in *Kaiser Aetna v. United States* changed, without discussion, the term “distinct investment-backed expectations”

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13. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 590–91 (1962); see also *Penn Cent.*, 438 U.S. at 126–27.

14. *Goldblatt*, 369 U.S. at 594; see also *Penn Cent.*, 438 U.S. at 124.

15. *Goldblatt*, 369 U.S. at 594.

16. *Penn Cent.*, 438 U.S. at 127 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414–15 (1922)).

17. *Id.* at 127–28 (citing *Penn Coal*, 260 U.S. at 414–15).

18. Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 216–17 (1995).

19. *Penn Cent.*, 438 U.S. at 130.

20. *Id.* at 130–31.

21. *Id.* at 131; see also Mandelker, *supra* note 18, at 217.

22. *Penn Cent.*, 438 U.S. at 137.

to “reasonable investment backed expectations.”<sup>23</sup> Whether the substitution of “reasonable” for “distinct” was a change in the law, or a clarification of the Court’s intended meaning from the beginning is subject to debate.<sup>24</sup> But there is little dispute that the substitution nominally anchored the analysis to the objective factors facing *any* owner in that situation, as opposed to that specific property owner’s subjective circumstances.<sup>25</sup>

## 2. Reasonable Investment-Backed Expectations Informed by Regulatory Notice

Since *Penn Central*, “distinct investment-backed expectations” has evolved to encompass not only property rights and value, but also an owner’s notice of government actions that might affect her property.<sup>26</sup> However, the Court’s jurisprudence on regulatory notice is less than clear. While the Court has noted that state law and customs forming the “whole of our legal tradition” shape an owner’s reasonable expectations,<sup>27</sup> it has also noted that a regulation’s mere enactment does not automatically place it within that tradition.<sup>28</sup> Nevertheless, the Court has interpreted both existing and potential future regulations as relevant in determining an owner’s reasonable expectations.

In recognizing “government action” in its reasonable expectations analysis, the Court considered notice of existing regulations as relevant to informing an owner’s expectations regarding her property’s treatment. To illustrate, in *Ruckelshaus v. Monsanto Co.*, a non-land use regulatory takings case, the Court held that Monsanto did not have reasonable expectations in maintaining trade secrets after a statute was adopted mandating their disclosure.<sup>29</sup> Rather, the Court noted, a “‘reasonable investment-backed expectation’ must be more than a ‘unilateral expectation or an abstract need,’” and here, Monsanto’s “constructive

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23. 444 U.S. 164, 175 (1979) (emphasis added).

24. Compare Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENVTL. L. 239, 247 (2011) (arguing that the substitution of reasonable for distinct “only made clearer the ‘reasonableness’ standard that was likely already intended in *Penn Central*’s version”), with Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do With Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43, 58–59 (2004) (arguing that the substitution was a “profound change in takings law” that attempted to furnish a per se rule despite the past use of an “ad hoc factual inquiry”).

25. See, e.g., *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)); *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) (“The [takings] determination . . . must turn on objective factors, such as the nature of the land use proscribed.”).

26. See *Kaiser Aetna*, 444 U.S. at 179 (finding that government action could “lead to the fruition of a number of expectancies embodied in the concept of ‘property’—expectancies that, if sufficiently important, the Government must condemn and pay for”); see also Ruppert, *supra* note 24, at 247.

27. *Lucas*, 505 U.S. at 1016 n.7; *id.* at 1035 (Kennedy, J., concurring).

28. See *Palazzolo*, 533 U.S. at 629–30.

29. 467 U.S. 986, 1006–07 (1984).

notice”<sup>30</sup> of the amended statute precluded any “reasonable investment-backed expectation” of confidentiality.<sup>31</sup>

Some have claimed that the Court’s decision in *Nollan v. California Coastal Commission* marked the death of notice in the reasonable expectations analysis.<sup>32</sup> The Nollans, owners of beachfront property in Ventura County, sought to replace their bungalow. As a precondition for the necessary permit, the state commission required that they establish an easement allowing public access to the beach, and the Nollans alleged a taking. The Court held that the permitting requirement did not effect a taking because it substantially advanced the state’s “legitimate police-power purpose” and did not deny the Nollans “economically viable use of [their] land.”<sup>33</sup> Writing for the majority, Justice Scalia rejected the dissent’s reliance on *Monsanto* to argue that because the California Coastal Commission had publicly announced its intention to require easements and the Nollans “acquired the land well after the Commission had begun to implement its policy,” they had “no reasonable claim to any expectation” of keeping out the public.<sup>34</sup> Unlike Monsanto’s right to maintain trade secrets following voluntary involvement in a government program, here “the right to build on one’s own property . . . cannot remotely be described as a ‘governmental benefit.’”<sup>35</sup>

Attempting to clarify the role of regulatory notice in the reasonable expectations analysis, the Court in *Lucas v. South Carolina Coastal Council* suggested in the oft-quoted footnote seven that an owner’s reasonable expectations may be “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.”<sup>36</sup> In his concurring opinion, Justice Kennedy elaborated that “reasonable expectations must be understood in light of the whole of our legal tradition” and be “based on objective rules and customs that can be understood as reasonable by all parties involved.”<sup>37</sup> Unfortunately for subsequent property owners and governments alike, the *Lucas* Court declined to definitively decide the expectations issue because it found no ambiguity in whether Lucas’s interest—a fee simple estate “with a rich tradition of protection at common law”—should be afforded legal recognition.<sup>38</sup>

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30. *Id.* at 1005–06 (quoting *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980)); see Mandelker, *supra* note 18, at 218–19.

31. *Monsanto*, 467 U.S. at 1005–06.

32. 483 U.S. 825, 833 n.2 (1987); see Mandelker, *supra* note 18, at 221–23, 243 (noting that although some argued *Nollan* marked the “death” of the notice rule, cases since *Nollan* have “held that actual notice of a regulatory program defeated an investment-backed expectations claim arising from a denial of development in that program”).

33. *Nollan*, 483 U.S. at 834–36 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

34. See *id.* at 833 n.2.

35. *Id.*

36. 505 U.S. 1003, 1016 n.7 (1992).

37. *Id.* at 1035 (Kennedy, J., concurring).

38. *Id.* at 1016 n.7 (majority opinion). The application of the *Lucas* footnote was heavily disputed by the parties before the Court in *Murr*. While the Murrs argued that a merger provision could not be considered part of the background principles and legal tradition just because it was enacted pretransfer,



Over a decade later in *Palazzolo v. Rhode Island*, yet another takings claim involving coastal property, the Court clarified that mere enactment of a regulation does not make it a “background principle” of State law for purposes of the reasonable expectations analysis.<sup>39</sup> But there was still disagreement among the justices: O’Connor’s concurrence argued that notice was still considered as one of several factors in the *Penn Central* analysis,<sup>40</sup> whereas Scalia argued that notice of a previous regulation was entirely irrelevant. Specifically, Scalia, author of the *Lucas* footnote, contended that “the fact that a [regulatory] restriction existed at the time the purchaser took title (other than a restriction forming part of the ‘background principles of the State’s law of property and nuisance’ [under *Lucas*]) should have no bearing upon the determination” of whether there is a taking.<sup>41</sup>

Despite this ambiguity in the Court’s stance on notice of existing regulations, the Court has interpreted notice of existing regulations to inform a property owner’s reasonable expectations of potential *future* regulations. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court reasoned that the fact the claimants had purchased their land “amidst a heavily regulated zoning scheme” in Lake Tahoe served as notice of potential future zoning regulations.<sup>42</sup> The Court seemed to imply that the owners “could have little [reasonable investment-backed expectations] in development that clearly harms an important public resource.”<sup>43</sup> Some have noted this reasoning stems from non-land use regulatory takings precedent referred to as the “heavily-regulated-industries” cases.<sup>44</sup> The theory goes, where one operates in a highly regulated context, one should plan or account for the likelihood of further regulation in the future.<sup>45</sup> Such is the “burden borne to secure ‘the advantage of

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the State and County pointed to the wide prevalence of merger provisions as evidence that they can be “fairly considered part of what Justice Kennedy has described as ‘the whole of our legal tradition.’” Brief for Respondent St. Croix County at 22, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2016) (No. 15-214) [hereinafter *St. Croix County Brief*] (quoting *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)). Ultimately, the Court in *Murr* dismissed the *Lucas* language regarding the denominator problem as dicta and found that, in any event, it did not conflict with its holding. *Murr*, 137 S. Ct. at 1946–47.

39. 533 U.S. 606, 629–30 (2001) (“A law does not become a background principle for subsequent owners by enactment itself.”).

40. *Id.* at 633 (O’Connor, J., concurring) (stating that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations”).

41. *Id.* at 637 (Scalia, J., concurring) (citation omitted) (quoting *Lucas*, 505 U.S. at 1029).

42. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 313 n.5 (2002).

43. Ruppert, *supra* note 24, at 259.

44. *See id.* at 257–58; *see also* *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999) (“In light of the growing consciousness of and sensitivity toward environmental issues, [the owner] must also have been aware that standards could change to his detriment, and that regulatory approval could become harder to get.”).

45. The heavily regulated theory comes up most often in the context of commercial businesses challenging new regulations. *See, e.g.*, *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 410 (4th Cir. 2007) (noting that while even in the case of real property, an owner expects his uses to be restricted from time to time, “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the

living and doing business in a civilized community.”<sup>46</sup> Many have questioned the extrapolation of this notice rule from businesses to property owners who may lack the complex knowledge and resources necessary to forecast future regulation.<sup>47</sup>

Despite the ambiguity in the Court’s treatment of regulatory notice—whether in the form of existing or likely future regulation—cases still discuss it as relevant to the regulatory takings analysis<sup>48</sup> and, as discussed below, *Murr* continued this trend.

*B. Murr’s Approach to the Threshold Denominator Question Brings the Reasonable Expectations Analysis Back to Regulatory Notice*

The Court in *Murr v. Wisconsin* introduced yet another multifactor balancing test to the regulatory takings analysis. But instead of considering the property owner’s reasonable expectations as one part in a multipart test, the Court framed the entire threshold denominator determination in terms of the owner’s expectations and added to the already ill-defined array of factors relevant to the expectations analysis. The case was the culmination of the Murr siblings’ hard-fought battle challenging the application of Wisconsin state and local zoning regulations—specifically, a merger provision—that treated their two adjacent, commonly owned lots as a single, merged property barred from separate sale or development.

*1. Facts: Two Adjacent, Substandard Lots Along the St. Croix River*

The two lots at issue—Lot E and Lot F—sit along the Lower St. Croix River in Troy, Wisconsin. The siblings’ parents purchased the lots from two different owners in the 1960s, maintaining the lots under separate ownership—one under the family’s name and the other under the family plumbing company—until transferring Lots E and F to their four children in 1994 and 1995, respectively.

In 1972, Congress designated the St. Croix River for federal protection under the Wild and Scenic Rivers Act, requiring Wisconsin to establish a program to manage development near the river.<sup>49</sup> Pursuant to the Act, the Wisconsin Department of Natural Resources and St. Croix County issued a merger provision that prevented property owners from using or selling an

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possibility that new regulation might even render his property economically worthless” (quoting *Lucas*, 505 U.S. at 1027–28)).

46. *Andrus v. Allard*, 444 U.S. 51, 67–68 (1979) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922)) (finding that prohibition of commercial transactions did not work a taking).

47. See, e.g., *Ruppert*, *supra* note 24, at 258 (questioning the belief that private property owners “are so sophisticated as to understand the complexity of regulatory regimes potentially affecting their property”).

48. See *id.*

49. Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174, 1174 (codified at 16 U.S.C. § 1274(a)(9) (2012)).

adjacent lot under common ownership as a separate, developable site unless that lot contained one acre of developable land.<sup>50</sup> The State grandfathered in “substandard lots” that were held in separate ownership from adjacent lands as of January 1, 1976, the regulation’s effective date.<sup>51</sup> Although Lots E and F each exceed one acre, topography limits their developable land to less than one acre, implicating the merger provision. Seeking to sell Lot E, the siblings unsuccessfully sought a variance from St. Croix County. State courts affirmed the denial, limiting the siblings to selling or building on the single, merged property.<sup>52</sup>

The Murrs filed a regulatory takings claim in state court, alleging that the regulations deprived them of “all, or practically all” of the use of Lot E, given that it could not be sold or developed as a separate lot.<sup>53</sup> The county court granted Wisconsin’s motion for summary judgment, reasoning that the Murrs still had “several available options for the use and enjoyment of their [whole] property,” including eliminating the current residence and building a new one.<sup>54</sup> Moreover, the court reasoned, the purported taking did not deprive the owners of all economic value of the combined property; its market-value decrease under the regulation was less than 10 percent.<sup>55</sup>

The Wisconsin Court of Appeals affirmed, finding that the lower court’s takings analysis “properly focused” on the regulations’ effect on the “property as a whole” and that as a whole, the merger provision did not effect a taking.<sup>56</sup> Because the Murrs were “charged with knowledge of the existing zoning laws” when they acquired the second lot under common ownership in 1995, they “could not reasonably have expected to use the lots separately.”<sup>57</sup> Shortly after the Wisconsin Supreme Court denied discretionary review, Governor Scott Walker appointed the Murrs’ long-time attorney, R. Michael Waterman, to the St. Croix County Circuit Court.<sup>58</sup> The family almost had to give up the case until, after a bit of Internet searching, they found the Pacific Legal Foundation, which agreed

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50. WIS. ADMIN. CODE NR §§ 118.03(27), 118.08(4) (2018). The version of the state administrative code the Court quotes was not promulgated until 2004, and the version in place before the lots’ transfer to the grandchildren was notably different. *See infra* Part II.b.

