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# Distinguishing Bundles from Sticks: Determining Denominators in Regulatory Takings Cases Involving Severed Mineral Rights

## DENOMINATOR DELIRIUM: TREATMENT OF SEVERED MINERAL RIGHTS BY LOWER COURTS

In 1992, a district court in Kansas held that a lessee of an oil and gas interest who the state prohibited from drilling did not have a compensable takings claim because a country club's surface rights on the same tract of land owned by a country club still had value.[1] The Takings Clause of the Fifth Amendment requires "just compensation" when the government takes private property for public use; but courts are split over how to define the relevant property, which affects the calculation for compensation in takings cases.[2] This difference of interpretation is as problematic for governments opening themselves up to takings liability by passing regulations aimed at bettering society as it is for property owners trying to anticipate the viability of their potential takings claims against governments for those regulations. Defining the property at issue accurately is critical to a regulatory taking claim's success or failure. Defining it narrowly enough will almost always result in the finding of a taking, whereas defining it too broadly will mean that a taking will almost never occur.[3]

In *Pennsylvania Coal Co. v. Mahon*, the first in a line of cases that comprise the so-called regulatory takings doctrine, the Supreme Court held that regulations on exercising mineral rights could be so onerous that they create compensable takings, in spite of valid governmental interests for regulating mineral activity.[4] Courts evaluate regulatory takings claims using a conceptual fraction of the value lost by regulation, in which the numerator is the loss in value of the affected property and the denominator is the original value of the parcel against which courts weigh the loss in value.[5] If regulation strips all or almost all of the value from the relevant

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1. Mid Gulf, Inc. v. Bishop, 792 F. Supp. 1205, 1214 (D. Kan. 1992).

2. U.S. CONST. amend. V; *see* Arkansas Game and Fish Comm'n v. U.S., 568 U.S. 23 (2012). *But see* Whitney Benefits, Inc. v. U.S., 926 F.2d 1169 (Fed. Cir. 1991); *see Mid Gulf*, 792 F. Supp. 1205 (D. Kan. 1992).

3. John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1536 (1994).

4. 260 U.S. 393 (1922).

5. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967).

parcel, whatever a court determines that to be, the State owes the owner of that parcel compensation.[6] In other words, courts use the fraction of the value lost by regulation to determine whether government action was so burdensome as to require compensation under the Takings Clause.

The U.S. Federal Circuit Court of Appeals held that courts should not view separately owned mineral and surface rights—rights "severed" from one another—together as one denominator.[7] Viewing such separately held rights as a single denominator would allow courts to consider all possible surface uses in a takings analysis, despite the fact that an owner of separately held mineral rights is only able to use the surface to the extent necessary to explore and extract minerals.[8] Under this single denominator analysis, a district court in Kansas held that an owner of severed mineral rights who the state had prohibited from drilling did not have a compensable takings claim because surface rights on the same tract that someone else owned still had value.[9] This analysis, while consistent with a doctrinal aversion to viewing the destruction of a single strand in the proverbial "bundle of rights"[10] that comprise ownership of property as a compensable taking,[11] is nonetheless troubling for owners of severed mineral rights that would have no chance at receiving compensation for burdensome regulations that still allow for alternative surface uses.

The United States Supreme Court, in the case establishing the current predominant regulatory takings framework, cautioned against dividing parcels into distinct property interests for the denominator analysis.[12] The Court has since upheld a merger of two adjacent tracts of land owned by the same person, emphasizing the Court's hostility toward dividing potential denominators to increase takings liability.[13] Despite the Court's hesitance to accept dividing parcels up for denominator analyses in those cases, the Court should recognize severed mineral rights as separate denominators. This conclusion is appropriate because, regardless of whether a jurisdiction conceptualizes mineral interests in a rights-based manner like Louisiana or an ownership-based manner like Texas, an owner

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6. *Id.* at 1232-33.
7. *Whitney Benefits, Inc.*, 926 F.2d, at 1172.
8. *Id.*
9. *Mid Gulf*, 792 F. Supp. at 1214.
10. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992). Property is commonly described as "bundle of sticks" or rights that make up ownership, with each interest in the property representing a single strand in the bundle. United States v. Craft, 535 U.S. 274, 274 (2002).
11. Fee, *supra* note 3, at 1558.
12. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).
13. Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

of separately held mineral rights cannot exercise all the uses of the property that the owner of the surface rights can.[14]

Part I of this Comment provides background on the regulatory takings doctrine and discusses the way courts tend to frame these issues. Part II of this Comment juxtaposes ownership of mineral rights in Texas, a common law jurisdiction, with ownership of such rights in Louisiana, a civilian jurisdiction, and highlights the practical implications of these differing approaches. Part III examines the history of the regulatory takings doctrine and discusses the relevance and effects of the denominator analysis on takings claims. Part IV focuses on the recent decision in *Murr v. Wisconsin* and its potential ramifications on denominator and regulatory takings analyses. Reading this case broadly, the Court settled the question of horizontal severance in the regulatory takings doctrine; but *Murr* may not have as much doctrinal weight as some scholars believe. Part V demonstrates the inapplicability of *Murr*'s acceptance of a merger of adjacent lots united under common ownership to situations in which different individuals own the mineral and surface rights in a single tract. Part V also develops a more logical way to conceptualize the denominator problem in these situations. In light of this analysis, courts should view severed mineral rights as their own denominators.

## I. BACKGROUND ON THE REGULATORY TAKINGS DOCTRINE

While courts have traditionally recognized takings when a government actually seizes property, compensable takings can also arise from situations in which regulation so burdens property that it effectively seizes it.[15] In other words, regulations can limit a property's use so much that courts deem states to have seized the property for the purposes of compensability under the Takings Clause. This idea has evolved into a complex doctrine of "regulatory takings." Lower courts appear to have difficulty consistently determining compensability of regulatory takings of severed mineral rights,[16] but a straightforward application of the principles at the core of the doctrine suggests that such takings are indeed compensable.

14. Annotation, *Severance of title or rights to oil and gas in place from title to surface*, 146 A.L.R. 880 (2017).

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

16. *See Mid Gulf*, 792 F. Supp. at 1214; *see also Whitney Benefits*, 926 F.2d at 1172.

*A. The Traditional Bundle of Sticks*

Scholars commonly describe property using the metaphor of a bundle of sticks, with all the sticks representing individual rights; and it has traditionally been the role of state law to determine which sticks compose the bundle.[17] If state property law sufficiently protects an economic interest in property, courts may compel others to compensate owners if they interfere with it.[18] When a person owns a tract of land, she typically also owns the rights to minerals that exist underground in her tract of land.[19] In these situations, the right to produce minerals is just one stick in the traditional bundle of rights.[20] This is not so with respect to separately held mineral rights.

*B. Dueling Perspectives on the Takings Clause*

In spite of the Takings Clause's broadly prohibitive language, there is an interpretive split over how broadly to construe the clause. The Fifth Amendment provides that "private property" shall not be "taken for public use, without just compensation."[21] When a government effectively seizes private property for public use, it owes the former property-holder compensation. Comporting with this traditional view of the Takings Clause, Chief Justice Roberts once described the clause "as a barrier between individuals and the press of the public interest."[22] While this notion of the Takings Clause certainly finds support in the doctrine, other interpretations abound.

Opinions as to the proper role of the Takings Clause in the protection of private property widely vary. One approach uses a broad reading of the Takings Clause, operating under the assumption that the Framers generally opposed efforts to redistribute wealth.[23] The Takings Clause, then, "states a principle that the government pays for what it takes," suggesting that compensation under the Takings Clause is an inevitability, rather than the

17. *Craft*, 535 U.S. at 274.

18. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

19. *See generally* NANCY SAINT-PAUL, *History of property interest in land—Oil and gas*, *in* 1A SUMMERS OIL AND GAS § 8:10 (3d ed. 2017).

20. *See generally* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 500–01 (1987).

21. U.S. CONST. amend. V.

22. *Murr*, 137 S. Ct. at 1956 (Roberts, C.J., dissenting).

