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Quaking in Their Boots: Oklahoma Landowners and Regulators Left with an Uncertain Future After *Murr v. Wisconsin*

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QUAKING IN THEIR BOOTS: OKLAHOMA LANDOWNERS AND REGULATORS LEFT WITH AN UNCERTAIN FUTURE AFTER *MURR V. WISCONSIN*

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I. Introduction

The United States Supreme Court has added three factors to its collection of analytical touchstones in the realm of regulatory takings with its decision in the case of *Murr v. Wisconsin*.[1] As an extension of the Supreme Court's controversial jurisprudence on regulatory takings, this case has certainly been subjected to its fair share of criticism. Aside from the fundamental criticisms of *Murr*, the Supreme Court's rationale poses interesting, challenging, and uncertain consequences for Oklahoma landowners and regulators. Before discussing the consequences of *Murr*, it is important to keep some background in mind.

The Fifth Amendment of the United States Constitution harbors many of the rights Americans enjoy. Among the many rights contained in the Fifth Amendment resides in what is known as the Takings Clause.[2] That clause states as follows: "nor shall private property be taken for public use without just compensation."[3] Upon first glance, the language of the Takings Clause indicates a negative right of the People to be protected from the government taking their property without being justly compensated. But, underlying this protection from the government is a power that the government itself wields. Namely, state and federal governments have the power to take private property so long as a citizen is justly compensated. This power is known as eminent domain—an old, deep-rooted, and fundamental government power. In fact, the Takings Clause's limitation on eminent domain is so fundamental in American jurisprudence that it was the first part of the Bill of Rights applied to the states.[4]

As a general proposition, the Takings Clause involves four inquiries.[5] First, a court must determine whether a taking has even occurred.[6] Second,

1. 137 S. Ct. 1933, 1945 (2017).
2. U.S. CONST. amend. V.
3. *Id*.
4. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 667 (Wolters Kluwer 5th ed. 2015) (citing Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897)).
5. *Id*. at 668.
6. *Id*.

a court must determine whether the taking involves "property" as contemplated by the Fifth Amendment.[7] Third, if the first and second questions have been answered in the affirmative, a court must determine whether the taking was for "public use."[8] The final question is whether "just compensation" has been paid.[9] Beyond these four questions, Takings Clause cases consists of two principal categories: (1) "possessory" takings and (2) "regulatory" takings.[10] A "possessory" taking is "when the government confiscates or physically occupies property," and a "regulatory" taking can be defined as one that "occurs when the government's regulation leaves no reasonable economically viable use of the property."[11]

The government's eminent domain power is easily understood in the context of a possessory or physical taking. In fact, it was originally thought that "in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation."[12] The Supreme Court has broadly interpreted what constitutes a "possessory" taking. Some common examples of this include government confiscation or occupation of real property, confiscation of interest on an account, and even use of airspace.[13]

American courts have also recognized that government action other than a confiscation or physical occupation can constitute a taking that implicates the Fifth Amendment. These types of government actions are the second category of takings known as "regulatory takings." The basic premise of a regulatory taking is this: When a government implements a regulation, the value of someone's property can be adversely impacted, and the property owner should be justly compensated for the loss in value. It is recognized that, at some level, "any government regulation decreases the value of someone's property."[14] Therefore, the relevant inquiry is not whether a government regulation does in fact negatively impact someone's property,

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7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*. at 669.
11. *Id*.
12. *Id*. (citing Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967)).
13. *Id*. at 669-70 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); United States v. Causby, 328 U.S. 256 (1946)).
14. *Id*. at 668.

it is instead a question of at which point a government regulation impacts the value of someone's property in a way that would require the government to justly compensate the property owner.[15]

II. Law Before the Case

A. The Supreme Court's Approach to Regulatory Takings

To say the least, the Supreme Court's cases on regulatory takings have left anything but a bright-line rule to guide lower courts in their analysis.[16] Instead, the Court has handed down a sampling of cases that serve as analytical touchstones, each of which leaves lower courts with a few things to consider. Ultimately, this leaves the courts to engage in what could appear as an *ad hoc*, case-by-case analysis.[17]