51. ADMIN. § 118.08(4)(a)(1).

52. *See Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 846 (Wis. Ct. App. 2011).

53. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1941 (2017) (quoting *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, at \*2 (Wis. Ct. App. Dec. 23, 2014)).

54. Petition for Writ of Certiorari at app. B-9, *Murr*, 137 S. Ct. 1933 (No. 15-214).

55. *Murr*, 137 S. Ct. at 1949. The appraiser explained the small reduction as a result of the fact that Lot E has roughly twice the amount of beachfront as Lot F and thus a single residence on the merged lots would mean increased privacy and prestige. *See Joint Appendix, supra* note 5, at 32–33, 45–59.

56. *Murr*, 137 S. Ct. at 1941 (quoting *Murr v. State*, 2014 WL 7271581, at \*5).

57. *Id.* at 1942 (quoting *Murr v. State*, 2014 WL 7271581, at \*5).

58. *See* Press Release, Office of Governor Scott Walker, Governor Walker Appoints St. Croix County Judge (Apr. 10, 2015), <https://walker.wi.gov/press-releases/governor-walker-appoints-st-croix-county-judge>.

to represent the family pro bono in their appeal before the U.S. Supreme Court.<sup>59</sup> The Court granted certiorari to address the “critical [denominator] question[]” of how to define the unit of property when assessing the effect of a government action.<sup>60</sup>

## 2. *Majority’s Test: Reasonable Expectations Shaped by Regulatory Notice and Property’s Physical Characteristics*

In a five to three decision,<sup>61</sup> the Court affirmed the judgment of the Wisconsin Court of Appeals, upholding the regulations and treating the lots as a merged unit of property for the regulatory takings analysis. Fashioning a new test for the threshold denominator question, the Court held that in light of the valid state merger provision, the property’s topography and location, and the remaining value and use in the merged unit, the Murrs could not reasonably expect their lots to be treated as separate units. In deciding the threshold denominator question in favor of merger, the Court analyzed the two lots as merged in its takings analysis.

Before reaching the denominator question, the Court described regulatory takings claims as divided into two camps: (1) those that deprive “all economically beneficial or productive use of land” under *Lucas*;<sup>62</sup> and (2) those that work a taking in light of a “complex of factors,” including distinct investment-backed expectations, outlined in *Penn Central*.<sup>63</sup> Given that a “central dynamic of the Court’s regulatory takings jurisprudence . . . is its flexibility,” the Court must weigh “the individual’s right to retain the interests and exercise the freedoms . . . of private property ownership” against “the government’s well-established power to ‘adjus[t] rights for the public good.’”<sup>64</sup>

The Court rejected both sides’ “wooden” approaches<sup>65</sup> to the denominator inquiry in favor of a multifactor analysis. Wisconsin had argued that the definition of the parcel should be tied to state law, which, applied here, meant the two lots were a single, merged unit. Although the Court ultimately reached the same outcome, it rejected the view that property rights “should be coextensive with those under state law”—a view advanced by Chief Justice

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59. Bruce Vielmetti, *Family’s Fight Over Vacation Land Goes to U.S. Supreme Court*, MILWAUKEE JOURNAL SENTINEL (Jan. 24, 2016), <http://archive.jsonline.com/news/wisconsin/familys-fight-over-vacation-land-goes-to-us-supreme-court-b99656139z1-366366571.html/>.

60. *Murr*, 137 S. Ct. at 1943–44 (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

61. The Supreme Court granted certiorari in January 2016, when the late Justice Scalia was still on the bench. Only eight Justices participated in this decision because arguments were heard on the same day that Justice Gorsuch’s confirmation hearing began.

62. *Murr*, 137 S. Ct. at 1942 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992))).

63. *Id.* at 1943 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

64. *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

65. Transcript of Oral Argument at 34, *Murr*, 137 S. Ct. 1933 (No. 15-214) (statement of Justice Kennedy).

Roberts in his dissent.<sup>66</sup> States, the majority reasoned, do not possess “unfettered authority to ‘shape and define property rights and reasonable investment-backed expectations.’”<sup>67</sup> The petitioners, by contrast, argued that the Court define the relevant parcel by lot lines, making Lot E the denominator. The Court likewise rejected this approach, reasoning that it “ignores . . . that lot lines are themselves creatures of state law.”<sup>68</sup>

Dismissing the parties’ requests for “formalistic rule[s],” the Court issued a multifactor, “objective” standard that asks whether a property owner’s reasonable expectations, rooted in “background customs and the whole of our legal tradition,” would lead her to anticipate her property’s treatment as one parcel or as separate tracts.<sup>69</sup> As a first step, courts should accord “substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law.”<sup>70</sup> On this front, “prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned.”<sup>71</sup> Second, courts must evaluate the property’s physical characteristics, including “the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment.”<sup>72</sup> This includes whether a property “is subject to, or likely to become subject to, environmental or other regulation.”<sup>73</sup> Third, courts should evaluate the property’s value under the challenged regulation “with special attention to the effect of [the] burdened land on the value of other holdings.”<sup>74</sup> In effect, the Court elevated reasonable expectations from one of several factors in the takings analysis to frame the entire threshold question of determining the relevant parcel.

Applying this standard to the petitioners’ property, the Court found that Lots E and F should be evaluated as a single parcel.<sup>75</sup> First, the local merger provision constituted a legitimate exercise of government power and informed the Murrs’ “reasonable expectation that [the lots] will be treated as a single property.”<sup>76</sup> Second, the lots’ rough topography suggested their “range of potential uses might be limited,” and their location along the river suggested regulation was likely.<sup>77</sup> Third, the restriction on separating the lots for individual sale was “mitigated by

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66. *Murr*, 137 S. Ct. at 1944, 1950 (Kennedy, J., concurring).

67. *Id.* at 1944–45 (quoting *Palazzolo*, 533 U.S. at 626).

68. *Id.* at 1947.

69. *Id.* at 1945–46 (citing *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)). As support for this language, the Court includes a *cf.* cite to Justice Kennedy’s concurrence in *Lucas* defining reasonable expectations as “based on objective rules and customs that can be understood as reasonable by all parties involved.” *Id.* at 1945 (quoting *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)).

70. *Id.* at 1945.

71. *Id.* (quoting *Palazzolo*, 533 U.S. at 627).

72. *Id.* (citing *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)).

73. *Id.* at 1945–46 (citing *Lucas*, 505 U.S. at 1035).

74. *Id.* at 1946.

75. *Id.* at 1948–49.

76. *Id.* at 1948.

77. *Id.* at 1948.

the benefits of using the property as an integrated whole”—benefits quantified by the lots’ combined valuation (\$698,300), which was far greater than the summed value of the lots individually (\$413,000).<sup>78</sup> Thus, under the Court’s new multifactor standard—and the traditional *Lucas* and *Penn Central* tests—the regulations did not work a compensable taking.

3. *Dissent’s Approach: Reasonable Expectations Should Frame the Takings Analysis, Not the Threshold Denominator Analysis*<sup>79</sup>

Writing for the dissent, Chief Justice Roberts advocated that the Court determine the denominator question using state law, which has historically defined property rights and offers a “readily ascertainable definition of the land.”<sup>80</sup> Roberts agreed that the property’s treatment and the owner’s reasonable expectations are appropriate considerations in determining whether a regulation constitutes a taking, but that “[c]ramming them into the definition of ‘private property’” unnecessarily complicates the analysis and has no basis in the Court’s takings jurisprudence.<sup>81</sup> Furthermore, by “double counting” the reasonableness of the government’s challenged regulation both in defining the property and in assessing the alleged taking, the scales are tipped to favor the government, in direct contravention of the Takings Clause’s purpose of preventing individuals from bearing an unfair share of the burdens of government.<sup>82</sup> Reliance on state law, the Chief Justice argued, would avoid the risk that property owners preemptively define the property right narrowly to overstate the impact of the regulation.

C. *Reasonable Expectations After Murr: A Moving Target*

Leading up to *Murr*, courts had considered a wide array of factors under the umbrella of reasonable expectations, including: appropriateness of the area for its current or proposed use;<sup>83</sup> diminution in value;<sup>84</sup> use of adjacent properties or other holdings;<sup>85</sup> time of purchase in relation to the promulgation of the contested regulation;<sup>86</sup> and location in a “heavily regulated” area or existence of

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78. *Id.* at 1948–49.

79. This Part discusses Chief Justice Roberts’ dissent, which Justices Thomas and Alito joined. In a brief, separate dissent, Justice Thomas additionally argued that the Court reconsider its regulatory takings jurisprudence in its entirety to determine whether it finds support in the Fifth and Fourteenth Amendments. *Id.* at 1957 (Thomas, J., dissenting).

80. *Id.* at 1950, 1953 (Roberts, C.J., dissenting).

81. *Id.* at 1954.

82. *Id.* at 1955–56.

83. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136–37 (1978).

84. *See supra* Part I.a.i (discussing *Penn Central* and *Goldblatt*).

85. *See Penn Cent.*, 438 U.S. at 137; *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035–36 (1992) (Kennedy, J., concurring).

86. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 613–15 (2001).

similar regulations.<sup>87</sup> The majority in *Murr*, recognizing that regulatory takings analysis is plagued by “ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances,” simply acknowledged the “number of factors” relevant to the analysis and decided to focus on three in particular as relevant to the threshold denominator inquiry.<sup>88</sup>

While *Penn Central* first introduced “distinct investment-backed expectations” as just one of the three prongs in its multifactor analysis,<sup>89</sup> *Murr* made the owner’s expectations—as “derive[d] from background customs and the whole of our legal tradition”—the *focus* of its threshold test for determining the relevant parcel.<sup>90</sup> As Wisconsin’s Solicitor General noted in oral argument, the Court effectively created “*Penn Central* squared,”<sup>91</sup> taking factors that closely resembled the already murky multifactor test for regulatory takings analysis and applying them to the denominator question. Chief Justice Roberts agreed, observing that under this approach, “you’re just kind of teeing up the definition of property to give you the right answer under the Takings Clause.”<sup>92</sup>

Despite this indeterminate precedent, one consistent trend in the Court’s regulatory takings analysis has been its emphasis on fairness. Although the Court did not directly link that underlying principle of fairness to its specific focus on reasonable expectations, it seems clear that “ad hoc, factual inquiries” that consider the reasonable expectations of the objective property owner strive to meet that goal. As the Court in *Murr* noted:

In adjudicating regulatory takings cases a proper balancing . . . requires a careful inquiry informed by the specifics of the case. In all instances, the analysis must be driven “by the purpose of the Takings Clause, which is to prevent the government from ‘forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”<sup>93</sup>

But in applying this purportedly fact-based, tailored inquiry, the Court here failed to adequately analyze all of the factors relevant to the Murrs. While this is partly the fault of the Murrs’ attorneys, who did not effectively address the Murrs’ expectations in their briefing, it is likely also the product of using an

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87. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 308–310, 313 n.5 (2002).

88. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (citing *Tahoe-Sierra*, 535 U.S. at 322); *id.* at 1945.

89. *Penn Cent.*, 438 U.S. at 124.

90. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (citing *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring)) (stating that the purpose of looking at these factors is to “determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts”).

91. Transcript of Oral Argument, *supra* note 65, at 46 (argument of Misha Tseytlin); Nicholas P. Shapiro, *Oral Argument in Murr v. Wisconsin: Catnip for Real Estate Litigators*, REAL EST. DEMNATION & TR. LITIG. (Am. Bar Ass’n, Chi., Ill.), Spring 2017, at 22, 25.

92. Transcript of Oral Argument, *supra* note 65, at 48–49 (statement of Chief Justice Roberts).

93. 137 S. Ct. at 1943 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001)).

unwieldy multifactor analysis without acknowledging the need for a subjective application.