23. Benjamin Allee, Comment, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 FORDHAM L. REV. 1957, 1995 (2002).

fact-intensive analysis of value lost that exists in most cases, particularly in regulatory takings cases.[24] However, scholars do not universally accept the historical underpinnings of this philosophy.[25] On the contrary, more detailed accounts of the Constitution's drafting reveal that the Framers intended the Takings Clause to have a much narrower scope.[26]

Additionally, there are those who believe that the Fifth Amendment, and by extension the Supreme Court of the United States, should not protect property rights.[27] Instead, those holding this view assert that this task should fall to state courts and state legislatures, which should protect these rights by defining them clearly.[28] The Court's role, then, "is to figure out some means whereby the broad and capacious terms of the clause are narrowed, so as to remove the constraint that it imposes on the actions of federal and state governments."[29] While judges and justices seldom accept this narrower view of the Takings Clause in traditional takings cases, they tend to do so with respect to regulatory takings cases.

### *C. Regulatory Takings as an Outgrowth of the Narrower View*

The Court construes the Takings Clause as having a narrower reach with respect to regulatory takings than it does for traditional takings cases, in the sense that fewer cases result in compensability.[30] Originalists, like Justice Thomas, explain this difference in approach by arguing that regulatory takings were never intended to fall within the ambit of compensability under the Takings Clause.[31] Although Justice Thomas' view is extreme, as it implies the erroneousness of an entire doctrine, it underscores a hostility toward compensating property owners for smaller-scale takings that pervades regulatory takings jurisprudence.[32]

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24. Fee, *supra* note 3, at 1553.

25. Allee, *supra* note 23, at 1995.

26. *Id.*

27. Rick Hills, *A Half-Hearted Two Cheers for the Victory of Federalism over Property Rights in* Murr v. Wisconsin (June 23, 2017), PRAWFSBLAWG, https://perma.cc/DN7Y-RUFB.

28. *Id.*

29. Richard A. Epstein, *Will the Supreme Court Clean Up Takings Law in* Murr v. Wisconsin*?*, 11.1 N.Y.U. J. L. & LIBERTY 860, 862 (2017).

30. *See* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601 (2014).

31. *Murr*, 137 S. Ct. at 1957 (Thomas, J., dissenting).

32. *See* Armstrong v. U.S., 364 U.S. 40, 49 (1960) (quoted in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)); *see also Penn Cent. Transp.* 438 U.S. 104.

A stark difference in the protection of property affected by burdensome regulation, as opposed to property seized in a more conventional way, is the rationale set forth in the "*Armstrong* principle." This principle states that the Takings Clause in the regulatory takings context is meant "to bar Government from forcing some people alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole."[33] The Supreme Court's emphasis on "fairness and justice" and "public burdens" seems more emblematic of substantive due process analyses than traditional takings analyses.[34] Reading this sort of balancing of interests into the takings analysis complicates what is an otherwise straightforward question of whether some governmental action reached the level of a seizure of private property.

The owner-centric, fairness-focused language of the *Armstrong* principle, on its face, seems incompatible with the property-focused, broadly prohibitive language of the Takings Clause.[35] The fact that fairness enters the calculus at all might favor a narrower view of the Takings Clause in the regulatory takings context, since it precludes compensability where the fairness rationale would not apply. In spite of this potential narrowing effect, the *Armstrong* principle militates in favor of compensating owners of separately held mineral rights because it would be unfair to force owners of such rights to lose a higher proportion of the value of their property than owners of mineral rights and surface rights without compensation.

Some scholars urge the Court to eliminate the division between physical and regulatory takings altogether, replacing this formalistic distinction with a rule that requires the government to compensate private owners for all losses—no matter their magnitude or the property rights with which they are associated—any time the government does not have traditional police power justifications for regulation.[36] While a bright-line rule like this would certainly make the regulatory takings analysis less complicated and easier to predict, the likelihood of the Court adopting this sort of rule is very slim, especially in light of the current state of the doctrine, since adopting it would require a much broader view of the Takings Clause. This sort of bright-line rule would also expose the government to crippling financial liability any time it did something that interfered with property interests.

While the Court has not adopted the preceding bright-line rule, it has adopted some bright-line rules that simplify regulatory takings analyses in

33. *Armstrong*, 364 U.S. at 49.
34. Eagle, *supra* note 30, at 614.
35. *Id.*
36. *See, e.g.*, Epstein, *supra* note 29, at 875.

some cases. One such rule is the *Lucas* "per se takings" test, which stands for the proposition that the State owes compensation any time it deprives property of all economically viable use, unless the State had prohibited the use at the time the owner acquired title.[37] If property owners do not satisfy the requirements of the per se rule, they are at the mercy of courts weighing and balancing various factors, including those set forth in *Penn Central v. City of New York* and, as of June 2017, *Murr v. Wisconsin*.[38]

*Penn Central* requires inquiry into the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action to determine whether a compensable taking occurred.[39] *Murr v. Wisconsin* states that the denominator analysis depends on: the treatment of the land under state and local law, the physical characteristics of the land, the prospective value of the regulated land, and background customs and the whole of our legal tradition.[40] Whether under *Lucas* or *Penn Central*, though, the denominator problem still exists because applying the denominator analysis to determine the property at issue necessarily precedes using the takings analysis to determine how the challenged regulation impacted that property.

### *D. Distinguishing Bundles from Sticks*

In determining whether the State owes compensation, the Court has calculated the value lost by regulation using a conceptual fraction in which the numerator is the loss in value of the affected property.[41] The pre-regulation value of the parcel against which courts will weigh the loss in value is the "denominator" in a regulatory takings case.[42] If the proportion of the value destroyed as compared to the relevant denominator is all or nearly all, the State owes compensation.[43] This means that the government will owe compensation when its regulations strip a property of all or nearly all of its value.

For the purposes of the Takings Clause, courts sometimes treat intangible property rights, like mineral rights, as property and sometimes

37. *Lucas*, 505 U.S. at 1027.
38. 438 U.S. 104 (1978); *see also* 137 S. Ct. 1933 (2017).
39. *Penn Cent. Transp.*, 438 U.S. at 124.
40. *Murr*, 137 S. Ct. at 1945.
41. Michelman, *supra* note 5, at 1192.
42. *Id.*
43. *Id.* at 1232–33.

do not, which makes it difficult to predict outcomes in particular cases.[44] This lack of clarity in the jurisprudence makes it challenging for property owners to discern denominators on their own. Determining the denominator in the context of a regulatory takings case is especially difficult because the Court has repeatedly held that the takings analysis must use the "parcel as a whole" as the denominator without clearly articulating what comprises that parcel.[45] For instance, it is unclear whether separately held mineral rights should constitute merely one stick in the traditional bundle, thus making the denominator both the mineral rights and the surface rights owned by someone else.

Courts might just as easily construe separately held mineral rights as bundles, and thus denominators, unto themselves. In fact, treating separately held mineral rights as denominators apart from the surface rights owned by someone else makes sense in light of the separately held nature of these rights.[46] Conceptualizing the denominator accurately is critical to the success or failure of a takings claim because defining it narrowly enough will almost always result in the finding of a taking, whereas defining it too broadly will mean that a regulatory taking will almost never occur.[47]

For example, if surface rights are a part of the denominator in a case involving separately held mineral rights, such a takings claim will be significantly less likely to succeed because the court would consider alternative surface uses that have value although the owner of separately held mineral rights could not exercise any of these uses. Using this analysis to preclude compensability of regulatory takings claims by owners of separately held mineral rights violates the *Armstrong* principle and seems at odds with the core principles of the regulatory takings doctrine. Thus, the appropriate denominator in regulatory takings cases involving separately held minerals rights is those rights themselves, and not those rights in combination with separately held surface rights.

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44. Andrew Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 578 (2003).

45. *Penn Cent. Transp.*, 438 U.S. at 130–31.

46. To be clear, the author is not discounting the policy reasons that favor striking down a claim of a regulatory taking of severed mineral rights on the merits. *See generally* Kevin J. Lynch, *Regulation of Fracking is Not a Taking of Private Property*, 84 U. CIN. L. REV. 39 (2016). The author is merely arguing, as a threshold matter, that the proper denominator in such a case is the severed mineral rights, not these rights and the surface rights.