The first landmark case that the Supreme Court decided that strayed from the traditional physical taking framework of the Takings Clause comes by way of *Pennsylvania Coal v. Mahon*.[18] In *Mahon*, a homeowner sued the Pennsylvania Coal Company, claiming that their mining operations would "cause a subsidence of the surface and of their house" in violation of Pennsylvania law,[19] which specifically prohibited coal mining operations that would cause subsidence.[20] The Court ultimately recognized that in this circumstance, the coal company's ability to mine had been rendered impracticable to the extent that the statute substantively functions in a way that had "nearly the same effect for constitutional purposes as appropriating or destroying it."[21] Ultimately, the lesson learned from this case is that even though the government, through the Pennsylvania law, did not physically occupy or confiscate the mining company's property, the statute could still implicate the Takings Clause.[22] Unfortunately, *Mahon* did not provide much guidance to lower courts in terms of what exactly would qualify as a "taking" when government action is only the implementation or enforcement of a statute. In fact, Justice Holmes, writing for the majority,

15. *See id*. at 668, 675.
16. *Id*. at 669.
17. *Id*.
18. 260 U.S. 393 (1922) [hereinafter *Mahon*].
19. *Id.* at 412.
20. *Id.* at 412-13.
21. *Id.* at 414.
22. *Id.* at 415.

went so far in saying that this question is one "of degree-and therefore cannot be disposed of by general propositions."[23]

More guidance on the scope of the Fifth Amendment's protections against regulatory takings without just compensation comes several decades later in *Penn Central Transportation Co. v. New York City*.[24] In *Penn Central*, the City of New York enacted a law allowing the City's Landmarks Preservation Commission ("Commission") to designate property as a "landmark" or other designation that would in turn prohibit some types of development.[25] At issue was the Commission's designation of Grand Central Terminal ("Terminal") as a "landmark."[26] Consequently, when the owners of the Terminal applied to build an office building on top of the station, they were denied.[27] Despite this denial, the Court held that the designation did not constitute a taking as understood by the Fifth Amendment,[28] and, therefore, the owners were not entitled to compensation.

More important than the outcome, however, is the framework by which the Court analyzed the question of whether a taking had occurred. In that regard, the Court identified three primary factors which play into the decision of whether a government regulation, such as the one here, constitutes a "taking."[29] First, the Court noted that the "economic impact of the regulation on the claimant" should be considered.[30] Second, courts generally should consider "the extent to which the regulation has interfered with distinct investment-backed expectations."[31] Third, courts should consider the "character of the governmental action."[32] In addition to these three factors, it is crucial to note that the Court goes out of its way to identify the inherently *ad hoc*, fact-specific nature of analyzing governmental actions in terms of whether something is a "taking" for Fifth Amendment purposes. Undoubtedly, this three-factor analysis is anything but a bright-line rule that lower courts can formulaically apply. Despite the lack of a bright-line rule, some commentators have noted that *Penn Central*

23. *Id.* at 416.
24. 438 U.S. 104 (1978) [hereinafter *Penn Central*].
25. *Id.* at 109-12.
26. *Id.* at 115.
27. *Id.* at 116-17.
28. *Id.* at 135-38.
29. *Id.* at 124.
30. *Id.*
31. *Id.*
32. *Id.*

and its progeny have not left lower courts in the dark. For example, it has been said that these cases have "at the very least[, established that] there is not a regulatory taking when the government's action leaves reasonable economically viable use of the property."[33]

B. Criticisms of Penn Central*, its Progeny, and the Supreme Court's Approach to Regulatory Takings*

Unsurprisingly, one of the main criticisms of *Penn Central* is that it still does not give lower courts much guidance. More poignantly, however, the *Penn Central* decision and the Court's approach to interpreting regulatory takings has been criticized as an area of law and methodology of analysis that is beyond the Supreme Court's constitutional powers.[34] In his article, Schwartz identifies three primary methods of Constitutional interpretation—all of which he claims do not support the Court's regulatory takings interpretation. Those methods are (1) textualism, (2) originalism, and (3) evolutionary document theory.[35]

First, textualism, also referred to as strict constructionism, is defined as "a literal, plain meaning of the terms of the Constitution."[36] It has been argued that the text of the Fifth Amendment referring to, among other things, "private property"[37] limits takings analysis to things like appropriation of title or physical appropriation of property through the government's exercise of eminent domain.[38] Under this argument, the impact of a regulation on property is plainly beyond the Fifth Amendment's scope.