Many have criticized the lack of clarity in the Court's approach to reasonable expectations.<sup>94</sup> Professor Richard A. Epstein stated in 1993, a year after the Court's decision in *Lucas*, that "we should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use."<sup>95</sup> Instead of remedying that gap in precedent, *Murr* effectively widened it: in elevating consideration of the property owner's reasonable expectations to the threshold denominator, as a lens through which to analyze all other factors, *Murr* increases the significance of reasonable expectations to the analysis while still failing to define it. The next Part, through a deep dive into the Murrs' circumstances, highlights the difficulty in basing a purportedly objective analysis on such factors that do not necessarily lend themselves to objective interpretation.

## II. REASONABLE EXPECTATIONS IN *MURR*: SHAPED BY LOCATION, ZONING REGULATIONS, AND TOPOGRAPHY

According to the majority, three sources of notice should have led the Murrs to reasonably expect that their lots would be regulated as one: their location on a heavily regulated river; the Murrs' voluntary decision to bring them under common ownership after the merger provision was promulgated; and their uneven terrain and narrow shape, which prompted the Murrs' variance application that put them on notice of the merger provision.<sup>96</sup>

This Part addresses those assertions by outlining the physical setting of the Murrs' property on the St. Croix Scenic Riverway; the promulgation and accessibility of the merger provisions and related zoning regulations; and the application of those regulations to the Murrs' property through the zoning board. The Court's evaluation of these three sources of notice shows that they are not as determinate as its brief analysis seems to suggest. First, the part of the river on which the Murrs' property sits is not federally managed under the national scenic river system. Rather, it was left to the supervision of the states of Wisconsin and Minnesota because it was already relatively developed and local zoning and easements were considered sufficient to address the preservation goals of the Wild and Scenic Rivers Act. Second, the merger language on which the U.S. Supreme Court and lower state courts relied was not added until 2004, nearly a decade after the lots were transferred into common ownership to the children. Finally, as illustrated through the Murrs' interactions with the zoning

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94. See, e.g., R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 449 n.3 (2001) (listing series of articles).

95. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

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



board, the lots' terrain and shape do not, without assistance of expert consultants or an application for a final decision through the zoning board, necessarily place owners on notice of the treatment of their property.

A. *Location: The Unspoiled St. Croix Riverway*

Without citing to precedent, the Court considered as relevant to the property's physical characteristics "the surrounding human and ecological environment," including whether a property "is subject to, or likely to become subject to, environmental or other regulation."<sup>97</sup> In applying this factor, the Court found that the lots' location along the St. Croix River was sufficient to show the Murrs "could have anticipated public regulation might affect their enjoyment of their property."<sup>98</sup> This subpart explores the designation of the St. Croix River and the rich legislative history of related acts to illustrate how this "heavily regulated" argument is less objective in application.

The St. Croix River, a tributary of the Mississippi River spanning approximately 169 miles through Wisconsin and Minnesota, "is widely acclaimed as one of the most scenic and relatively unpolluted large rivers in the United States."<sup>99</sup> Presently, the upper section of the river is relatively undeveloped and largely managed by the National Park Service.<sup>100</sup> The lower section, including the Murr property, is comparatively more developed and managed by the state and local governments of Wisconsin.<sup>101</sup>

At the recommendation of President Johnson<sup>102</sup> and the Outdoor Recreation Resources Review Commission,<sup>103</sup> Congress passed the Wild and Scenic Rivers

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97. *Id.* at 1945–46 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)).

98. *Id.* at 1948.

99. *National Scenic Rivers System: Hearings on H.R. 8416, H.R. 90, S. 119, and Related Bills Before the Subcomm. on Nat'l Parks & Recreation of the H. Comm. on Interior & Insular Affairs*, 90th Cong. 31 (1968); see also *Designating a Segment of the St. Croix as Part of Wild and Scenic Rivers System: Hearing on S. 1928 Before the Subcomm. on Pub. Lands of the S. Comm. on Interior & Insular Affairs*, 92d Cong. 4–5 (1972) [hereinafter *Hearing on S. 1928*] (statement of Sen. Walter Mondale) (stating it is "fair to say that the St. Croix River is probably the last remaining unpolluted, scenic river left in the Nation next to a major metropolitan area").

100. See generally U.S. DEP'T OF THE INTERIOR, GENERAL MANAGEMENT PLAN: UPPER ST. CROIX AND NAMEKAGON RIVERS iii, v, 14 (1998), [https://www.nps.gov/sacn/learn/management/upload/SACN\\_1998\\_GMP.pdf](https://www.nps.gov/sacn/learn/management/upload/SACN_1998_GMP.pdf).

101. See generally WIS. DEP'T OF NAT. RES. ET AL., COOPERATIVE MANAGEMENT PLAN: LOWER ST. CROIX NATIONAL SCENIC RIVERWAY 1, 17 (2002), <https://www.rivers.gov/documents/plans/lower-st-croix-plan.pdf>.

102. On February 8, 1965, in a special message to Congress on "conservation and restoration of natural beauty," President Johnson advocated for establishment of a National Wild Rivers System in an effort to "preserve free flowing stretches of our great scenic rivers before growth and development make the beauty of the unspoiled waterway a memory." Special Message to the Congress on Conservation and Restoration of Natural Beauty, 1 PUB. PAPERS 155, 160 (Feb. 8, 1965).

103. Congress created the Outdoor Recreation Resources Review Commission in 1958 as an arm of the Bureau of Outdoor Recreation in the U.S. Department of the Interior "to ensure that the [recreation resources and] needs of present and future generations are adequately and efficiently met." OUTDOOR

Act (Act) in 1968 to preserve eight free-flowing rivers in their natural condition “for the benefit and enjoyment of present and future generations.”<sup>104</sup> The Act included the Upper St. Croix in its initial eight rivers and mandated for federal study twenty-seven other rivers—including the Lower St. Croix—for later inclusion.<sup>105</sup> The Act provided two routes for adding a river to the federal system: by an act of Congress or by application to the Secretary of the Interior.<sup>106</sup> The latter route requires the state governor to request inclusion of a river already protected by a state river protection program.<sup>107</sup> As of December 2014, the national river system consisted of 208 rivers spanning forty states.<sup>108</sup>

A federal-state team convened in January 1970 to conduct hearings in Wisconsin and Washington, D.C. regarding the potential inclusion of the Lower St. Croix.<sup>109</sup> Unlike the upper river, which was subject entirely to federal protection by Congress, the Lower St. Croix was split at the Department of the Interior’s recommendation.<sup>110</sup> The Lower St. Croix River Act of 1972 immediately designated the upper twenty-seven miles of the lower portion of the river for federal protection.<sup>111</sup> The lower section’s lower twenty-five miles, where the Murrs’ property sits, required the governors of Minnesota and Wisconsin to apply to the Secretary of the Interior for designation as a state-administered river with nominal inclusion in the national river system.<sup>112</sup> Contrary to the Court in *Murr*, these applications did not take effect until 1976.<sup>113</sup> Following the successful application to designate the remaining twenty-five miles encompassing the Murrs’ lots, the states issued another management plan in 2002, following an “analysis completed over a seven year period in a

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RECREATION RES. REVIEW COMM’N, *OUTDOOR RECREATION FOR AMERICA: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE OUTDOOR RECREATION RESOURCES REVIEW COMMISSION 2* (1962); *see also* GEORGE H. SIEHL, RES. FOR THE FUTURE, *THE POLICY PATH TO THE GREAT OUTDOORS: A HISTORY OF THE OUTDOOR RECREATION REVIEW COMMISSIONS 2* (2008), <http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-08-44.pdf>.

104. Wild and Scenic Rivers Act, Pub. L. No. 90-542, § 1(b), 82, Stat. 906, 906 (1968) (codified as amended at 16 U.S.C. §§ 1271–1287 (2012)) (designating rivers in California, Idaho, Minnesota, Missouri, New Mexico, Oregon, and Wisconsin).

105. *Id.*

106. *Id.*

107. *Id.*

108. *About the WSR Act: Safeguarding the Character of Our Nation’s Unique Rivers*, WILD & SCENIC RIVERS COUNCIL, <https://www.rivers.gov/wsr-act.php> (last visited May 5, 2018).

109. *Hearing on H.R. 12690 and H.R. 12870 Before the Subcomm. on Nat’l Parks & Recreation of the H. Comm. on Interior & Insular Affairs*, 93d Cong., at add. 2 (1974) [hereinafter *Hearing on H.R. 12690 and H.R. 12870*] (written statement of Sen. Gaylord Nelson).

110. *Id.* at 19 (testimony of Sen. Gaylord Nelson).

111. Lower St. Croix River Act of 1972, Pub. L. No. 92-560, § 2, 86 Stat. 1174, 1174 (codified at 16 U.S.C. § 1274(a)(9)).

112. *Id.*

113. Lower Saint Croix National Scenic Riverway, 41 Fed. Reg. 26,236, 23,236–37 (June 25, 1976); *see Murr v. Wisconsin*, 137 S. Ct. 1933, 1940 (2017) (stating that the lower twenty-five miles were designated in the 1972 Act).

collaborative effort between the National Park Service, Minnesota, Wisconsin, local agencies and the public.”<sup>114</sup>

The chief concern motivating efforts to protect the St. Croix River had been the looming threat of development.<sup>115</sup> For the federally managed parts of the river, this protection came swiftly in the form of purchasing large swaths of land in fee simple. But for the Murrs’ portion of the river, the legislature decided that local zoning and easements were sufficient, given that the area was already relatively developed. After all, the Murrs’ subdivision alone boasts over forty waterfront parcels, featuring “some of the most crowded development” in the district.<sup>116</sup> As Dr. Richard Curry, the National Park Service’s Associate Director for Legislation noted in a hearing before the House, the effort to leave the lower twenty-five miles of the Lower St. Croix in state hands sought “not to restore the resource to a pristine state, but rather . . . to freeze it in time with possible orderly development in the area.”<sup>117</sup> Thus, relative to the other portions of the St. Croix River, the Murrs’ segment was not as stringently regulated.

The hearings leading up to the designation of the Lower St. Croix highlight strong opposition by senators, states, and state agencies to the prospect of fending off development through zoning alone. One senator characterized zoning as “an unsettling prospect for those of us in the Congress and on [the] committee who have such a bright future in mind for the Riverway.”<sup>118</sup> Another emphasized zoning’s unpredictability, noting that “zoning regulations can be changed any time a property owner convinces the local government they ought to change it.”<sup>119</sup> In a similar vein, the representative on behalf of Minnesota’s governor characterized zoning as the “weakest tool available” for combatting development given that a “few variances . . . could jeopardize the environmental quality of the entire” river.<sup>120</sup> Yet the legislature decided the Murrs’ segment, though federally

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114. Wis. Nat’l Res. Bd., Order Amending, Repealing and Recreating, and Creating Rules 2, Doc. No. WT-28-03 (2004) [hereinafter *Wisconsin Natural Resources Board 2004 Order*], [http://docs.legis.wisconsin.gov/code/misc/chr/lrb\\_filed/cr\\_03\\_054\\_final\\_rule\\_filed\\_with\\_lrb.pdf](http://docs.legis.wisconsin.gov/code/misc/chr/lrb_filed/cr_03_054_final_rule_filed_with_lrb.pdf) (amending and creating rules relating to minimum standards and guidelines for Lower St. Croix National Scenic Riverway zoning ordinances).

115. See 113 CONG. REC. 255 (1967) (stating as a policy justification for the Act that “[t]he thrust of our economic demands threatens the destruction of this part of our scenic and cultural heritage”); *Hearing on S. 1928*, *supra* note 99, at 4 (statement of Sen. Gaylord Nelson) (noting that the St. Croix River is “a prime target for the development pressures that would destroy its natural values forever”); Special Message, *supra* note 102, at 155–56.

116. Joint Appendix, *supra* note 5, at 66. For several pictures of the property and river, see Bruce Vielmetti, *Wisconsin Cottage at Center of Property Rights Dispute Goes to U.S. Supreme Court*, MILWAUKEE JOURNAL SENTINEL (Mar. 17, 2017), <https://www.jsonline.com/story/news/local/wisconsin/2017/03/17/wisconsin-cottage-center-property-rights-dispute-goes-us-supreme-court/99182746/>.

117. *Hearing on H.R. 12690 and H.R. 12870*, *supra* note 109, at 37 (testimony of Dr. Richard Curry).

118. *Id.* at 5 (statement of Rep. Vernon Thompson).

119. *Id.* at 39 (testimony of Rep. Roy Taylor).

120. *Id.* at add. 6 (written statement of Archie D. Chelseth); see also *id.* at 50–51 (testimony of Archie D. Chelseth) (noting that the master development plan for the river stated that “zoning historically has been a very weak tool, and it is not sufficient to do the job,” necessitating easements to supplement).

designated, would still be state-managed through zoning and easements. Contrary to the Court, that area was not and would not be subject to a long history of federal management “long before [the siblings] possessed the land.”<sup>121</sup>

By not considering the unique designation process of the lower section of the Lower St. Croix River the Court failed to consider that, for property owners in the area, the “heavily regulated” argument might not carry as much weight. Their specific portion was left to state administration because its scenic and environmental values were deemed less worthy of conservation—or perhaps past the point of no return given the current state of development—relative to the remainder of the “unspoiled” riverway. Because this segment of the river was not federally managed, it instead faced regulations from “two states and 36 separate local units of government.”<sup>122</sup> Coupling the fact that the zoning regulations stemmed from a dizzying array of state and local sources with the ambiguity and complexity of those regulations, as discussed below, meant that property owners were not necessarily objectively “on notice” of their property’s potential treatment under the law.