47. Fee, *supra* note 3, at 1536.

## II. UNDERSTANDING MINERAL RIGHTS

Determining whether separately held mineral rights constitute all or merely part of the denominator in a regulatory takings action requires examination of the essence of these rights. The nature of mineral rights in Louisiana, a civilian jurisdiction, is different from the nature of these rights in Texas, a common law jurisdiction; and these differing approaches could impact regulatory takings analyses. While all states have developed their own bodies of mineral law, Louisiana's and Texas' disparate treatments of mineral rights are noteworthy, not only because they highlight the distinction between civilian and common law treatment of these rights but also because of these states' reputations for being rich in minerals.[48]

### *A. Louisiana's Treatment of Mineral Rights*

In the absence of controlling provisions in the Civil Code or special legislation, Louisiana courts created rules for mineral rights by analogizing to disparate provisions in the Civil Code.[49] In 1920, in *Frost-Johnson Lumber Co. v. Salling's Heirs et al.*, the Louisiana Supreme Court began to clarify the nature of mineral rights in Louisiana by explicitly rejecting "dismemberment of the so-called mineral estate from the so-called surface estate."[50] This view of separate estates remains the common law rule today, but this common law notion of estates has never been part of Louisiana law.[51] Instead, Louisiana has used a more rights-based conception of mineral rights.

In 1974, the Louisiana Legislature enacted the Mineral Code as a supplement to the Civil Code in order to clarify the state's mineral law.[52] The legislature has seldom amended the Mineral Code.[53] Under the Louisiana Mineral Code, ownership of land does not necessarily include ownership of oil, gas, and other liquid or gaseous minerals.[54] The

48. *See* Paul Ausick & Michael B. Sauter, *The 10 most oil-rich states*, USA TODAY (Aug. 3, 2013), https://perma.cc/LZ87-28Q9.

49. Patrick S. Ottinger, *From the Courts to the Code: The Origin and Development of the Law of Louisiana on Mineral Rights*, 1 LSU J. ENERGY L. & RESOURCES 5, 16 (2012).

*50. Id.* at 24; *See* Frost-Johnson Lumber Co. v. Salling's Heirs et al., 91 So. 207 (1920).

51. Patrick H. Martin & J. Lanier Yeates, *Louisiana Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 782–83 (1992).

52. LA. REV. STAT. §§ 31:1 et seq. (2017).

53. Ottinger, *supra* note 49, at 40.

54. LA. REV. STAT. § 31:6 (2017).

landowner does, however, have the exclusive right to explore and develop her property for the production of such minerals and to reduce them to possession and ownership.[55] Therefore, in spite of the fact that a Louisiana mineral rights holder does not "own" the minerals in her property in place, she nevertheless has comparable rights to the minerals as someone in an ownership-based jurisdiction, like Texas. In contrast to the common law notion of "estates," under Louisiana's Civil Code, everything is subject to absolute ownership; and things like mineral rights are burdens or charges on absolute ownership.[56] Louisiana defines mineral rights as incorporeal immovables that are alienable and heritable.[57]

### *B. Texas' Treatment of Mineral Rights*

Texas, for the most part, follows the traditional common law theory of mineral and surface estates that are conceptually distinct from one another and thus severable.[58] In Texas, mineral estate holders have executive and leasing rights, the right to explore and develop, and the right to receive royalties and other payments.[59] The ownership-in-place doctrine, predominant in Texas, asserts that the holder of a mineral right owns the oil and gas in the ground even though no one actually possesses it until they bring it to the surface.[60] Through this doctrine, Texas courts have come up with one way to facilitate severance of mineral estates from surface estates and have encouraged exploitation of underground reservoirs of oil, gas, and groundwater.[61]

Vertically severing[62] mineral estates from surface estates creates problems for owners of severed mineral estates, particularly when they

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55. *Id.*

56. Martin & Yeates, *supra* note 51, at 784.

57. LA. REV. STAT. § 31:18 (2017). "Alienable and heritable" here means that the mineral rights may be conceptually separated from the land and sold or inherited as something apart from the land itself. *See* Hornsby v. Slade, 854 So. 2d 441, 445–46 (La. Ct. App. 2003).

58. *See* Timothy Riley, *Wrangling with Urban Wildcatters: Defending Texas Municipal Oil and Gas Development Ordinances Against Regulatory Takings Challenges*, 32 VT. L. REV. 349 (2007).

59. *See* Altman v. Blake, 712 S.W.2d 117 (1986).

60. Dayna Ferebee, Comment, *Handshakes and Heartaches: Who Owns the Oil After* Rogers v. Ricane*?*, 2 TEX. WESLEYAN L. REV. 129, 138 (1995).

61. Riley, *supra* note 58, at 358.

62. As will be addressed in greater detail in Part V, while the Court is generally unfriendly to any form of so-called conceptual severance, it is possible to sever property for takings analyses vertically—into mineral, surface, and air rights—or horizontally along lot lines. *See* Darren Botello-Samson, *The*

want to access or use the surface. Often, the owners of the mineral estate have no ownership rights in the surface estate.[63] Texas resolves this issue by recognizing an implied easement to conduct mineral activity and by clearly defining responsibilities between severed surface and mineral estate owners.[64] Without such an implied easement, owners of severed mineral estates would be in the awkward position of having no means of exercising the rights to the minerals in the ground they purchased.

These rules and others like them "are predicated on a fundamental truism in Texas: the mineral estate is dominant over the surface."[65] This means that the mineral estate owner can exercise her rights over the objection of the surface estate owner, allowing her to do whatever is reasonably necessary to exercise those rights.[66] Of course, while the mineral estate owner does have access to the surface to facilitate production, the law recognizes that this surface access is not completely unlimited.[67]

### *C. Comparing the Louisiana and Texas Approaches*

Some scholars suggest the Mineral Code owes at least some credit to Texas cases for many of its provisions, referencing comments to the Mineral Code articles that borrow standards from Texas precedent.[68] For example, as mentioned briefly above, Louisiana mineral rights are alienable and heritable, meaning previous owners can transfer them to new owners, in much the same way owners can transfer a severed mineral estate under Texas law.[69]

In Louisiana, when a landowner sells off the ability to produce minerals on her land, she is granting a mineral servitude, which is a "right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."[70] This is one of the above-mentioned burdens or charges on absolute ownership that Louisiana recognizes.[71] While Texas landowners own the minerals

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*Benchmark of Expectations: Regulatory Takings and Surface Coal Mining*, 22 NAT. RESOURCES & ENVTL. L. 1, 7 (2008).

63. Riley, *supra* note 58, at 358.

64. *Id.*

65. *Id.*

66. *Id.*

67. Ronald W. Polston, *Surface Rights of Mineral Owners—What Happens When Judges Make Law and Nobody Listens?*, 63 N.D. L. REV. 41, 68 (1987).

68. Martin & Yeates, *supra* note 51, at 779.

69. *See Hornsby*, 854 So. 2d at 445-46; *see* LA. REV. STAT. § 31:18 (2017).

