Murr v. Wisconsin [1]
582 US ___ (2017)

CHIEF JUSTICE ROBERTS, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

[…] The Court today holds that the regulation does not effect a taking that requires just compensation. This bottom-line conclusion does not trouble me[.]

Where the majority goes astray, however, is in concluding that the definition of the "private property" at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) "the physical characteristics of the land," (2) "the prospective value of the regulated land," (3) the "reasonable expectations" of the owner, and (4) "background customs and the whole of our legal tradition." *Ante,* at 11–12. Our decisions have, time and again, declared that the Takings Clause protects private property rights as state law creates and defines them. […] The majority's new, malleable definition of "private property"—adopted solely "for purposes of th[e] takings inquiry," *ante,* at 20—undermines that protection. [...] Whether a regulation effects a taking of that property is a separate question, one in which common ownership of adjacent property may be taken into account. Because the majority departs from these settled principles, I respectfully dissent.

I

A

The Takings Clause [...] raises three basic questions that individuals, governments, and judges must consider when anticipating or deciding whether the government will have to provide reimbursement for its actions. The first is what "pri-vate property" the government's planned course of conduct will affect. The second, whether that property has been "taken" for "public use." And if "private property" has been "taken," the last item of business is to calculate the "just compensation" the owner is due.

Step one—identifying the property interest at stake—requires looking outside the Constitution. The word "property" in the Takings Clause means "the group of rights inhering in [a] citizen's relation to [a] . . . thing, as the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945) .[...] By protecting these established rights, the Takings Clause stands as a buffer between property owners and governments, which might naturally look to put private property to work for the public at large.

When government action interferes with property rights, the next question becomes whether that interference amounts to a "taking." [...]

[N]ot all takings are so direct: Governments can infringe private property interests for public use not only through appropriations, but through regulations as well. [...] . Our regulatory takings decisions, then, have recognized that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [*Mahon*] This rule strikes a balance between property owners' rights and the government's authority to advance the common good.

[1] Note: This dissenting opinion has been edited from the original text by Travis Braidwood for classroom use. The full case text can be found here: < https://supreme.justia.com/cases/federal/us/582/15-214/dissent4.html >. Also, the footnote numbers in this abridgment are the same as those that appear in the slip opinion.

Depending, of course, on how far is "too far." We have said often enough that the answer to this question generally resists *per se* rules and rigid formulas. There are, however, a few fixed principles: The inquiry "must be conducted with respect to specific property." *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 495 (1987) (internal quotation marks omitted). And if a "regulation denies all economically beneficial or productive use of land," the interference categorically amounts to a taking. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1015 (1992) . For the vast array of regulations that lack such an extreme effect, a flexible approach is more fitting. The factors to consider are wide ranging, and include the economic impact of the regulation, the owner's investment-backed expectations, and the character of the government action. The ultimate question is whether the government's imposition on a property has forced the owner "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 123 (1978) (internal quotation marks omitted). […]

B

[...] If owners could define the relevant "private property" at issue as the specific "strand" that the challenged regulation affects, they could convert nearly all regulations into *per se* takings. And so we do not allow it. In *Penn Central Transportation Co.* v. *New York City*, we held that property owners may not "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest." 438 U. S., at 130. [...]

The question presented in today's case concerns the "parcel as a whole" language from *Penn Central*. This enigmatic phrase has created confusion about how to identify the relevant property in a regulatory takings case when the claimant owns more than one plot of land. Should the impact of the regulation be evaluated with respect to each individual plot, or with respect to adjacent plots grouped together as one unit? According to the majority, a court should answer this question by considering a number of facts about the land and the regulation at issue. The end result turns on whether those factors "would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Ante,* at 12.

I think the answer is far more straightforward: State laws define the boundaries of distinct units of land, and those boundaries should, in all but the most exceptional circumstances, determine the parcel at issue. [...]

State law defines all of the interests that come along with owning a particular parcel, and both property owners and the government must take those rights as they find them.

The majority envisions that relying on state law will create other opportunities for "gamesmanship" by landowners and States: The former, it contends, "might seek to alter [lot] lines in anticipation of regulation," while the latter might pass a law that "consolidates . . . property" to avoid a successful takings claim. *Ante,* at 11, 17. But such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm. [...]

Once the relevant property is identified, the real work begins. To decide whether the regulation at issue amounts to a "taking," courts should focus on the effect of the regulation on the "private property" at issue. Adjacent land under common ownership may be relevant to that inquiry. [...]

In sum, the "parcel as a whole" requirement prevents a property owner from identifying a single "strand" in his bundle of property rights and claiming that interest has been taken. Allowing that strategic approach to defining "private property" would undermine the balance struck by our regulatory takings cases. Instead, state law creates distinct parcels of land and defines the rights that come along with owning those parcels. Those established bundles of rights should define the "private property" in regulatory takings cases. While ownership of contiguous properties may bear on whether a person's plot has been "taken," *Penn Central* provides no basis for disregarding state property lines when identifying the "parcel as a whole."

II

The lesson that the majority draws from *Penn Central* is that defining "the proper parcel in regulatory takings cases cannot be solved by any simple test." *Ante,* at 20. Following through on that stand against simplicity, the majority lists a complex set of factors theoretically designed to reveal whether a hypothetical landowner might expect that his property "would be treated as one parcel, or, instead, as separate tracts." [...]

While it is true that we have referred to regulatory takings claims as involving "essentially ad hoc, factual inquiries," we have conducted those wide-ranging investigations when assessing "the question of what constitutes a '*taking*' " under *Penn Central*. *Ruckelshaus*, 467 U. S., at 1004 (emphasis added)[.] And even then, we reach that "ad hoc" *Penn Central* framework only after determining that the regulation did not deny all productive use of the parcel. See *Tahoe-Sierra*, 535 U. S., at 331. Both of these inquiries presuppose that the relevant "private property" has already been identified. [.] There is a simple reason why the majority does not cite a single instance in which we have made that identification by relying on anything other than state property principles—we have never done so.

In departing from state property principles, the majority authorizes governments to do precisely what we rejected in *Penn Central*: create a litigation-specific definition of "property" designed for a claim under the Takings Clause. [...]

[T]he majority's approach will lead to definitions of the "parcel" that have far more to do with the reasonableness of applying the challenged regulation to a particular landowner. The result is clear double counting to tip the scales in favor of the government: Reasonable government regulation should have been anticipated by the landowner, so the relevant parcel is defined consistent with that regulation. In deciding whether there is a taking under the second step of the analysis, the regulation will seem eminently reasonable given its impact on the pre-packaged parcel. Not, as the Court assures us, "necessarily" in "every" case, but surely in most.[...]

Put simply, today's decision knocks the definition of "private property" loose from its foundation on stable state law rules and throws it into the maelstrom of multiple factors that come into play at the second step of the takings analysis. The result: The majority's new framework compromises the Takings Clause as a barrier between individuals and the press of the public interest.

III

[…] [T]he Wisconsin Court of Appeals was wrong to apply a takings-specific definition of the property at issue. Instead, the court should have asked whether, under general state law principles, Lots E and F are legally distinct parcels of land. I would therefore vacate the

judgment below and remand for the court to identify the relevant property using ordinary principles of Wisconsin property law.

After making that state law determination, the next step would be to determine whether the challenged ordinance amounts to a "taking." […]

I respectfully dissent.

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JUSTICE THOMAS, dissenting.

[…] In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment. [...]