#### *B. Zoning Regulations: The Merger Provision*

When the Court in *Murr* considered the property’s treatment “under state and local law”—that is, under the merger provision—as the first factor framing the Murrs’ reasonable expectations, it assumed that the provision was “understood as reasonable by all concerned,” in part because of the prevalence of merger provisions across the country.<sup>123</sup> This subpart illustrates the unreasonableness of that assumption: first, the merger provision in place prior to the lots’ transfer was ambiguously worded, and second, presupposing notice of merger provisions based on the prevalence of merger provisions around the country ignores the wide variability in those provisions.

In response to the 1972 federal legislation designating the Lower St. Croix River, but before the inclusion of the lower portion of the Lower St. Croix River, Wisconsin enacted legislation implementing its preservation in 1973. The legislature required the Department of Natural Resources (DNR) to “adopt, by rule, guidelines and specific standards for local zoning ordinances” and the municipalities to adopt ordinances at least as restrictive as those of the DNR.<sup>124</sup> In its 1975 rulemaking, effective in 1976, the DNR established “baseline

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

122. *Hearing on S. 1928*, *supra* note 99, at 4 (statement of Sen. Gaylord Nelson); *see also id.* at add. 2 (written statement of Archie D. Chelseth) (noting that as a result of the many sources of relevant state and local law, it was “very difficult, if not impossible, to preserve the outstanding attributes of the Lower St. Croix”).

123. *Murr*, 137 S. Ct. at 1945, 1947 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001)).

124. WIS. STAT. § 30.27(2)–(3) (2018).

standards for local zoning ordinances,” including the merger provision at issue here.<sup>125</sup>

Merger provisions are an increasingly common zoning tool for eliminating substandard lots and meeting minimum lot size requirements. The since-rescinded<sup>126</sup> Wisconsin merger provision provided that adjacent lots held under common ownership could not be developed as separate lots if each of the lots did not have “at least one acre of net project area.”<sup>127</sup> Net project area was defined as “developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands.”<sup>128</sup> A grandfather clause excluded from merger lots in separate ownership from abutting lands or those meeting the minimum building requirement.<sup>129</sup> Variances from these regulations could be granted where their enforcement would entail “unnecessary hardship,” which, though not explicitly defined, could not be established by “[e]conomic considerations alone.”<sup>130</sup> The merger provision, in combination with the grandfather clause and variance provision, served “to ultimately phase out substandard lots in the long term” without “interfer[ing] with any current investment-backed expectations.”<sup>131</sup>

Generally, merger provisions have been viewed as a fair compromise between addressing the societal interest in effectuating zoning purposes and the

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125. St. Croix County Brief, *supra* note 38, at 6–7.

126. Five months after the *Murr* decision, the Wisconsin legislature passed and Governor Scott Walker signed the Homeowners’ Bill of Rights, explicitly prohibiting local governments from merging adjacent lots belonging to the same owner without their consent, rendering these provisions obsolete. *See* Assemb. 479, 2017–18 Leg., 103d Sess. § 25 (Wis. 2017); Patrick Marley, *Wisconsin Gov. Scott Walker Signs Bill to Expand Property Rights*, MILWAUKEE JOURNAL SENTINEL (Nov. 27, 2017), <https://www.jsonline.com/story/news/politics/2017/11/27/wisconsin-gov-scott-walker-signs-bill-expand-property-rights/898148001/>.

127. WIS. ADMIN. CODE NR § 118.08(4)(a)(2) (2018); *see also* ST. CROIX COUNTY, WIS., ORDINANCE ch. 17, § 17.36(I)(4)(a) (2014).

128. ADMIN. § 118.03(27).

129. *See* Petitioners’ Reply Brief on the Merits at 19, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214) [hereinafter *Murr* Reply Brief] (“The reason a grandfather clause exists is to provide relief to property owners when regulations change.”); Brief for Respondent State of Wisconsin at 10, *Murr*, 137 S. Ct. 1933 (No. 15-214) [hereinafter *State* Brief] (noting that lot-size restrictions are coupled with grandfather clauses “to eliminate substandard lots while protecting settled property rights”); *see generally* H. Bernard Waugh, Jr., *Grandfathered—The Law of Nonconforming Uses and Vested Rights* 4 (2009 ed.), <https://www.nh.gov/osi/resource-library/land-use/documents/grandfathered-nonconforming-uses.pdf> (“‘Grandfathering’ strikes a balance by protecting the permanence while allowing for the change. It protects landowners from rules which change in the middle of the game, but it only protects those who, by their investments, have hazarded a stake in that game. The heart of the doctrine is justified investment-backed expectations.”).

130. ADMIN. § 118.09(4)(b); *see also* ORDINANCE ch. 17, § 17.09(A)(265). Following the *Murr* decision, the Wisconsin Legislature amended the definition of “unnecessary hardship,” requiring a showing that the property owner would have “no reasonable use of the property in the absence of a variance . . . based on conditions unique to the property, rather than considerations personal to the property owner.” Assemb. 479, 2017–18 Leg., 103d Sess. § 10 (Wis. 2017).

131. *See* Transcript of Oral Argument, *supra* note 65, at 41 (argument by counsel for the State).

individual landowner's interest in developing her lot.<sup>132</sup> Many of the substantive arguments for and against merger provisions stem from arguments for and against minimum lot sizes. Proponents emphasize that minimum lot sizes limit traffic congestion, protect against the "evils of overcrowding and the ill effects of urbanization," safeguard the environment, and sustain property values.<sup>133</sup> Opponents argue that they unfairly penalize developers who acquire or own adjacent parcels "for good and valid business reasons," thereby interfering with the efficient use of and investment in property.<sup>134</sup> Others argue that merger provisions allow the government to sidestep liability for restrictions that would otherwise result in a taking, which was particularly troubling for a group of amici states with federally owned land.<sup>135</sup>

Wisconsin's first iteration of its merger provision did not provide an exception for substandard lots that together formed one acre of net project area.<sup>136</sup> Rather, property owners were barred from development strictly based on common ownership.<sup>137</sup> Beginning in 1980, the DNR exempted lots meeting net project area requirements.<sup>138</sup> At that point, the state and local versions of the merger provision simply provided that lots in common ownership could not be "allowed as [a] building site[]" unless "each of the lots have at least one acre of net project area."<sup>139</sup> This was the language before the Murrs when the property transfers that effectively sealed the fate of their takings claim occurred.<sup>140</sup> But this language included no explicit prohibition on the *sale* of substandard lots—just their development. Rather, the explicit prohibition on development and sale

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132. See St. Croix County Brief, *supra* note 38, at 41; Brief of Amici Curiae Nat'l Ass'n of Counties et al. in Support of Respondents at 8, 11–12, *Murr*, 137 S. Ct. 1933 (No. 15-214) [hereinafter Brief of Nat'l Ass'n of Counties]; Brief of Amici Curiae Carlisle Ford Runge et al. in Support of Respondents at 34–35, *Murr*, 137 S. Ct. 1933 (No. 15-214).

133. 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 51.12, Westlaw (database updated April 2018) (footnotes omitted); see generally Gavin L. Phillips, Annotation, *Validity of Zoning Laws Setting Minimum Lot Size Requirements*, 1 A.L.R. 5th 622 (1992) (discussing the various justifications for minimum lot sizes).

134. Brief of Amici Curiae Nat'l Ass'n of Homebuilders et al. in Support of Petitioners at 11–12, *Murr*, 137 S. Ct. 1933 (No. 15-214).

135. See Brief of Amici Curiae Nevada et al. in Support of Petitioners at 26–28, *Murr*, 137 S. Ct. 1933 (No. 15-214) ("If the federal government can so easily avoid paying just compensation, it will be able to wield its powerful regulatory authority with even greater force to coerce and punish resisting states."). Nevada was joined by Alaska, Arizona, Arkansas, Kansas, Oklahoma, South Carolina, West Virginia, and Wyoming in support of the Murrs, arguing against any presumptive aggregation of contiguous parcels.

136. Wis. Nat'l Res. Bd., Order Creating Rules 11, Doc. No. M-54-74 (1975), [https://docs.legis.wisconsin.gov/code/register/1975/240b/rules/nr\\_118.pdf](https://docs.legis.wisconsin.gov/code/register/1975/240b/rules/nr_118.pdf) (promulgating the 1976 version of WIS. ADMIN. CODE NR § 118.05(11)).

137. See *id.*

138. Wis. Nat'l Res. Bd., Order Repealing and Recreating Rules 14–15, Doc. No. PR-19-79 (1980), [https://docs.legis.wisconsin.gov/code/register/1980/294b/rules/nr\\_118.pdf](https://docs.legis.wisconsin.gov/code/register/1980/294b/rules/nr_118.pdf) (promulgating the 1980 version of WIS. ADMIN. CODE NR § 118.06(14)(a)).

139. *Id.*

140. Recall that the Murr family acquired the two lots in the early 1960s and transferred them to their children in the mid-1990s.

that the Supreme Court and Wisconsin courts repeatedly cited—"[a]djacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area"—was not added until 2004, nearly a decade after the parents had transferred the lots to the children.<sup>141</sup> Though the County noted the discrepancy in its brief,<sup>142</sup> the Murrs' counsel never discussed it, and the Court failed to address it in its opinion, choosing to rely on the language favoring its preferred outcome.<sup>143</sup>

St. Croix County argued that it "in practice applied the same restriction on separate sale and development prior to the . . . amendment, based on its interpretation of the earlier language."<sup>144</sup> Yet the June 2003 notice to amend the state administrative code noted the DNR's purpose to "improve the clarity and consistency of the code, increase the flexibility of owners of existing non-conforming structures to repair, maintain and, in some cases, expand those structures."<sup>145</sup> The DNR analysis prepared alongside the final rule likewise emphasized its effort to grant Lower St. Croix River district property owners "more land use options."<sup>146</sup>

Despite this ambiguity in both the underlying regulations and in their application, several briefs argued and the Court implied that since merger provisions are a staple of modern zoning law, they are effectively "within the reasonable expectations of landowners and their lawyers."<sup>147</sup> Indeed, at least thirty-three states have adopted, or have counties that have adopted, a merger provision.<sup>148</sup> Prior to Wisconsin's ban on merger provisions following the outcome in *Murr*, seventeen of the state's seventy-two counties had zoning ordinances that explicitly combined commonly owned, contiguous substandard lots, and thirty-three counties had ordinances that implicitly did so.<sup>149</sup> One of the

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141. See WIS. ADMIN. CODE NR § 118.08(4)(a)(2). In describing the merger provision, the Court quotes the "sold or developed as separate lots" language, which was not added until 2004. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1940 (2017). The Wisconsin Court of Appeals, both in the appeal of the zoning decision and in the appeal of the takings claim, relied on the language enacted in 2004 when it reprinted the code in full in its opinions. See *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, at \*1 n.4 (Wis. Ct. App. Dec. 23, 2014); *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 842 (Wis. Ct. App. 2011).

142. See St. Croix County Brief, *supra* note 38, at 9 n.3.

143. See *Murr*, 137 S. Ct. at 1940.

144. St. Croix County Brief, *supra* note 38, at 9 n.3.

145. 570 Wis. Admin. Reg. 25, 26 (June 30, 2003).

146. *Wisconsin Natural Resources Board 2004 Order*, *supra* note 114, at 1.

147. Brief of Nat'l Ass'n of Counties, *supra* note 132, at 32; see also *Murr*, 137 S. Ct. at 1944–45; St. Croix County Brief, *supra* note 38, at 41–44; see also State Brief, *supra* note 129, at 8.

148. See Transcript of Oral Argument, *supra* note 65, at 47 (argument of Richard J. Lazarus); see also Brief of Nat'l Ass'n of Counties, *supra* note 132, at 12–31 (listing various merger provisions across the country).