70. LA. REV. STAT. § 31:21 (2017).

71. *See* Martin & Yeates, *supra* note 51, at 784.

themselves through the ownership-in-place theory, Louisiana landowners have the "right to produce" the minerals on their property.[72] In Louisiana, landowners cannot create and sell a separate estate for the minerals on their property, but they can sell off their right to produce those minerals.[73]

### *D. A Distinction without a Difference?*

Under Texas' ownership-in-place theory, under which the landowner owns the "fee" to oil, landowners can sever oil and gas in place from the surface.[74] Nevertheless, courts can reach similar results under rights-based theories like Louisiana's where owners can grant rights to all the production of oil from a property to someone other than the owner of the surface.[75] Under both theories, the practical effect is the same: landowners can transfer all of the mineral rights usually belonging to them to someone else.[76] There are certainly conceptual differences between civil and common law treatment of mineral rights, and there are plenty of differences in treatment of minerals from state to state. No matter what theory of ownership a state has or how a particular state conceptualizes mineral rights, the holder of those rights does not also have access to all potential surface uses. Thus, the denominator calculation, and, by relation, the regulatory takings analysis, should remain the same.[77]

## III. TREATMENT OF REGULATORY TAKINGS: ANALYSIS UNDER A SHIFTING DOCTRINE

The regulatory takings doctrine is still relatively young, as it only began to develop around 1922.[78] The current factor-based analysis of regulatory takings did not develop until 1978.[79] As will become clear, however, this test is not the beginning and end of every regulatory takings analysis, as it has numerous exceptions and modifications that apply to

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72. *Id.* at 803.
73. *Id.* at 804.
74. Annotation, *Severance of title or rights to oil and gas in place from title to surface*, 146 A.L.R. 880 (2017).
75. *Id.*
76. *Id.*
77. *Whitney Benefits*, 926 F.2d at 1172. If, however, a state treated mineral rights as completely non-severable from surface rights, courts would have no choice but to conclude that mineral rights and surface rights should be viewed together as a single denominator.
78. *See Pa. Coal*, 260 U.S. 393.
79. *See Penn. Cent. Transp.*, 438 U.S. 104.

specific circumstances. The Court's latest gloss on the denominator analysis that precedes an analysis of compensability of regulatory takings came in the summer of 2017.[80]

*A. The Doctrine in its Infancy*

In *Pennsylvania Coal v. Mahon*, the United States Supreme Court invalidated a statute which prohibited miners from extracting sub-surface coal that supported surface-level buildings owned by someone else by classifying it as a regulatory taking. The Court explained that it did not "see that the fact that [such surface owners'] risk has become a danger warrants giving to them greater rights than they bought."[81] In *Pennsylvania Coal*, the coal company that filed the takings claim only had rights to the minerals, not to the surface, because they sold the surface before the statute's enactment.[82] This was the first case to afford protection under the Takings Clause to owners of severed mineral rights, and many legal scholars see Justice Holmes' opinion in this case as the beginning of the regulatory takings doctrine.[83]

Justice Brandeis' lone dissent in *Pennsylvania Coal* demonstrates that, from the inception of regulatory takings jurisprudence, there was disagreement about how best to determine the relevant parcel in cases concerning separately held mineral rights.[84] Justice Holmes appeared to address only the value of the affected coal.[85] Justice Brandeis, on the other hand, argued that the Court should consider the value of the "whole property" because the sum of the rights in parts of property, surface and subsoil, cannot be greater than the rights associated with the whole.[86]

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80. *See Murr*, 137 S. Ct. 1933.

81. *Pa. Coal*, 260 U.S. at 416.

82. *Id.* at 412.

83. *See*, *e.g.*, Daniel R. Hansen, *Environmental Regulation and Just Compensation: The National Priorities List as a Taking*, 2 N.Y.U. ENVTL. L.J. 1, 5 (1993).

84. *Pa. Coal*, 260 U.S. at 416 (Brandeis, J., dissenting).

85. Stuart Miller, *Triple Ways to Take: The Evolution and Meaning of the Supreme Court's Three Regulatory Takings Standards*, 71 TEMP. L. REV. 243, 263 (1998).

86. *Id. See Pa. Coal*, 260 U.S. at 416 (Brandeis, J., dissenting).

Justice Brandeis' ad coelum[87] conception of property, which would consider the surface as well as the subsurface in the takings analysis,[88] makes sense when the owner of the mineral rights also owns the surface rights. However, this treatment of property makes no sense in the context of separately held mineral rights because it increases the parcel considered as the denominator, thus reducing the likelihood of compensability, by considering uses outside the control of the owner of the mineral rights.[89] Justice Holmes' notion of the denominator as only the mineral rights in regulatory takings cases concerning separately held mineral rights is more logical than an alternative theory that would reduce the likelihood of takings by considering uses of the surface outside the control of the owner of the mineral rights.

### *B.* Penn Central *and its Impact*

The next watershed for the regulatory takings doctrine was the development of the factor test in *Penn Central Transportation Co. v. New York City*.[90] New York City adopted its Landmarks Preservation Law (LPL) in 1965 to protect and enhance its landmarks and historic districts.[91] Final designation as a landmark under this law resulted in land use restrictions.[92] The City designated Penn Central Terminal as a landmark under the LPL and designated the city tax block as a landmark site.[93] Penn Central entered into a contract with UGP Properties for UGP to build a multistory office building on top of the terminal, but the Commission rejected certificates for this proposed development.[94] None of Penn Central's attempts to secure judicial relief in New York state courts were successful, so it appealed to the Supreme Court of the United States.[95]

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87. The ad coelum doctrine is the "common-law rule that a landowner holds everything above and below the land, up to the sky and down to the earth's core, including all minerals." *Ad coelum doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

88. *Pa. Coal*, 260 U.S. at 416.

89. This is leaving aside the merits of Brandeis' argument if the same person owns both mineral and surface rights, in which case a burden on the former would leave the latter completely unaffected. In this situation, the ad coelum view, and its effect of decreasing the likelihood of compensability, makes sense.

90. *Penn. Cent. Transp. Co.*, 438 U.S. 104.

91. *Id.* at 109.

92. *Id.* at 111.

93. *Id.* at 115–16.

94. *Id.* at 116–17.

95. *Id.* at 119–22.

The Court established the current regulatory takings analysis[96] by identifying the following factors for determining such takings from jurisprudence at the time: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action.[97] The application of this factor test and the way that courts have weighed each factor has varied greatly. Legal scholar Steven J. Eagle[98] believes that the *Penn Central* inquiry also implicitly included a fourth factor, the "parcel as a whole," which was another concept discussed in the opinion.[99] The "parcel as a whole" is essentially shorthand for the denominator in these cases; so Eagle, by identifying this as a fourth factor, acknowledges that the denominator analysis and the takings compensability analysis are intertwined. Because these analyses are related, how courts determine the denominator in a case involving separately held mineral rights is critical to whether such a claim will be compensable.

### *C. After* Penn Central*: Bright-Line Bonanza*

As mentioned above, courts have varied in their applications and balancing of the *Penn Central* factors. As Eagle points out, since *Penn Central*, courts have "patched its flaws with [other] increasingly complex tests."[100] The Court has issued a number of decisions interpreting the scope of the Takings Clause that have provided sparse guidance by supplying some categorical rules; but these decisions have also muddied the doctrine with additional considerations.

While *Penn Central* is the primary test for the compensability of regulatory takings, other factors and cases continue to influence the doctrine.[101] In fact, the Court sometimes evades the *Penn Central* analysis altogether by relying on one of the bright-line rules the court has

96. One legal scholar said, "*Penn Central* now stands as the central test used to determine the existence of a regulatory taking." Botello-Samson, *supra* note 62, at 7.

97. *Penn Cent.Transp. Co*., 438 U.S. at 124.

98. Steven J. Eagle is a professor of law at George Mason University's School of Law and has written extensively on regulatory takings issues, including a comprehensive treatise on the topic available through Lexis. HOME PAGE OF STEVEN J. EAGLE, PROFESSOR OF LAW, https://perma.cc/3C8F-9MLA (last visited September 20, 2017).

99. Eagle, *supra* note 30, at 614; *See Penn Cent. Transp. Co*., 438 U.S. at 131.

100. Eagle, *supra* note 30, at 603.

101. Botello-Samson, *supra* note 62, at 8.

developed to supplement the *Penn Central* analysis.[102] Since critics have attacked the *Penn Central* test as vague, the Court might be relying on additional rules to bolster the regulatory takings doctrine with some bright-line rules. By developing exceptions to the *Penn Central* framework, the doctrine may appear more predictable; but the limited scope of these bright-line rules necessarily means they cannot clarify the entire doctrine. The exceptions and additions to the *Penn Central* analysis are myriad, which also allows courts to be inconsistent in their application of these additional considerations.[103]

One such exception to the *Penn Central* analysis came from *Lucas*, in which the Court held that, if the loss of property use resulting from a regulation is equal to the sum of all usage rights in a piece of property, a compensable taking has occurred.[104] *Lucas* does come with a significant caveat: the government may deny compensation if "the proscribed use interests were not a part of [the owner's] title to begin with."[105] In some cases, this means that if regulations were in place at the time the owner acquired the property, the owner has no means of challenging them as takings because the uses fall outside the reasonable investment-backed expectations prong of *Penn Central*.[106] The Court itself pointed out in *Palazzolo v. Rhode Island* that this principle of denying takings where the owner was on notice of the regulation at the time of purchase should not be taken too far. In that case, the Court warned that states should not be allowed to "put an expiration date on the Takings Clause" by passing legislation that would progressively restrict uses after subsequent changes in ownership.[107]

In *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, which challenged a Pennsylvania statute limiting coal mining at such a level as to undermine support of surface-level properties, the Court expressed "hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances."[108] The Court upheld the statute

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102. *Id.* at 9-10.