149. See Jeffrey A. Mandell & Barbara Neider, *Part 2: Why the Supreme Court Should Decide Not to Decide Murr v. Wisconsin*, STAFFORD ROSENBAUM LLP (June 21, 2016), <https://www.staffordlaw.com/blog/article/why-the-supreme-court-should-decide-not-to-decide-murr-v.-wisconsin/>. Mandell and Neider, two Stafford Rosenbaum attorneys, authored the amicus brief on behalf of local government

two amicus briefs cited by the Court noted that by the 1960s, merger provisions were “so common that the American Society of Planning Officials included one in the Model Zoning Ordinance it published for the benefit of local governments nationwide.”<sup>150</sup> “[W]ith just a few minutes of research,” the brief argued, “one can find many periodicals and web pages explaining that the purchaser of a vacant nonconforming lot should be careful to ascertain whether the lot is governed by a merger provision.”<sup>151</sup>

This conflation of a law’s prevalence with it being well known overstates reality: it assumes property owners can retain counsel when making intrafamily land transfers or that, at the least, the application of these regulations to their property is uniform and clear.<sup>152</sup> But merger provisions vary widely. While some states may enact merger provisions that mandate county-level adoption, other states “significantly limit the authority of political subdivisions to merge lots without the owners’ consent.”<sup>153</sup> For instance, New Hampshire provides only for “voluntary merger” and gives landowners a method for “un-merging” lots that were involuntarily merged before September 18, 2010.<sup>154</sup> Colorado requires consent prior to the merger of contiguous parcels.<sup>155</sup> Wisconsin likewise adopted a consent requirement following the outcome in *Murr*.<sup>156</sup> And other states combat unfair merger by requiring additional due process, requiring “notice and public hearing” first.<sup>157</sup> In other words, without an attorney or an application to the zoning board, a property owner will not necessarily be on notice of how their local will affect their property.

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associations in Wisconsin. Brief of Amici Curiae Wisconsin Counties Ass’n et al. in Support of Respondents, *Murr*, 137 S. Ct. 1933 (No. 15-214).

150. Brief of Nat’l Ass’n of Counties, *supra* note 132, at 10 (citing AM. SOC’Y OF PLANNING OFFICIALS, THE TEXT OF A MODERN ZONING ORDINANCE 26–27 (2d ed. 1960)).

151. *Id.* at 33.

152. See, e.g., Ruppert, *supra* note 24, at 258 (questioning the “heavily regulated” theory’s presumption that private property owners “are so sophisticated as to understand the complexity of regulatory regimes potentially affecting their property”).

153. State Brief, *supra* note 129, at 12.

154. *Id.* (emphasis added) (citing N.H. REV. STAT. ANN. §§ 674:39-a, 674:39-aa (2018)); see N.H. REV. STAT. ANN. § 674:39-aa(II) (“Lots or parcels that were involuntarily merged prior to September 18, 2010 . . . shall at the request of the owner, be restored to their premerger status” where the request was submitted before December 31, 2016.).

155. COLO. REV. STAT. § 30-28-139(2)(a) (2018) (“No merger of parcels that is the subject of a hearing pursuant to subsection (1) of this section shall be effective unless: . . . The owner of the parcels has given his, her, or its consent to the merger of said parcels . . .”).

156. See Assemb. 479, 2017–18 Leg., 103d Sess. § 25 (Wis. 2017) (“[N]o political subdivision may enact or enforce an ordinance or take any other action that requires one or more lots to be merged with another lot, for any purpose, without the consent of the owners of the lots that are to be merged.”).

157. N.M. STAT. ANN. § 47-6-9.1(B) (2018); see also CAL. GOV’T CODE § 66451.13 (2018) (requiring that before recording a merger, local agency must mail current owner a notice of its intention to determine the parcels’ status and advise the owner of opportunity to request a hearing).



*C. Topography: The Lots' Rough Terrain*

Finally, in perhaps the Court's most difficult-to-apply factor of its multifactor test, the Court found that the Murrs' lots' "rough terrain and narrow shape make it reasonable to expect their range of potential uses might be limited."<sup>158</sup> This subpart contends that, while the lots' rough terrain ultimately prompted the Murrs to engage with the zoning board process that put them on notice of the merger provision, the lots' terrain and shape do not, without help from expert consultants or an application for a final decision through the zoning board, necessarily place owners on notice of the treatment of their property.

The Murrs' lots are bisected by a steep, 130-foot bluff.<sup>159</sup> Because a large portion of the land below the bluff sits within the St. Croix River's floodplain, the two lots only contain .48 and .50 acres of net project area.<sup>160</sup> In addition to the Murrs, at least eight other property owners in the neighborhood own one or more contiguous, substandard riverfront lots with just one allowable building site.<sup>161</sup> The neighborhood consists of both seasonal and year-round homes "with many of the newer homes being high value."<sup>162</sup>

Donna Murr testified that her parents "bought [the property] as an investment and planned to construct a year-round retirement home on top of the bluff."<sup>163</sup> In the meantime, they built a three-bedroom, 950-square-foot cabin on Lot F.<sup>164</sup> As for Lot E, they planned "on either developing [it] for themselves or selling it to someone else."<sup>165</sup> At the advice of their accountant, the parents kept the lots in separate ownership—one with the family and the other with the family-owned plumbing company—for tax purposes.<sup>166</sup> This meant the parents

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

159. *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011); St. Croix County Brief, *supra* note 38, at 12 (noting that the lots "are bisected by a very steep, nontraversable slope" and that the "land at the bottom [of the lots] is sharply constrained for development by the river to the north and the bluff to the south").

160. St. Croix County Brief, *supra* note 38, at app. A-3. Although this number still does not meet the net developable acre requirements (one acre) even when the lots are joined, the Wisconsin Court of Appeals presumed that commonly owned lots that did not meet this requirement could still be a single buildable lot when combined together. *Murr*, 796 N.W.2d at 843 n.9.

161. Joint Appendix, *supra* note 5, at 67; St. Croix County Brief, *supra* note 38, at 36; *see* Transcript of Oral Argument, *supra* note 65, at 41–42 (argument of Misha Tseytlin) ("[M]ost people bring these lots under common ownership purposefully . . . to build a single house up on a bluff, a bigger house. . . . It's already happened with eight property owners in this area.").

162. Joint Appendix, *supra* note 5, at 52.

163. Brief of Plaintiffs-Appellants at 9, *Murr v. State*, No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. Dec. 23, 2014), 2014 WL 2516928, at \*8 [hereinafter *Murr* Brief Appealing Summary Judgment].

164. Petition for Writ of Certiorari, *supra* note 54, at 3.

165. *Murr* Brief Appealing Summary Judgment, *supra* note 163, at \*10; Joint Appendix, *supra* note 5, at 76.

166. *See* Petition for Writ of Certiorari, *supra* note 54, at 3; *see also* Petitioners' Brief on the Merits at 3, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) (No. 15-214). St. Croix County in its brief before the Supreme Court points out that the lots were actually in common ownership as early as 1982, before the conveyance to the children, because the parents re-conveyed Lot F to the family name from the plumbing company. The Murrs acknowledged this fact in a footnote in the first round of litigation before the state

sheltered under a grandfather clause that arguably was never intended for them.<sup>167</sup>

Due to its location and topography, the Murrs' property is not only subject to the Riverway Ordinance at issue here, but also a Shoreland Ordinance, Floodplain Ordinance, and additional zoning imposed by the town of Troy.<sup>168</sup> Therefore, "the zoning provisions that affect the subject property are numerous and complex."<sup>169</sup> Despite the Court's claims that the owners were on alert of the regulations long before the transfer, Donna Murr testified that she first became aware of them around December 2004 when she "started working with the St. Croix County Zoning Department . . . to flood-proof the cabin on Lot F and sell Lot E as a buildable lot."<sup>170</sup> On April 12, 2005, her attorney wrote her "reminding [her] of the substandard lot provisions and of their nature."<sup>171</sup> Four months later, the County zoning department explicitly notified the Murrs that they "were required to obtain special exception permits/variances in order to proceed with their desired plan."<sup>172</sup>

Without a definitive ruling on a variance application, it is unclear how a property owner could form "reasonable" expectations about the treatment of their property. This is especially true for the St. Croix subdivision where the Murrs' neighbors had been granted variances to develop in the past.<sup>173</sup> At the advice of her lawyer, Donna Murr applied for eight variances to either reconstruct the cabin on higher ground or sell the lots as separate building sites. The board conducted a public hearing on June 22, 2006 at which the DNR and county zoning staff strongly opposed all eight applications.<sup>174</sup> The representative for Troy, however,

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court of appeals, but the lower courts did not discuss it in their opinions. *See* St. Croix County Brief, *supra* note 38, at app. E-3 n.1. In their reply brief before the Supreme Court, the Murrs again acknowledged the 1982 transfer but maintained that even if the lots were in common ownership, they "did not legally become a single parcel" because, if they had, the parents would not have been able to separately convey the lots to the children in 1994. Murr Reply Brief, *supra* note 129, at 10–11.

167. Setting aside the fact that the lots were technically placed in common ownership in 1982, even when the lots were in "separate ownership," they were still both effectively held by the Murrs—one was just in the family company. During oral argument, several Justices questioned whether the lots still should have been considered in common ownership despite this technicality. Chief Justice Roberts suggested that different treatment based on separate ownership was inherently unfair: "That seems . . . a little quirky that these owners are not entitled to treat [the lots] separately, while if they . . . just happen to record them in . . . separate names . . . they would be [in an] entirely different situation. . . . [D]oes the whole takings issue really turn on that?" Transcript of Oral Argument, *supra* note 65, at 40–41.

168. Letter from St. Croix Cty. Planning & Zoning to William L. Tilton (Aug. 31, 2005) (on file with author).

169. *See* Joint Appendix, *supra* note 5, at 40–43.

170. *Id.* at 7, 99.

171. Response Brief of Defendant-Respondent St. Croix County at 20, Murr v. State, No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. Dec. 23, 2014), 2014 WL 3056296, at \*19 [hereinafter St. Croix County Response Brief].

172. *Id.* at 11.

173. *See* St. Croix County Brief, *supra* note 38, at app. F-36 (reproducing the Murrs' variance application to the St. Croix County Board of Adjustment).

174. *See* St. Croix County Zoning Board of Adjustment, *Meeting and Hearing Minutes*, at 22–27 (June 22, 2006) (on file with author); Joint Appendix, *supra* note 5, at 64.

recommended approval and “propose[d] research on the use of contiguous substandard lots in common ownership,” suggesting that the impact of the provision had been less than clear.<sup>175</sup>

The board ultimately denied Donna Murr’s requests in a written decision, pointing to the “spirit of the zoning law,” the “spirit of the federal Act” designating the river, and principles of fairness.<sup>176</sup> The Murrs’ application to sell and use the lots as separate buildable sites defied the zoning regulations’ “spirit and intent” to “limit[] the use of substandard lots for the purpose of reducing the adverse effects of overcrowding and poorly planned shoreline and bluff area development.”<sup>177</sup> Specifically, granting these variances “could result in yet another residence with access to the river” in an area that “features some of the most crowded development” in the Riverway District.<sup>178</sup> Moreover, the board reasoned, these principles apply to property owners across the district, and at least eight other property owners in the immediate area faced similar issues.<sup>179</sup>

The Murrs appealed the decision in state court, which affirmed the board’s denial of the request to sell or use the two lots as separate building sites but reversed the board on its denial of the remaining seven requests regarding floodproofing reconstruction.<sup>180</sup> Nearly two years later, after finally receiving the written decision from the judge, the board unanimously moved to appeal the decision.<sup>181</sup> After both parties filed their appeals, the Murrs’ attorney contacted the zoning department to “see if the Murrs and the Board could find common ground and settle outside [of] court.”<sup>182</sup> As a result, the board, on its own initiative, reconsidered its decision in a December 18, 2008 rehearing, suggesting the board might consider a compromise.<sup>183</sup>

The reconsideration hearing was less than fruitful: the board ultimately decided to postpone its decision again, this time until the following year.<sup>184</sup> In the hearing, the Chairman of the Board noted the uncertainty surrounding the pending appeal, given that “the Board found no hardship[,] . . . the judge said

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175. St. Croix County Zoning Board of Adjustment, *Meeting and Hearing Minutes*, at 22; Joint Appendix, *supra* note 5, at 64.

176. Joint Appendix, *supra* note 5, at 64.

177. *Id.* at 65–66.

178. *Id.* at 66.

179. *Id.* at 67. Following passage of the Wisconsin Homeowners’ Bill of Rights, discussed *supra* note 126, those eight property owners, in addition to the Murrs, will be able to build or develop their substandard lot(s), assuming compliance with other zoning provisions.

180. St. Croix County Brief, *supra* note 38, at app. B-4–B-6. In reversing the floodproofing variances, the court reasoned that the “Murrs suffer from a hardship because the unique terrain, limited building area and ongoing flooding make literal conformity to the zoning ordinances to be unreasonable and unnecessarily burdensome.” *Id.* at app. B-4.

181. St. Croix County Zoning Board of Adjustment, *Meeting and Hearing Minutes*, at 21 (Aug. 28, 2008) (on file with author).

182. St. Croix County Zoning Board of Adjustment, *Meeting and Hearing Minutes*, at 3–4 (Dec. 18, 2008) (on file with author).

183. *Id.* at 4–5.