103. *Id.*

104. Fee, *supra* note 3, at 1536; *see Lucas*, 505 U.S. 1003.

105. *Lucas*, 505 U.S. at 1027.

106. *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

107. 533 U.S. at 627 (2001). Of course, where a landowner attempts to increase takings liability by severing her property into smaller pieces that will experience intensified economic impacts under regulatory burdens, compensation is not owed. Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 229 (2004).

108. *Keystone*, 480 U.S. at 491.

in *Keystone* while nevertheless declining to invalidate the earlier *Pennsylvania Coal* decision that struck down a similar statute.[109] In so doing, the Court relied on an established "public nuisance exception" to the compensability of takings, which generally states that the state has power to regulate private property for health and general welfare purposes even where the regulation deprives the property of all its value.[110]

The Court distinguished *Keystone* from the earlier case, positing that *Keystone* dealt with public interests, whereas, in *Pennsylvania Coal*, the Kohler Act served only private interests because it was more tailored to a specific situation.[111] The Court explained that the Kohler Act was meant for the sole protection of surface owners who had released their rights to the subsurface, whereas the legislation at issue in *Keystone* more generally protected society from unsafe mining practices.[112] The takeaway from *Keystone* is that statutes that merely prohibit mining at levels that will likely lead to subsidence or other dangers to surface owners will likely not lead to compensable takings. The Court reached this conclusion without clearly describing the proper denominator for cases involving separately held mineral rights, finding that the statute fell within the categorical "public nuisance" exception.[113] The various bright-line exceptions to *Penn Central* and to the general principle of compensability of regulatory takings produce mixed results for owners of separately held mineral rights.

In an ownership-in-place jurisdiction like Texas or a rights-based jurisdiction like Louisiana, regulation of mineral rights can lead to compensable takings under *Penn Central* or possibly even under *Lucas*, because both jurisdictions recognize the possibility of separately held mineral rights. Under both theories of ownership, though, if state property law changes to outlaw this possibility, regulation of mineral rights would be less likely to lead to compensable takings under *Penn Central* and would almost certainly not lead to compensable takings under *Lucas*. Additionally, if the purpose of regulation is to protect the public from an unacceptable risk of harm, the regulation would fit squarely in the public nuisance exception to compensability articulated in *Keystone* and thus not lead to a compensable taking.

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109. *Id.*

110. Miller, *supra* note 85, at 254.

111. *Keystone*, 480 U.S. at 484.

112. *Id.* at 482.

113. The Court explained, ". . . even if we were to accept petitioners' invitation to view the support estate as a distinct segment of property for 'takings' purposes, they have not satisfied their heavy burden of sustaining a facial challenge to the Act," signaling that it was not basing its decision on the denominator determination. *Id.* at 501.

## IV. *MURR V. WISCONSIN* AND ITS IMPLICATIONS

In the summer of 2017, the Court published its opinion in *Murr v. Wisconsin*, its latest interpretation of the regulatory takings doctrine. [114] *Murr* does not replace *Penn Central* but is rather another example of the aforementioned factor tests designed to fill gaps in the *Penn Central* factors.[115] In particular, it is designed to address and better articulate what constitutes the denominator in a case involving adjacent lots owned by the same person.[116] Before this case, most courts entertained "at least a strong presumption" that contiguous land united under common ownership should comprise a single parcel for a takings analysis.[117] This presumption is now much closer to black-letter law because of the Court's decision in *Murr*.

### *A. The Facts of* Murr

The Murrs purchased a small lot in 1960 and built a small cabin on it.[118] In 1961, they transferred the lot to the family plumbing company.[119] In 1963, they purchased the neighboring lot in their own names.[120] The Murrs later transferred the lots, one at a time in 1994 and 1995, to their children.[121] At this time, a county ordinance, which prohibited the individual development or sale of adjacent lots united under common ownership unless they made up at least an acre measured together or separately, merged the lots.[122] The Murrs asked for variances from the St. Croix County Board of Adjustment to allow them to move the cabin to a different portion of the lot it was on and sell the other lot to fund this move; and the Board denied their requests.[123] The Murrs then brought suit challenging the merger ordinance as a regulatory taking.[124]

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114. *Murr*, 137 S. Ct. 1933.
115. *See* Eagle, *supra* note 30, at 603.
116. *Murr*, 137 S. Ct. at 1938.
117. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1031 (2003).
118. *Murr*, 137 S. Ct. at 1940.
119. *Id.*
120. *Id.*
121. *Id.* at 1941.
122. *Id.*
123. *Id.*
124. *Id.*

### *B. The Majority's Analysis: New Factors for the Denominator Determination*

The Court tweaked the regulatory takings analysis by identifying factors to "determine whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or as separate tracts."[125] These factors determine the proper denominator in regulatory takings cases dealing with multiple adjacent tracts of land. *Murr* sets forth the following factors: the treatment of the land under state and local law, the physical characteristics of the land, the prospective value of the regulated land, and background customs and the whole of our legal tradition.[126]

These factors make sense in the context of the facts in *Murr* but will be difficult to apply to cases that deviate from these particular facts. Additionally, if reasonable expectations actually do guide the factors, and thus the denominator analysis, separately held mineral rights should certainly constitute denominators apart from the surface rights. Considering reasonable expectations, it is unlikely that owners of severed mineral rights would reasonably expect such rights to be viewed in conjunction with surface rights over which they have no legal authority.

### *C. Criticism of the New Factors from the Bench*

The Justices on the Court were not all on board with the majority's analysis. Chief Justice Roberts penned a dissent in *Murr* that Justices Thomas and Alito joined.[127] Justice Roberts argued that the majority's departure from previously settled deference to state property rules "authorize[d] governments to do precisely what [the Court] rejected in *Penn Central*: create a litigation-specific definition of 'property' designed for a claim under the Takings Clause."[128] He went on to say that such a departure from deference to state law property regimes "compromises the Takings Clause as a barrier between individuals and the press of the public interest."[129] This retreat from using state law definitions of property to determine denominators is worrisome for private landowners across the United States, as it creates the possibility of fewer compensable takings, but should perhaps be less so to individuals who own only the rights to minerals.

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125. *Id.* at 1938.
126. *Id.* at 1945.
127. *Id.* at 1950 (Roberts, C.J., dissenting).
128. *Id.* at 1954–55 (Roberts, C.J., dissenting).
129. *Id.* at 1956 (Roberts, C.J., dissenting).

Justice Thomas filed his own dissent in *Murr*, in which he recommended that the Court should reexamine its 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."[130] Justice Thomas suggested that *Pennsylvania Coal* and its progeny, and thus the entire regulatory takings doctrine, were out of step with the understanding at the time that the Takings Clause only provided compensation in cases of direct appropriation of property.[131] This narrow scope of the Takings Clause would lead to substantially fewer compensable takings and would turn years of doctrine on its head.

While even Justice Thomas would likely agree that the Court invalidating an entire doctrine seems unrealistic, the dissents in *Murr* demonstrate that there is still some hesitance by members of the Court to move away from deference to state definitions of property interests. Justice Roberts points out that the conclusion in any given case might be the same but nevertheless argues that courts should not look to factors outside of state law to define the boundaries of parcels of land.[132] State definitions of property interests should determine denominators, and courts should only use other factors to determine whether a compensable taking actually occurred.

### *D. Frontloading the Merits Analysis: The Impact of* Murr

After the decision in *Murr*, there was a flurry of legal scholarship attempting to unpack its significance and potential impact on the regulatory takings doctrine. For some legal scholars, a case like *Murr* means relatively little because they believe that state governments, not the Fifth Amendment, should protect private property.[133] Others believe the most effective strategy

130. *Id.* at 1957 (Thomas, J., dissenting).