184. *Id.* at 5.

there is hardship . . . [and b]oth sides think they will win on appeal.”<sup>185</sup> A DNR representative led a large part of the discussion and warned, seemingly for the first time in the recorded interactions with the family, that by allowing the Murr variances, the county would be at risk of retributive measures at the federal level. Specifically, he argued, and the board ultimately agreed, that FEMA, which administers flood insurance, would respond to variances from the ordinance requirements with “drastic measures against the municipality which could include suspension so no one in the County could get flood insurance or be eligible for any hazard damage relief.”<sup>186</sup>

Attempts at settlement apparently fell through, as the board’s agenda an entire year later still listed the Murrs’ matter as “unfinished business.”<sup>187</sup> The case moved to the Wisconsin Court of Appeals, where the Murrs alleged that the ordinance did not apply to their two parcels because they did not come under common ownership until after the effective date of the ordinance.<sup>188</sup> The court disagreed, devoting the majority of its decision to its interpretation of the state and local regulations in place in 2004 and 2005.<sup>189</sup> While simultaneously finding that the merger provision and local regulations resulted in “no ambiguity in [their] application here,” it acknowledged that the Murrs technically should not have been able to develop any building on their lots because, even combined, they did not meet the one acre of net project area requirement.<sup>190</sup> But the court found that such a technical reading

would lead to the seemingly absurd result that an owner of two adjacent properties would be prevented from building even one home, while an owner of a single substandard lot would be entitled to build. We assume without deciding . . . that if all commonly owned lots do not contain the minimum net project area, they shall together suffice as a single buildable lot.<sup>191</sup>

The same court three years later in the takings suit adopted this assumption without discussion, citing the above language for the assertion that “if abutting, commonly owned lots do not each contain the minimum net project area, they together suffice as a single, buildable lot.”<sup>192</sup> The Supreme Court seemed to assume the same, given that it never mentions the discrepancy.

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185. *Id.* at 4.

186. *Id.* (stating that given the overlap of the various zoning ordinances applicable to the Murrs’ property, the “opportunities for change are very limited . . . . It decreases the ability to do things without jeopardizing, on a County wide basis, the eligibility for flood insurance or the department taking action against the municipality and the County for decisions in violation of what the County has already approved”).

187. St. Croix County Zoning Board of Adjustment, *Agenda*, at 1 (Dec. 2, 2009) (on file with author).

188. *See* *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 843 (Wis. Ct. App. 2011).

189. *See id.* at 843–46.

190. *Id.* at 843 & n.9. The Murrs’ combined lots had only .98 acres of net project area. *See* St. Croix County Brief, *supra* note 38, at app. A-3.

191. *Id.*

192. *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, at \*3 (Wis. Ct. App. Dec. 23, 2014).

The Murrs' long saga with the local zoning board and Wisconsin Courts shows that the family could not form "reasonable expectations" regarding the treatment of its property strictly based on its slope or narrow shape. First, the board recommended that the Murrs apply for zoning variances, suggesting that they could be granted an exception. Then, the board issued a final decision denying those applications for variances, but the Wisconsin County Court reversed on all of the variances except the one at issue here. Next, while the appeal of the County decision was pending, the board engaged in settlement talks with the Murrs to decide the issues out of court. At the rehearing decision, an entirely new concern arose about federal-level FEMA retribution if the county did not avoid development along the river and takes the day for the board. This decade-long back-and-forth, coupled with the array of factors that could influence the local agency's decision making, result in a wholly unpredictable process, even for the most "reasonable" property owner. It was premature for the Court to assume that, based on the lots' topography, the Murrs should have expected their lots to be treated as a merged unit.

This Part challenged the fairness of the Court's reliance on the location, regulatory notice, and topography by showing how the application of those factors was not so objective for the Murrs. Although the Court devoted only a few sentences of analysis to each in its opinion, a deeper dive into the record shows three important holes in the Court's analysis. First, the lots' location along a federally designated river does not necessarily communicate the potential for future regulations. Here, the legislative record shows this segment of the river was left to state management because the region was already relatively developed. Second, the Court relies on a merger provision that was not enacted until a decade after the lots were transferred to the Murr children in common ownership. Thus, that language could not have informed the children's expectations regarding the severability of the lots. The Court's finding that a national prevalence of merger provisions around the country should have informed the Murrs' expectations was likewise ill founded. It ignores the fact that many of those "merger" provisions explicitly ban involuntary merger like the one executed on the Murrs' property. Finally, as evident in the Murrs' ongoing interactions with the zoning board and state courts, the lots' topography does not necessarily place owners on notice of their property's treatment without a final decision on a variance request or a consultation with an expert.

### III. *MURR* DEMONSTRATES THE REASONABLE EXPECTATIONS ANALYSIS IS DIVORCED FROM REALITY

The Court has purposefully refrained from establishing concrete, bright-line rules in its regulatory takings jurisprudence. As Justice Ginsburg noted in 2012, "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable

rules in this area.”<sup>193</sup> But under the Court’s new multifactor approach in *Murr*, property owners are not only expected to forecast the factors that will be relevant to the Court but also how those factors apply to their property—neither of which necessarily lends itself to an objective analysis.

This Part discusses how many of the difficulties in applying the Court’s multifactor test to the Murrs’ denominator question discussed in Part II stem from: one, the Court’s reliance on nominally objective but intrinsically subjective factors when painting a picture of a property owner’s reasonable expectations; two, the Court’s emphasis on regulatory notice and physical characteristics; and three, the Murrs’ attorneys’ failure to effectively marshal facts to argue those subjective factors in their favor. Set against the Court’s already “muddled” regulatory takings doctrine, the Court’s treatment of reasonable expectations creates more questions than answers.

#### A. *Inherent Tensions in an Objective Reasonable Expectations Analysis*

The Murrs’ case highlights three tensions between the Court’s reasonable expectations test and the Takings Clause’s underlying goal of fairness. First, there is the issue of whose expectations the Court considers. The Court here considered solely the expectations of the siblings, the passive recipients<sup>194</sup> in the separate transfers of Lots E and F who brought this claim before the Court. But since the Murrs’ parents triggered the merger provision at the heart of the lawsuit, should the Court assign their reasonable expectations any weight in its analysis?<sup>195</sup> Theoretically, “a potential takings claim materializes at the moment government regulates property,” independent of the ownership status of the property.<sup>196</sup> However, if as the Court has suggested, a takings claim is not ripe until the owner understands how a regulation will apply to her property,<sup>197</sup> then

193. Ark. Game & Fish Comm’n v. United States, 568 U.S. 23, 31 (2012); see *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002) (noting the Court’s tendency to “resist the temptation to adopt *per se* rules” in regulatory takings cases).

194. See Transcript of Oral Argument, *supra* note 65, at 8 (statement of Justice Sotomayor) (arguing that the Murr children “could have said, no, I don’t want two contiguous ones, Dad and Mom. I’ll go buy the next-door lot from someone else”).

195. See *id.* at 8 (argument of John Groen) (arguing that the “taking occurs in 1975 when the regulations redefined the property rights” and not just when the owners learn of the regulations).

196. Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 14–15 (2003); see also Transcript of Oral Argument, *supra* note 65, at 7 (statement of Justice Sotomayor) (noting that while the parents might have claimed a taking when the regulation passed, “[t]he children when they took were subject to the regulation, and they knew it”); State Brief, *supra* note 129, at 42 (noting that the “Murr parents could have challenged the enactment of this [merger] provision in 1976”).

197. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001) (stating that “a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation . . . including the opportunity to grant any variances or waivers allowed by law”); *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (“Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized

a claim was never ripe for the parents, who never sought a variance to build on the property, nor clarification from the zoning board.

Second, setting aside the “who,” there is the issue of timing, which is particularly thorny given the series of amendments to the relevant regulations. If the Court focuses the inquiry on the children, as it did here, does it consider their expectations when they received the property or when they first decided to do something with Lot E after the 2004 amendment adding the specific prohibition on sale? Here, the Court only considered the regulations most favorable to its preferred outcome—those after the 2004 amendment—and assumed fair notice of those regulations without further discussion. It failed to address the Murrs’ notice of and expectations surrounding the regulations when the actual transfer occurred.

Finally, there is the age-old issue of evaluating “reasonableness.”<sup>198</sup> In oral argument, Professor Richard Lazarus, on behalf of St. Croix County, argued that the test should not change depending on the property owner’s “particular subjective preferences;” rather, it should consider “the reasonable expectations . . . of *people*.”<sup>199</sup> Albeit intuitively appealing to tie the expectations analysis to objective benchmarks—apparently such as all “people”—the Murrs’ case shows that (1) laws do not necessarily offer reasonable notice by their enactment; and (2) there is dispute over when those laws fit into the “whole of our legal tradition” under *Lucas*.<sup>200</sup> Regarding the first, do we expect the reasonable property owner to research the zoning board’s prior decisions on variance applications to figure out whether the board has an unwritten policy of not granting variances on nonconforming lots? Should owners attend hearings relating to nonconforming lots in their neighborhood to find out whether their neighbors received variances? Or, as required in certain states, should they have to obtain counsel?<sup>201</sup> In light of such questions, the “imprecise [reasonable person] standard” becomes far from objective, instead

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the procedures [the State] provides for obtaining just compensation, respondent’s claim is not ripe.”). This issue was heavily disputed in the lower courts but was not addressed by the Supreme Court.

198. See, e.g., RESTATEMENT (SECOND) OF TORTS §283, cmt. c (AM. LAW INST. 1965) (stating that the “reasonable man” standard is objective and external to the individual).

199. Transcript of Oral Argument, *supra* note 65, at 51 (emphasis added).

200. Compare State Brief, *supra* note 129, at 24 (“[W]hen a substandard land lot is subject to a merger provision under state law, such that it cannot be sold and developed separately from a neighboring, commonly owned lot, then the owner’s objectively reasonable expectations would be that the lot is not a separate parcel.”), with Murr Reply Brief, *supra* note 129, at 5–6 (The *Lucas* Court “did not suggest that ‘all’ of Wisconsin zoning law is used to define the relevant parcel. Rather, the reference is to State law that provides legal recognition and protection to a particular interest in land.”).

201. For instance, Delaware requires owners to have attorneys present at closing. See *In re Mid-Atlantic Settlement Servs., Inc.*, No. 102, 2000, 2000 WL 975062 (Del. May 31, 2000), *aff’g* File No. UPL 95-15 (Del. Bd. Unauthorized Practice of Law Mar. 8, 2000), <https://courts.delaware.gov/ODC/Digest/Download.aspx?id=419>. Whether this would address issues faced by owners like the Murrs is less clear, as the devil was in the details. At the least, counsel here notified the Murrs of the zoning regulation and encouraged them to seek a final decision on the application of the zoning regulations to their property.

turning “on the judge’s individual opinion as to the worth of the claimant’s expectations rather than on an objective evaluation of the evidence produced.”<sup>202</sup> Regarding the second, the Court has explicitly stated that mere enactment of a regulation does not make it a “background principle of the State’s law.”<sup>203</sup> So then where does the Court draw the line between a background principle and just a new regulation?<sup>204</sup> And more importantly, how is the property owner supposed to know?

The parties’ proffered alternative approaches to the denominator analysis are varied and numerous. The Murrs argued that fee title to single parcels should decide the denominator, noting the “long-held underpinnings” of defining land holdings by metes and bounds, as recorded in a system of deeds.<sup>205</sup> The State of Wisconsin and Chief Justice Roberts strongly advised against the adoption of yet another multifactor approach and both argued for an analysis rooted in state law, akin to that suggested by Justice Scalia in the oft-cited footnote seven in *Lucas*.<sup>206</sup> St. Croix County, on the other hand, advocated for a multifactor approach because “[c]oncepts of fairness and justice—which form the basis of the takings clause—are best served by eschewing any set formulas.”<sup>207</sup> Thus, the County argued, the analysis should consider “the extent to which parcels are contiguous, ownership history, physical characteristics, unity of use, the extent to which the restricted portion benefits the unregulated portion, and how the government, including state and local governments have treated the land.”<sup>208</sup> The U.S. Solicitor General likewise argued that a multifactor approach is necessary to ensure “[p]rinciples of fairness and justice,” suggesting an analysis

202. Chipchase, *supra* note 24, at 57 & n.90 (arguing that since “what a reasonable landowner would do or plan for in a particular situation . . . presents a debatable question in virtually every case,” then the decision invariably turns on the court’s opinion).

203. Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

204. See Transcript of Oral Argument, *supra* note 65, at 11 (statement of Justice Ginsburg) (“And we’re told these merger rules have a long history. Many States have them. So why isn’t that background State law that . . . would apply?”); see also Shapiro, *supra* note 91, at 27 (“[I]t is reasonably clear, from reading the entire footnote, that when he wrote about ‘reasonable expectations . . . shaped by the State’s law of property’ in *Lucas*, Justice Antonin Scalia was referring to real property law, not regulatory law.”).

205. Murr Reply Brief, *supra* note 129, at 16–18.

206. Murr v. Wisconsin, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) (characterizing the majority’s test as “elaborate” and its definition of property “malleable” and advocating that the Court instead “stick with [its] traditional approach: State law defines the boundaries of distinct parcels of land, and those boundaries . . . determine the ‘private property’ at issue”); State Brief, *supra* note 129, at 35 (Rooting the analysis in State law “would also avoid unpredictable, subjective, or idiosyncratic inquiries that are focused on the particular landowner. Some lower courts have determined the relevant ‘parcel’ by looking at a hodgepodge of case-specific factors, such as the manner in which a landowner has treated the particular land, the landowner’s development plans, and the land’s purchase history. These inquiries introduce disuniformity into the classification of land that is treated identically under state law.” (citation omitted)).

207. Brief in Opposition to Petition for Writ of Certiorari at 20, *Murr*, 137 S. Ct. 1933 (No. 15-214) (“[T]he Supreme Court has also unmistakably explained that good reason exists for refusing to establish such specific and bright-line rules in regulatory takings cases.”).

208. St. Croix County Brief, *supra* note 38, at 52 (citing *Dist. Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 880–82 (D.C. Cir. 1999)).



focused on three dimensions—“spatial, temporal, and functional”—with consideration of “the owner’s use of the property [and] his objectively reasonable expectations.”<sup>209</sup>

Without passing judgment on the ideal approach to the denominator inquiry, it becomes clear that the Court’s current reasonable expectations approach makes little sense in an analysis purportedly focused on fairness. For such an analysis, if truly fair, cannot always be as objective as the Court suggests. As Wisconsin noted, “the extent the ‘economic expectations’ factor considers subjective expectations—even if contrary to what reasonable property owners would understand under state law— . . . only highlights the problematic nature of asking such questions in this area.”<sup>210</sup> In the Murrs’ case, the problems in this analysis were particularly glaring in the Court’s treatment of the regulatory framework and the lots’ physical characteristics.

*B. Difficulties in Basing Reasonable Expectations on Regulatory Notice and Physical Characteristics*

As discussed in Part II, the Court cited the lots’ location along the river, the local merger provision, and the lots’ rough topography as factors relevant to the Murrs’ reasonable expectations. However objective those factors may be in other settings, they were not clear-cut here. While the fact that a regulation was in effect at the time the owner took the action that impacted their property is relevant to the court’s expectations analysis, it should not automatically constitute objective evidence that the owner was “on notice” without a close look at the specific facts of that case.<sup>211</sup>

The Murrs faced a dizzying array of zoning regulations that “add[ed] to the complexity of [any development] requests.”<sup>212</sup> The appraiser hired by the state and county during the Murrs’ takings litigation emphasized the “complexity of the zoning” in the Murrs’ area, admitted that his report “may not take all of the complexities into consideration,” and recommended consultation with

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209. Brief for the United States as Amicus Curiae Supporting Respondents at 12, *Murr*, 137 S. Ct. 1933 (No. 15-214); see Transcript of Oral Argument, *supra* note 65, at 61–63 (argument of Asst. U.S. Solicitor Gen., Elizabeth B. Prelogar) (stating that state law can “shape[] expectations about how land can properly be used,” but ultimately, it is “important to have a flexible, nuanced approach” to account for the “many different ways that property interests arise”).

210. State Brief, *supra* note 129, at 45.

211. *But see* *Texaco v. Short*, 454 U.S. 516, 531–32 (1982) (“Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. . . . It is well established that persons owning property within a [jurisdiction] are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.”).

212. Letter from St. Croix Cty. Planning & Zoning, *supra* note 168 (noting the complexity of regulations facing the Murrs given the application of Riverway, Floodplain, and Shoreland District requirements at both the State and County levels); see also St. Croix County Brief, *supra* note 38, at app. F-28 (noting that the Murrs’ property falls within the St. Croix Riverway, Floodplain, and Shoreland District).

“[p]rofessionals such as St. Croix zoning office personnel, surveyors, engineers, or attorneys . . . before coming to any conclusions” regarding the property.<sup>213</sup> In evaluating the Murrs’ options, the appraiser himself found it “difficult” to give “a definitive answer without developing a plan and presenting it.”<sup>214</sup> In an April 2005 letter, the Murrs’ attorney likewise advised Donna to ask the County “to render an opinion as to the applicability of the county’s ordinance relative to [their] property.”<sup>215</sup> Even the board in its decision noted that “[w]hile some components of the applicants’ request may be allowed as proposed in one district, the project in its entirety cannot meet the standards in all three districts” and that in fact, compliance with standards in the Floodplain District directly “results in noncompliance with standards in the other districts.”<sup>216</sup>

Setting aside the sheer number and complexity of the regulations affecting the Murrs’ property, those regulations were simply inaccessible as written. In addition to relying on the merger language adopted post-transfer, the Court in *Murr* failed to consider that the zoning regulations at issue were repeatedly characterized as confusing by the state agency that promulgated the regulations, the Wisconsin courts, and the appraiser hired by the state and county in this lawsuit. The DNR analysis supporting the enactment of the 2004 merger provision, among other amendments to the administrative code’s zoning provisions, even noted that the “[a]pplication of the zoning standards has been controversial since the beginning of the Riverway regulations” because “[c]onfusion and misunderstandings have resulted from unclear, subjective language, and inconsistent application of zoning standards.”<sup>217</sup> And that, as a result, “[l]andowners and local governments have been frustrated in applying and interpreting the intent of the Riverway regulations.”<sup>218</sup> Despite those amendments, the regulations remained unclear nearly a decade later, given that the Wisconsin Court of Appeals, both in hearing the appeals of the zoning board decision in 2011 and the takings claim in 2014, explicitly remarked on the administrative code’s ambiguity: “[T]he administrative code provision [from the local zoning ordinance] is ‘not a model of clear draftsmanship,’ and we renew our call, implicit in our previous decision, for the DNR to review its language.”<sup>219</sup> Even the St. Croix County zoning specialist charged with the

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213. Joint Appendix, *supra* note 5, at 43–44.

214. *Id.* at 55. Or waiting for another neighbor to do the same. Donna Murr made sure to attend a zoning hearing for her neighbor, Lyn Opitz, who sought to “completely tear down the existing structure and rebuild.” *Id.* at 98. “[A]s neighbors,” Donna “wanted to know what he had in mind so he applied for and was granted every variance that I’m aware of because he was able to rebuild.” *Id.*

215. St. Croix County Response Brief, *supra* note 171, at 26. In briefs before the state court, St. Croix County asserts, as one of its arguments regarding the statute of limitations, that 2005 was one of the points at which the court could have found the clock began running. *Id.*

216. St. Croix County Brief, *supra* note 38, at app. F-28.

217. *Wisconsin Natural Resources Board 2004 Order*, *supra* note 114, at 2.

218. *Id.*

219. *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, at \*1 n.4 (Wis. Ct. App. Dec. 23, 2014) (quoting *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 843 (Wis. Ct. App. 2011)); *see also*

regulations' enforcement had to repeatedly ask for clarification from the Wisconsin DNR for the application of the floodproofing and nonconforming lot regulations to the Murrs' and neighboring properties.<sup>220</sup>

Even assuming the merger provision was clearly articulated, its mere existence fails to notify owners of how it will be applied given the additional provision for variances.<sup>221</sup> A property owner here could have read the variance provision and the undefined concept of "undue hardship" and "reasonably" assume their property would be a prime candidate. Yet documents available on the St. Croix County zoning board's website for the relevant time period indicate that the Wisconsin DNR expressed the stance that the "requirement that there be one acre of net project area cannot be waived or a variance granted" in the Riverway District.<sup>222</sup> In response to the Murrs' and a neighbor's requests for variances for floodproofing, St. Croix County similarly stated as justification for denying its variance: "According to the Wisconsin DNR, variances have not historically been granted to elevate residential structures by means other than the use of fill."<sup>223</sup> Such predispositions or policy stances are not immediately clear from—and can explicitly contradict—the regulations' language.

The application of the merger provision was particularly complicated here due to the unwieldy definition of "net project area." While the Murrs' lots each exceed one acre, their fate turned on the fact that they did not each have one acre of "net project area," or "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands."<sup>224</sup> The current chapter of the relevant administrative code fails to define "slope preservation zone" and the property appraiser could only tentatively state that the Murrs' bank "appear[ed]

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*Murr*, 796 N.W.2d at 842 n.8 ("The internal paragraph lettering and numbering of the ordinance is illogical and potentially confusing. Therefore, we have substituted that of the administrative code.").

220. See Letter from Jenny Shillcox, St. Croix Cty. Zoning Specialist, to Eunice Post & Gary Lepak, Wis. Dep't of Nat. Res. (Nov. 1, 2004) (on file with author) ("Mr. Tilton also raises questions on the applicability of the 50% rule for non-conforming structures, which I admit I am not entirely clear on."); Memorandum from Jenny Shillcox, St. Croix Cty. Zoning Specialist, & Robert Bezek, St. Croix Cty. Code Adm'r, to FEMA & Wis. Dep't of Nat. Res. (Aug. 3, 2005) (on file with author).

Given that we are both still relatively new to Wisconsin's Administrative Code on floodplain development and, due to the fact that there are some inconsistencies both within the St. Croix County Ordinance and between it and DNR and FEMA guidelines, we are requesting your guidance on how to proceed with the[] [Murr] application[].

*Id.*

221. See Joint Appendix, *supra* note 5, at 37 ("The problem appears to be that there are so many regulations affecting the lower level of the subject land . . . . It could be very difficult to obtain permission [through a variance] and, in the end, success would be speculative at best."); see generally *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001) (stating that a takings claim is not ripe until the land use authority has an opportunity to hear an application for a variance); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (same).

222. Letter from Jake VanderVoort, Wis. Dep't of Nat. Res. to Harold Barber, Zoning Adm'r (Jan. 13, 1984) (on file with author).

223. Letter from St. Croix Cty. Planning & Zoning, *supra* note 168.

224. WIS. ADMIN. CODE NR § 118.03(27) (2018).

to qualify” as such.<sup>225</sup> As shown in the discussion of the Murrs’ applications for floodproofing, that factor is far from clear and may require hiring a slew of outside experts.<sup>226</sup> Thus, the extent to which a private property owner can assess these factors appears limited. Whether a lot is nonconforming or substandard does not show up on a preliminary title report or deed and in looking solely at the parcel lines described in the deed, the property would appear to satisfy the requirements.<sup>227</sup> And in the case of the Murrs, the tax records and surveys described the property as two separate lots through 2012.<sup>228</sup>

The Court’s failure to address these ambiguities—those man-made in the poorly drafted statute and those inherent in a system allowing variances—was likely the fault of the Murrs’ counsel. But regardless of lawyering, the application of the majority’s new test to the Murrs’ facts illustrates that where a property owner cannot understand the application of regulations without the assistance of specialists or application for a variance, it is dangerous for the Court to prematurely define expectations based on those regulations’ mere existence and the physical characteristics of the property.

### C. A Missed Opportunity in Lawyering

Setting aside the merits of considering a property owner’s knowledge of regulations and physical characteristics as relevant to her reasonable expectations, the Murrs’ attorneys in the lower courts could have more effectively appealed to that framework. In the Wisconsin state courts, the Murrs’ counsel only indirectly discussed reasonable expectations via the family’s subjective intentions for the property’s future use. Before the Supreme Court, the Murrs’ new Pacific Legal Foundation attorneys largely framed the Murrs’ expectations in terms of their surprise, given the “common understanding” that lots are defined by their lot lines. But the Murrs’ attorneys in both settings *should* have focused more on the Murrs’ reasonable expectations with regards to the specific regulatory framework. At both levels, the Murrs’ briefs failed to highlight the long track record of ambiguity in the merger provision and failed to respond to the County and State’s effective arguments regarding notice and expectations. Unsurprisingly, it is the County and State’s arguments that ultimately appear in the Supreme Court’s opinion and that shape its new multifactor test.

In appealing the St. Croix County Court decision, the County persuasively framed the Murrs’ reasonable expectations based on their property’s physical

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225. Joint Appendix, *supra* note 5, at 40–41.

226. See discussion *supra* Part II.C. The Murrs’ neighbor, William Tilton, hired five different third-party consultants and engineers to provide the necessary support for his floodproofing applications.

227. For a discussion of how lot lines are created and recorded on survey plats generally, and specifically in Wisconsin, see State Brief, *supra* note 129, at 5–8.