131. *Id.* (Thomas, J., dissenting).

132. *Id.* at 1950 (2017) (Roberts, C.J., dissenting).

133. Rick Hills, *A Half-Hearted Two Cheers for the Victory of Federalism over Property Rights in* Murr v. Wisconsin (June 23, 2017), PRAWFSBLAWG, https://perma.cc/SQ8U-SUL2. The Wisconsin legislature seemed to vindicate this approach by enacting a "Homeowners' Bill of Rights" in direct response to the Supreme Court's ruling, but a legislative fix does not change the fact that this sort of merger has been upheld as a matter of federal constitutional law. *See* E-Update, State Representative Robert Brooks (November 7, 2017), https://perma.cc/6YEE-R5S7.

of protecting property rights "combines litigation with political action, rather than relying on either exclusively."[134]

The inherent flexibility of the regulatory takings doctrine made it somewhat difficult to determine denominators before *Murr*.[135] The Court's creation of additional factors certainly did not make the denominator analysis any easier.[136] The majority's approach also opens the door to strategic manipulation by landowners who will try to lessen their risk of uncompensated takings by avoiding placing contiguous lots under common ownership, and by the state, which will likewise attempt to manipulate the factors in the majority opinion to its own advantage.[137]

*Murr* might also make landowners prove a taking twice by double-counting factors associated with a loss in value of the property, once to determine the appropriate denominator and again to determine whether a compensable taking occurred.[138] This puts the question backward by emphasizing loss in value before determining the proper denominator.[139] The front-loading of any valuations certainly gives the impression that the Court is setting the bar much higher for plaintiffs trying to prove regulatory takings than for plaintiffs claiming traditional takings. On the other hand, this may just be yet another outgrowth of the Court's attempts to constrain compensability of regulatory takings.

Some argue that *Murr* gives "undue attention to the needs of the government without giving due consideration to the notion of 'property' or the rights that inure to the 'owner' of property in the first instance."[140] As evidenced by the Court's broad application of the so-called "public nuisance exception" to the compensability of takings in *Keystone*,[141] the scales undoubtedly tip in the government's favor when considering the compensability of a regulatory taking associated with potentially dangerous

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134. Ilya Somin, *More on* Murr *– a response to Rick Hills*, WASHINGTON POST, June 23, 2017, https://perma.cc/97WD-GRYZ.

135. Michael M. Berger, Murr*: More Confusion and More Work for Lawyers*, The U.S. Supreme Court and Property Rights: The "Larger Parcel" Issue and the Future of Regulatory Takings, TSZF02 ALI-CLE 75 (July 25, 2017).

136. Ilya Somin, *A Loss for Property Rights in* Murr v. Wisconsin *[updated with a link to my response to Prof. Rick Hills]*, WASHINGTON POST, June 23, 2017, https://perma.cc/32X4-7P7U.

137. *Id.*

138. Robert H. Thomas, *Restatement (SCOTUS) of Property: What Happened to Use in* Murr v. Wisconsin*?*, TSFZ02 ALI-CLE 129 (July 25, 2017).

139. Berger, *supra* note 135.

140. Karl E. Geier, *No Boundaries: The Erosion of Private Property Rights by Judicial Deference to Regulatory Overreach*, 28 MILLER & STARR REAL EST. NEWSALERT, no. 1, Sept. 2017, at 3.

141. *Keystone*, 480 U.S. at 491.

activities like producing minerals. At least one scholar has expressed concern that *Murr* might create an "exception for cases where the owner happens to own a lot next door."[142] Respectfully, while *Murr* is certainly troubling for owners of contiguous lots, factor tests like the one created in *Murr* do not create such categorical rules. Factual differences might lead to more landowner-friendly results in future cases. The reach of *Murr* is limited in that the factors favor different results in situations other than the specific facts of the case, such as cases involving separately held mineral rights.

## V. APPLICATION OF *MURR* TO SEPARATELY HELD MINERAL RIGHTS AND A PATH FORWARD FOR THE DOCTRINE

Application of the factor test set forth in *Murr* favors treating separately held mineral rights as a distinct denominator. Under the factors identified as relevant by the Court, mineral rights owned by someone other than the owner of the surface rights should be viewed as an independent parcel for the purposes of the regulatory takings analysis.

### *A. The* Murr *Factors' Application to Separately Held Mineral Rights*

If "reasonable expectations about property ownership"[143] are what shape the majority's factors in *Murr*, and thus the whole denominator analysis, the case for separately held mineral rights comprising a denominator apart from the surface rights is even stronger. It would be unreasonable for an owner of severed mineral rights to expect a court to define her property in conjunction with surface rights to which she has no legal claim for a takings analysis, especially in light of the ways states have created systems which favor, or at least promote, separate ownership of mineral rights.[144]

The first factor the *Murr* Court considers is the treatment of the parcels under state and local law.[145] As highlighted in an earlier section of this Comment,[146] whether using a rights-based or ownership-based theory of mineral rights, these rights are conceptually distinct from the underlying land because it is possible to sell one's mineral rights without also selling other uses of the tract of land.[147] Since these rights are susceptible of

142. Somin, *supra* note 136.
143. *Murr*, 137 S. Ct. at 1938.
144. *See supra* Part II.
145. *Murr*, 137 S. Ct. at 1948.
146. *See supra* Part II(D).
147. *See supra* Part II.

separate ownership, and since states have gone to such great lengths to facilitate mineral production, it follows logically that mineral rights should constitute their own denominators and be compensable as separate parcels when they are owned by someone other than the landowner.

The Court has expressed that, while states can pass reasonable land use regulations without effecting takings, states may not use regulation as an end-run around the Fifth Amendment by stripping more and more uses from property owners' titles over time.[148] Treating separately held mineral rights as part of a larger denominator includes uses to which the mineral rights-holder has no access in the consideration of what value is lost. This facilitates an erosion of the Takings Clause by allowing states to constantly fall back on the argument that there are other uses associated with the property, even if the holder of the mineral rights cannot exercise them. Especially in states like Texas, where mineral rights explicitly dominate over surface rights,[149] courts should recognize such state efforts to protect the rights of mineral owners as militating in favor of viewing separately held mineral rights as separate denominators.

The second factor the *Murr* Court considers is the physical characteristics of the tracts, which include things like the physical relationship of distinguishable tracts, the topography, and the surrounding environment.[150] The Court's gloss on this factor in particular suggests that the Court is not trying to create a factor test with broad applicability across a range of potential denominator determinations. Some denominator analyses will necessarily require courts to make distinctions between theories of ownership rather than the physical composition of the property at issue. Applied in *Murr* by considering the range of the tracts' alternative uses, this factor favors viewing separately held mineral rights as separate denominators because owners' rights in these situations are so limited.

The third factor the *Murr* Court considers is the prospective value, which is calculated under the challenged regulation with special attention to the effect of the burdened land on the value of the other holdings.[151] In applying this factor, the Court compared the value of the Murrs' lots separately to the value of the lots together and arrived at the conclusion that, since the lots were worth significantly more valued together, they could also be viewed together for denominator purposes.[152] The value of mineral rights together with surface rights would not likely be significantly higher than the respective values of these rights separately, so this factor

148. *Palazzolo*, 533 U.S. at 627.
149. *See* Riley, *supra* note 58, at 358.
150. *Murr*, 137 S. Ct. at 1948.
151. *Id.* at 1948–49.
152. *Id.* at 1949.

also seems to favor viewing separately held mineral rights as a separate denominator.

As articulated earlier in this Comment, collapsing considerations of value into the denominator analysis creates conceptual problems and may lead to double-counting of some of the factors traditionally associated with the question of whether there is a compensable taking in a particular case.[153] The Court's evolution of a complex, multi-faceted regulatory takings analysis has frustrated and confused lower courts, and even the Court itself has been inconsistent with its application of all the parts and sub-parts of the analysis it created.

The preceding analysis demonstrates that, whatever its merit, the *Murr* formulation does not settle all questions of conceptual severance, taking one stick from the proverbial bundle and treating it separately for the purposes of a takings analysis, in denominator problems.[154] Instead, the factor test seems to only provide an answer to the horizontal severance issue—that is, creating multiple denominators by splitting distinguishable parcels up along lot lines—because this is the only situation for which the Court was examining "reasonable expectations about property ownership."[155] As demonstrated below, it is not even completely clear that *Murr* provides a firm answer on the question of whether this sort of conceptual severance is acceptable.

### *B. What the* Murr *Analysis Leaves Unsettled*

Many courts have failed to explicitly articulate their reasoning in particular regulatory takings cases, choosing instead to express conclusions without much indication of how they reached these results.[156] These leaps in logic make regulatory determinations seem arbitrary and unpredictable.[157] Compounding this problem is the fact that the Court allows multiple analyses for similar issues to co-exist, further muddying an already murky doctrine. For example, one Federal Circuit case,[158] which came up through the courts at the same time as *Murr*, suggests that *Murr* did not completely settle the horizontal severance issue.[159] The Federal Circuit concluded that the proper denominator in a case involving

153. *See supra* Part IV.

154. *See* Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L. J. 663, 694 (1996).

155. *Murr*, 137 S. Ct. at 1938.

156. Fee, *supra* note 3, at 1537.

157. *Id*.

158. Lost Tree Village Corp. v. U.S., 787 F.3d 1111 (2015).

159. Thomas, *supra* note 138.

the Corps of Engineers' denial of a permit for development of a single parcel was that parcel alone and not that single parcel, an adjacent plat, and scattered wetlands also owned by the plaintiff.[160] The fact that the Court did not hear this case together with *Murr* or vacate the decision and remand for consideration in light of *Murr* may mean that *Murr* does not have the weight that some assume it has.[161]

Even if the Court believes, in spite of the Court of Appeals case, that it settled the question of horizontal severance, the *Murr* factors certainly do not settle all questions of conceptual severance—the breaking apart of distinguishable property rights into multiple denominators. The issue of conceptual severance of mineral rights from surface rights, sometimes dubbed vertical severance, begs the question posed by scholar Frank Michelman: Why not recognize the distinction between mineral and surface rights and say "that the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of *those* rights—which the regulation totally destroys?"[162] While there are certainly flaws with this method of determining denominators in situations where the owner of the mineral rights is also owner of the surface rights, because this would be the sort of strategic division of denominators the Court cautioned against in *Penn Central*,[163] it seems appropriate to frame denominators this way for situations involving severed mineral rights.

### *C. The Possibility of a* Lucas *Total Taking*

A footnote[164] in the Court's opinion in *Lucas*—which, as previously discussed, stood for the principle that the government owed compensation when it deprived property of all economically viable uses[165]—sheds some light on the question of how to determine denominators in regulatory takings cases. The Court states that the answer to the question of how to define the denominator "may lie in how the owner's reasonable expectations have been shaped by the State's law of property," in other words, to what degree state property law has afforded protection for individual interests in the property.[166] As previously discussed, whether in a rights-based system like

160. *Lost Tree Village Corp*., 787 F.3d at 1114.
161. Thomas, *supra* note 138.
162. Michelman, *supra* note 5, at 1193.
163. *See Penn Cent. Transp. Co.*, 438 U.S. at 130.
164. *Lucas*, 505 U.S. at 1016 n.7.
165. *Id.* at 1027.
166. *Id.* at 1016 n.7.

Louisiana or an ownership-based system like Texas, state property law has afforded mineral rights a great deal of protection.[167]

Scholars like Patrick C. McGinley[168] argue that the *Lucas* categorical takings rule should be limited to claims of owners of both mineral and surface rights, thus precluding such a claim where the denominator is only mineral rights.[169] McGinley argues that the holding of *Lucas* does not require the application of the categorical rule to future cases involving less than full ownership and leaves unresolved the potential application of the categorical rule to separately held mineral rights.[170] While the Supreme Court expressed hesitation in whole-heartedly endorsing this footnote in *Murr*, it nonetheless explained how the *Murr* decision was consistent with the deference to state law expressed in *Lucas*. This discussion indicates that the footnote is at least worth considering.[171]

Also, *Keystone* is not conclusive on the denominator issue, which is critical in determining whether to apply the *Penn Central* or the *Lucas* standard.[172] If courts expressly prohibited applying conceptual severance to separately held mineral rights, which they do not, there would be no possibility of a *Lucas* total taking, which would put the plaintiff in the somewhat trickier position of having to prove a taking using the murky, value-based analysis set forth in *Penn Central*. Even if courts do not require the application of the *Lucas* categorical rule, they should apply it because of the Court's consistently expressed deference, even in its weaker state in *Murr*, to state law protection of distinct property rights.

Under Louisiana's rights-based or Texas' ownership-based theory of mineral rights, there is a possibility of a *Lucas* total taking so long as the state does not expressly prohibit separate ownership of mineral rights. Owners of mineral rights in jurisdictions like Texas have a more

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167. *See supra* Part II. Pooling and unitization also protect mineral rights, sometimes even in the wake of regulation. *See generally* 1 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION, §§ 6.01, 6.02 (LexisNexis Matthew Bender 2017).

168. Patrick C. McGinley is a Charles H. Haden II Professor of Law at West Virginia University's College of Law and his written extensively relating to environmental law, natural resources, and specifically coal law and regulation. WEST VIRGINIA UNIVERSITY, COLLEGE OF LAW, FACULTY, PATRICK C. MCGINLEY, https://perma.cc/2ABW-C9LU (last visited September 18, 2017).

169. Patrick C. McGinley, *Bundled Rights and Reasonable Expectations: Applying the* Lucas *Categorical Takings Rule to Severed Mineral Property Interests*, 11 VT. J. ENVTL. L. 525, 529 (2010).

170. *Id.* at 542.

171. *Murr*, 137 S. Ct. at 1946–47.

172. Riley, *supra* note 58, at 394.

straightforward claim under this theory, because they will be asserting a taking of physical property, the minerals they own in place. Owners of mineral rights in jurisdictions like Louisiana can reach the same result by using the footnote in *Lucas* to demonstrate the Court's potential acceptance of a taking of a property interest like an exclusive right to produce minerals. While owners of mineral rights in ownership-in-place jurisdictions like Texas will have an easier time demonstrating a *Lucas* total taking of their mineral rights, such a claim may also be successful in a rights-based jurisdiction like Louisiana.

### *D. Still protected by* Penn Central*?*

Even relying exclusively on *Penn Central*, courts should still protect owners of separately held mineral rights by recognizing these rights as a denominator apart from the surface rights. The *Murr* majority did not offer any reason for precluding independent protection of divided interests when state law encourages such division.[173] The case for protection of such interests is even stronger when the owner of the mineral rights does not also have the rights to all possible surface uses. One scholar argued that the regulatory taking inquiry should hinge on "whether the property interest proposed to have been taken is in fact substantial enough to warrant Fifth Amendment protection as an independent bundle of rights."[174] As previously discussed,[175] states have afforded mineral rights a great deal of protection; and this approach would justify mineral rights comprising distinct denominators.[176]

In the realm of *Penn Central*, the denominator analysis is especially critical to determine whether a taking has occurred. The current analysis precludes an owner from claiming a taking where a regulation leaves some valuable uses of her property intact.[177] Therefore, if the denominator includes surface uses even in situations involving separately held mineral rights, owners will almost always lose their takings claims because these surface uses will offset whatever loss in value things like moratoriums on drilling create. Some have suggested that, under *Penn Central* and

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173. Epstein, *supra* note 29, at 885.

174. Fee, *supra* note 3, at 1557.

175. *See supra* Part III.

176. Texas, in particular, clearly treats mineral rights as an independent bundle of rights. Texas jurisprudence holds that a mineral estate consists of five separate and distinct interests: the right to develop, the right to lease, the right to receive bonus payments, the right to receive delay rentals, and the right to receive royalty payments. *In re* Estate of Slaughter, 305 S.W.3d 804, 808 (Tex. Ct. App. 2010).