228. Joint Appendix, *supra* note 5, at 6, 23–24. The parties dispute the relevance of tax records to the Murrs’ expectations in their briefs, but the Court does not address this in its opinion.

setting and the local merger provision. The County’s brief opens with a strong narrative focused on the well-established regulation of the St. Croix waterfront and the Murrs’ notice of the merger provision, stating that the Murrs acquired the property “knowing that it was very well protected by federal, state, county and local regulations intended to preserve its significance,” including “longstanding and unambiguous land-use restrictions contained in the substandard lot provisions.”<sup>229</sup> It then argued that because these merger provisions were in place before the transfer of the lots

[T]he Murrs were aware of—or should have been aware of—the substandard lot provisions when they placed Lots E and F into common ownership in 1995. At that time, they knew—or should have known—of the consequences of placing the lots into common ownership, and of any injury that would have resulted from their doing so.<sup>230</sup>

In an interesting take on fairness, the County then noted that allowing the Murrs to prevail here would effectively “reward the Murrs for their delay” in bringing a lawsuit.<sup>231</sup> Even after the State and County persuasively argued that the Murrs were on notice of these well-known regulations, capable of understanding with “reasonable (or even minimal) due diligence,” the Murrs’ attorneys still did not address those arguments in their reply.<sup>232</sup>

The County and State’s arguments apparently were effective, given that the Wisconsin Court of Appeals emphasized the physical context and regulatory notice as particularly relevant to the Murrs’ reasonable expectations of the lots’ treatment. Regarding the physical context, the court noted that the “Murrs knew or should have known that their lots were ‘heavily regulated from the get-go.’”<sup>233</sup> Regarding the zoning regulations, the court quickly “dispose[d]” of any consideration of the Murrs’ subjective intention to develop or sell Lot E individually<sup>234</sup> and reasoned that because the Murrs

[P]resumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger under the Ordinance[,] . . . even if the Murrs did intend to separately develop or sell Lot E, that expectation of

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229. St. Croix County Response Brief, *supra* note 171, at 3–4. Wisconsin’s brief opened with similar language:

[T]he Murrs’ voluntarily took title to their land within the restrictions of the regulation in 1995 by transferring the second lot into common ownership with the first. From that point on, the second lot was actively restricted by the regulation. . . . And the Murrs, with reasonable diligence, should have discovered this . . . well before 2006.

Brief of Defendant-Respondent State of Wisconsin at 8, *Murr v. State*, No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. Dec. 23, 2014), 2014 WL 3056297, at \*7.

230. St. Croix County Response Brief, *supra* note 171, at 20.

231. *Id.* at 26.

232. *Id.* at 24–25; see Reply Brief of Plaintiffs-Appellants at 13, *Murr v. State*, No. 2013AP2828, 2014 WL 7271581 (Wis. Ct. App. Dec. 23, 2014), 2014 WL 3732080, at \*12.

233. *Murr v. State*, No. 2013AP2828, 2014 WL 7271581, at \*8 (Wis. Ct. App. Dec. 23, 2014) (quoting *R&W Docks & Slips v. State*, 628 N.W.2d 781, 790 (Wis. 2001)).

234. *Id.* at \*8 n.8 (“A property owner’s subjective, desired use is irrelevant to determining the extent of the property at issue for purposes of a regulatory taking.”).

separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994.<sup>235</sup>

The Murrs' "subjective, desired use," the court concluded, "is irrelevant to determining the extent of the property at issue."<sup>236</sup>

Yet, ever persistent, the Murrs' newly appointed counsel from the Pacific Legal Foundation continued to direct the Court's attention to the Murrs' "subjective, desired use" for the property, unfortunately wasting precious page-limited space highlighting evidence clearly unpersuasive to the Court, while not giving fair weight to the arguments that ultimately took the day in both oral arguments and the Court's decision. The Murrs' petition opens with a plea for sympathy for the Murrs' plight, noting that the Murr parents "had foresight[,] [r]ecognizing the long-term potential of the area" when they decided to purchase the second lot as an investment property.<sup>237</sup> It then devotes several pages to the family's intentions for the property, the effort to keep the "family legacy intact," and the many birthdays, holidays, and family gatherings held there.<sup>238</sup> Even in the Murrs' brief on the merits, the arguments regarding the Murrs' expectations are vague and unpersuasive, arguing that separate sale and development "are the normal rights that any American family would understand they receive."<sup>239</sup> And after all, "[t]he Murrs are a typical family with normal understandings of real property."<sup>240</sup>

Before the Supreme Court, the County and the State continued to offer more tangible and compelling arguments about the level of surprise an owner in the Murrs' position was warranted to feel. Seeming to forecast the importance of regulatory notice to the Court, despite the Murrs' failure to address it, both the State and the County preemptively harped on the Murrs' notice of the regulations in light of the prevalence of existing merger provisions. The County argued that their prevalence "makes clear that anyone remotely knowledgeable about land use law, including realtors, mortgagees, title companies, builders, and local counsel, knows the implications," and that the "relevant law is therefore readily accessible to landowners."<sup>241</sup> And more broadly, that prevalence means "the distinct treatment of commonly owned, adjacent substandard lots is so longstanding and widespread as to be fairly considered part" of the "whole of our legal tradition" upon which "reasonable expectations must be

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235. *Id.* at \*8.

236. *Id.* at \*8 n.8.

237. Petition for Writ of Certiorari, *supra* note 54, at 4.

238. *Id.* at 3–6.

239. Petitioners' Brief on the Merits, *supra* note 166, at 27.

240. *Id.* at 32.

241. St. Croix County Brief, *supra* note 38, at 43; *see also* State Brief, *supra* note 129, at 11.

understood.”<sup>242</sup> As a result, the Murrs’ “stated surprise” could not be attributed to a lack of adequate notice.<sup>243</sup>

In addition to reinforcing the prevalence of merger provisions, the State’s reply brief went one step further and highlighted the inherent tension in the reasonable expectations analysis: fairness versus objectivity. The State cautioned the Court against adopting any “unpredictable, subjective, or idiosyncratic inquiries that are focused on the particular landowner,” which “introduce disuniformity into the classification of land.”<sup>244</sup> Even if the Murrs argued that their reasonable expectations were otherwise, the State noted, “the record lacks any indication of [the Murrs’] subjective ‘expectations’ when they acquired Lot E.”<sup>245</sup> It is not until the Murrs’ final brief that they tangentially address these arguments, interpreting them as an issue of ripeness as opposed to one of factual circumstances.<sup>246</sup>

While reasonable expectations were rarely mentioned in the Murrs’ briefs throughout the decade of litigation, they featured prominently in the Court’s questioning during oral argument. The Murrs’ avoidance did not go unnoticed, as Justice Kagan quickly asked John Groen, counsel for the Murrs, whether he thought “reasonable expectations matter at all” under his approach.<sup>247</sup> Kagan questioned why the merger provision would be inconsistent with a property owner’s reasonable expectation given that as a property owner, “I’m supposed to know the zoning regulations, and when I buy a house, when I buy a piece of land, I’m buying subject to the preexisting zoning regulations.”<sup>248</sup> Similarly, Justice Sotomayor argued, “You may not choose to look at [the regulations], but you—you should. Ignorance of the law is not a defense anywhere. I don’t know why it should be in the regulatory context.”<sup>249</sup> But again, Groen sidestepped these questions entirely, leaving members of the Court “sympathetic” to the County and State’s strong stance on regulatory notice as an objective indicator of owners’ expectations.<sup>250</sup>

Given the untidy facts in *Murr* and the lack of counterarguments by the family’s counsel, it should not come as a surprise that the Court seized on

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242. St. Croix County Brief, *supra* note 38, at 22, 43–44 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring)); State Brief, *supra* note 129, at 24 (“Where the State has chosen to make separately platted lots individually developable and saleable, a landowner’s objectively reasonable expectations will *naturally* be that a lot is a separate ‘parcel.’” (emphasis added)).

243. St. Croix County Brief, *supra* note 38, at 34.

244. State Brief, *supra* note 129, at 35.

245. *Id.* at 45.

246. *Murr* Reply Brief, *supra* note 129, at 14 (again stating that the family was “quite flabbergasted” by the regulations and that their claim was not ripe until they first secured a decision of how those regulations would apply).

247. Transcript of Oral Argument, *supra* note 65, at 19 (statement of Justice Kagan).

248. *Id.* at 20.

249. *Id.* at 70 (statement by Justice Sotomayor).

250. *Id.* at 46 (statement of Justice Kagan) (“I’m pretty sympathetic to the idea that preexisting State law really does influence quite a bit your expectations about what property you own and what you can do with it”).

regulatory notice and physical characteristics as some of the few theoretically objective themes in the case. It also, at least in part, might explain why the Court proffers a new legal test with little reliance on precedent and even less analysis of the facts. Had the Murrs' attorneys marshaled a more compelling showing on the reasonable expectations front, rather than sheltering under free-standing policy arguments about the general expectations of "the American people," they would have found wide breadth on which to challenge the State and County's argument that the Murrs were charged with the knowledge of the merger provision. Instead, armed with the parties' two extreme and "wooden" positions<sup>251</sup> on certiorari—the Murrs' outright presumption against parcel aggregation and the State's unfettered discretion to aggregation pursuant to state law—the Court, straining for tangible rules, opted instead to place the property owner's purportedly objective reasonable expectations analysis to the forefront of regulatory takings jurisprudence.

#### CONCLUSION

Over the last forty years, the Court has emphasized the fairness of the reasonable expectations approach to regulatory takings analysis, while simultaneously asserting its objectivity. The Murrs' case shows that those two goals can be at odds. A truly fair ad-hoc analysis can entail a close look at not only the specific context in which the claim arose, but how those specific property owners understood that context. While the Murrs' attorneys stressed the unfairness of merger provisions per se, they failed to show the unfairness in the application of the Court's factors to the Murr family. Seemingly concrete benchmarks, such as physical characteristics and zoning regulations, can in practice garner starkly different interpretations and understandings. By placing the "objective" expectations of a property owner at the forefront of the analysis without considering that individual property owner, the test promulgated in *Murr* serves as yet another roadblock to the already bleak chances of success for property owners claiming regulatory takings.<sup>252</sup>

The Wisconsin State legislature has since fought that roadblock with a statutory amendment prohibiting involuntary merger of adjacent, commonly owned lots.<sup>253</sup> Assuming the Murrs' lots comply with other applicable zoning provisions, the family can now sell or develop their second lot.<sup>254</sup> Had the legislature acted sooner, the Murrs' decade-plus of appeals and litigation could

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251. Transcript of Oral Argument, *supra* note 65, at 34 (statement of Justice Kennedy).

252. See F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141 (2003) (finding empirically that landowners lose 90 percent of regulatory takings claims).

253. See *supra* note 126 and accompanying text (discussing Wisconsin Homeowners' Bill of Rights).

254. See Scott Bauer, *Walker Signs Bill Inspired by Cabin-Owners' Court Fight*, ASSOCIATED PRESS (Nov. 27, 2017), <https://apnews.com/baa1af45a7eb4bd7be398fae521cf9d7> ("The main thing is we have our choices back," [Donna Murr] said. "We can do what we want.").



have been avoided and the Supreme Court would not have promulgated yet another multifactor test for takings analysis, or at least not a test colored by the Murrs' complex and ill-investigated circumstances. But perhaps the Murrs, though losing their battle, can take solace in knowing it was their case that ultimately effected state-level change that won the war.<sup>255</sup> Unfortunately, the resulting state ban on merger likely interferes with local efforts to prevent overcrowding and ensure protection of the riverway.<sup>256</sup> Perhaps there was room for a compromise that did not set property rights so starkly in contrast with environmental protections.

While Wisconsin and other states have explicitly banned involuntary merger of adjacent properties, many states, including California, continue to endorse merger as an effective compromise tool for combatting urbanization. During oral argument, Chief Justice Roberts got a laugh when he told Wisconsin's counsel that property owners in merger states will not bring lots into common ownership following this case, adding, "[Y]ou'll be smart enough to say: Okay. Husband, you own F; I will own E."<sup>257</sup> But that logic is indicative of how the Court's decision in *Murr* missed the forest for the trees. It should not take a Supreme Court decision to put property owners "on notice" of the application of regulations that in turn dictate the outcome of the regulatory takings analysis. The Court cannot, in good faith to its interminable penchant for fairness, continue to predicate its denominator analysis on property owners' reasonable expectations without acknowledging the unfairness of an "objective" application.

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255. And that led to the creation of the punny new property rights' slogan: "Don't Murr-der My Property Rights." See Mike Longaecker, *Lawmakers Seek to Solve Murr Property Dispute Through Legislation*, NEW RICH. NEWS (July 27, 2017), <http://www.newrichmond-news.com/news/government-and-politics/4303883-lawmakers-seek-solve-murr-property-dispute-through-legislation>.

256. See Kevin Giles, *Wisconsin's New Property Rights Law Could Invite More St. Croix River Development*, STAR TRIB. (Nov. 27, 2017), <http://www.startribune.com/wisconsin-s-new-property-rights-law-could-invite-more-st-croix-river-development/460309683/> (noting that St. Croix County officials and other local organizations have argued that the new law interferes with local preservation and zoning efforts).

257. Transcript of Oral Argument, *supra* note 65, at 41.

**We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**