177. Epstein, *supra* note 29, at 866.

*Keystone*, courts should consider air, mineral, and surface rights as a single denominator regardless of severed ownership;[178] but this would lead to some pretty absurd results, as the district court case in Kansas[179] featured in the Introduction indicates.

### *E.* Penn Central *Factors Analyzed for Severed Mineral Rights*

A common-sense application of the *Penn Central* factors to separately held mineral rights as their own denominator can still lead to compensable takings. As previously mentioned,[180] legal scholar Steven Eagle believes that the "parcel as a whole," which has become shorthand for the denominator, is a fourth factor in these cases.[181] An analysis of the Court's three factors and Eagle's fourth factor demonstrates the possibility of compensability in cases involving separately held mineral rights.

The first factor the *Penn Central* Court considers is the economic impact of the regulation, which, perhaps more than any of the majority's other factors, is extremely fact-dependent.[182] Here, if the government has regulated away all or nearly all the economically valuable uses, there is the added possibility of a *Lucas* total taking, as previously discussed.[183] If, in the alternative, the government's regulation merely impacts part of the value of the property, for instance if a drilling moratorium only affects part of the property and drilling is still possible elsewhere on the property, courts must weigh the rest of the factors to determine whether the governmental action is still a compensable taking.

The second factor the *Penn Central* Court analyzes is the investment-backed expectations of the owner.[184] In weighing this factor, the Court's other cases provide some guidance. As previously mentioned,[185] *Palazzolo v. Rhode Island* stood for the proposition that reasonable land use regulations do not effect a taking but also made clear that states could not reduce property-owners' rights just by regulating potential uses of land out of individuals' titles over time.[186] In weighing this factor, courts should certainly be cognizant of the fact that people who own severed mineral rights, or any mineral rights for that matter, should expect to be regulated

178. Fee, *supra* note 3, at 1558.
179. *Mid Gulf*, 792 F. Supp. at 1214.
180. *See supra* Part III.
181. *See generally*, Eagle, *supra* note 30, at 622-23.
182. *Penn Cent. Transp. Co.*, 438 U.S. at 124.
183. *See supra* Part V(C).
184. *Penn Cent. Transp. Co*., 438 U.S. at 124.
185. *See supra* Part V(A).
186. *Palazzolo*, 533 U.S. at 627 (2001).

pretty heavily. However, courts should also be careful not to presume that such owners expected to lose all or nearly all of their rights.

The third factor the *Penn Central* Court considers is the character of government action.[187] This factor is where the public nuisance exception, mentioned above relating to *Keystone*,[188] comes in. The State is certainly free to prevent something as severe as subsidence, as in *Keystone*, but should not be free to pass protectionist legislation targeting private interests but declaring itself as connected to putative public interests, as in *Pennsylvania Coal*. Courts may have problems in drawing this distinction. In so doing, they should be especially careful not to apply cases like *Keystone* and *Penn Central* as bright-line rules militating against vertical or conceptual severance of property interests rather than the fact-sensitive, complex inquiries they are in reality.

Another concept the *Penn Central* Court discusses, treated here as a fourth factor, is the "parcel as a whole."[189] This concept essentially incorporates the denominator analysis into the analysis to determine the compensability of the action challenged as a taking. In regulatory takings cases involving separately held mineral rights, the "parcel as a whole" in an ownership-based jurisdiction like Texas or a rights-based jurisdiction like Louisiana should be only the severed mineral rights, not merely because this would be the only regulated property but also because this property is fundamentally distinct from the surface rights. Under either theory, viewing the severed mineral rights as the "parcel as a whole," or denominator, is not dividing the parcel up to increase takings liability but is rather looking only to the parcel at issue without considering other parcels or property interests. Thus, an application of the *Penn Central* factors can lead to a finding of compensability for a taking of separately held mineral rights.

## CONCLUSION: A TIME AND PLACE FOR CONCEPTUAL SEVERANCE

Situations involving separately held mineral rights seem ripe for the theory of conceptual severance, since owners of such rights cannot use the surface of a property in all the ways surface owners can. Scholars have criticized the use of conceptual severance in situations where the property owner holds both the mineral and surface rights. Application of conceptual severance would allow such an owner to be compensated for something like a prohibition on drilling a gas well in spite of the fact that she would

187. *Penn Cent. Transp. Co.*, 438 U.S. at 124.
188. *See supra* Part III(C).
189. *Penn Cent. Transp. Co*., 438 U.S. at 131.

still be able to put the surface to all manners of alternative uses.[190] Conceptual severance is clearly inappropriate in this situation, because it would use only those rights affected by the regulation as the denominator.

While the Court has generally rejected defining the denominator as only the rights or the part of the parcel affected by the regulation in question, it has nevertheless employed the theory of conceptual severance under certain circumstances to construe the denominator more narrowly and thus find a taking where there might not otherwise be one.[191] Situations like ownership of separately held mineral rights, in which the owner does not also have access to alternative surface uses, cry out for this sort of analysis as a logical approach to prevent unduly harsh results.[192] Without conceptual severance in these situations, plaintiffs who own only the mineral rights would be without compensation merely by virtue of the existence of alternative surface uses that they could not exercise.

While the Court has tried to curb the use of the conceptual severance doctrine, it has nonetheless been receptive to its application when value is tied to a single use which regulation prohibits, so long as no economic value remains through other uses.[193] The very nature of separately held mineral rights implies that value is tied to a single use; so the Court should have no problem with conceptual severance in these situations. While *Murr* appears to be another instance in which the Court is disavowing or at least strongly disfavoring notions of conceptual severance for takings analyses, owners of separately held mineral rights still have valid takings claims where regulations place a moratorium on drilling but would still allow for other development. Their mineral rights would only allow them to use the surface to the extent necessary for their drilling and would also not give them rights to develop on the surface.

Asking a court to consider mineral rights as a separate denominator when the owner of the mineral rights also owns surface rights on the property is certainly the sort of division the Court was cautioning against. However, asking a court to do the same when all the owner has is the

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190. Riley, *supra* note 58, at 391.

191. Allee, *supra* note 23, at 1973–79.

192. Of course, if the only regulation is on drilling or other access in a particular place, the situation becomes even more complicated, as these situations may result in partial takings, affecting a stick in the bundle of rights that comprise mineral rights ownership. These situations can still give rise to compensable takings, though, because the most important attribute of mineral rights ownership is the right of surface access. Karolyn King Nelson, *Takings Law West of the Pecos: Inverse Condemnation of Federal Oil and Gas Rights*, 37 NAT. RESOURCES J. 253, 273 (1997).

193. Wright, *supra* note 107, at 209.

mineral rights associated with a property does not pose the same risk. Rather, this sort of conceptual severance makes sense and is in keeping with the *Armstrong* fairness principle, that the Government should not force "some people alone to bear public burdens which, in fairness and justice, should be borne by the public as a whole,"[194] at the heart of the regulatory takings doctrine. It would not be fair to force owners of separately held mineral rights to lose a higher proportion of the value of their property than other owners of mineral rights without any means by which they could recoup their losses.

The original animus behind the creation of the regulatory takings doctrine also militates in favor of treating separately held mineral rights as a separate denominator.[195] In *Pennsylvania Coal*, Justice Holmes invalidated a prohibition on extracting sub-surface coal that supported surface-level buildings owned by someone other than the owner of the coal on the grounds that he did not "see that the fact that [such surface owners'] risk has become a danger warrants giving to them greater rights than they bought."[196] Viewing separately held mineral rights and surface rights together as one denominator would give surface owners greater rights than they bought and effectively strip owners of mineral rights of their rights.

While the *Murr* factors and other recent cases signal that the Court is hesitant to buy into the theory of conceptual severance, the factors favor a different result in cases involving separately held mineral rights. As demonstrated by the preceding analysis, such mineral rights should be viewed as a denominator apart from the rest of the tract with which they are associated, because holders of these rights do not have the potential for alternative uses that owners of surface rights, with or without mineral rights, have at their disposal.

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194. *Armstrong*, 364 U.S. at 49 (quoted in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978)).

195. *See Pa. Coal Co.*, 260 U.S. 393.

196. *Pa. Coal*, 260 U.S. at 416.

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