Second, originalism is defined as going beyond textualism insofar as it is "attempting to discern the intent of the framers or the public['s] understanding of constitutional text at the time it was ratified."[39] Generally, it has been argued that the original understanding of the Takings Clause had nothing to do with government regulation, and that it had everything to do with the government physically occupying or taking control of an individual's property.[40] Schwartz goes as far as to say that Justice Scalia, an

33. CHEMERINSKY, *supra* note 4, at 676.

34. *E.g.*, Andre W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENVTL. L.J. 247 (2015).

35. *Id.* at 255.

36. *Id.*

37. U.S. CONST. amend. V.

38. Schwartz, *supra* note 34, at 255-56.

39. *Id.* at 257.

40. *Id.* at 258 (citations omitted).

adamant defender of regulatory takings has all but admitted that the framers did not contemplate regulatory takings.[41] Specifically, Schwartz noted that Justice Scalia admitted as much in *Lucas v. S.C. Costal Council*,[42] where he said that before *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property" and that "[e]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all."[43]

Third, the evolutionary document theory is described as "propos[ing] that the Constitution establishes a general framework for effective governance of a nation destined to grow and change," but this growth and change is limited by the "core values embodied in the various provisions of the Constitution and the Declaration of Independence [which] tend to further both individual dignity and collective democratic activity."[44] There are three primary reasons for arguing that evolutionary document theory does not support the Court's approach to regulatory takings: (1) it is not supported by precedent, (2) it is contrary to the core values of the Constitution, and (3) the Court's concern for overbearing regulation is overstated.[45]Despite academic criticism of the Court's approach to regulatory takings, *Murr v. Wisconsin* shows the Court's willingness to soldier on.[46]

III. Statement of the Case

Murr v. Wisconsin is the Supreme Court's most recent decision interpreting and implementing its regulatory takings jurisprudence.[47]

A. Facts of the Case

This case involves two adjoining lots owned by the Murr family, one of which has a cabin built on it, and all of which rests along the St. Croix River in Wisconsin.[48] After the transfer of the parcels of land to the Murr children, Lot F being transferred in 1994 and Lot E in 1995, they sought to move the cabin on Lot F "to a different portion of the lot and [to] sell[] Lot

41. *Id.* at 257-58.
42. 505 U.S. 1003 (1992).
43. Schwartz, *supra* note 34, at 258 n.34 (citations omitted).
44. *Id.* at 259-60 (internal quotations and citations omitted).
45. *Id.* at 255-312.
46. 137 S. Ct. 1933 (2017).
47. *Id*.
48. *Id.* at 1940.

E to fund the project."[49] However, Wisconsin law prohibited them from doing so because the lots unified under common ownership principles.[50] A statute unifying lots is also known as a merger provision. The Murrs claimed that this prohibition constituted a regulatory taking, noting that the appraised value of the lots together was approximately $70,000 less than if they were allowed to sell the "lots as two distinct buildable properties. . . ."[51] The Circuit Court of St. Croix County granted summary judgment in favor of the state of Wisconsin because, among other reasons, the Murrs "had not been deprived of all economic value of their property."[52] The Wisconsin Court of Appeals affirmed this decision, and the Wisconsin Supreme Court denied review.[53]

B. Issue

Turning to whether a regulatory taking had occurred here, the Court posed a more narrow and important question: "What is the proper unit of property against which to assess the effect of the challenged governmental action?"[54]

C. Holding

The Supreme Court held that the State of Wisconsin's action did not constitute a regulatory taking.[55]

D. Decision of the Case

Because the facts in *Murr* technically involve more than one parcel of land, the Court had identified the relevant parcel or parcels of land involved before applying the three regulatory taking factors from *Penn Central*. Writing for the majority, Justice Kennedy identified an additional three factors for the Court to consider when determining the relevant parcel:

> First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. . . . Second, courts must look to the physical characteristics of the landowner's property. . . . Third, courts

49. *Id.* at 1941.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1941-42.
54. *Id.* at 1943.
55. *Id.* at 1949.

> should assess the value of the property under the challenged regulation.[56]

The Court ultimately determined that, taken together, these three factors tilted in favor of considering the land to be a single parcel and, as such, no regulatory taking occurred.[57]

E. Potential Implications of the Decision

On top of being a significant decision in terms of an affirming the "parcel as a whole" concept, *Murr* could have implications for Oklahoma's regulatory entities. Namely, this decision could significantly impact on the Oklahoma Corporation Commission's ("OCC") efforts to regulate injection wells in response to the increased level of earthquakes in Oklahoma.

IV. Criticisms and Commentary on the Case

One criticism of *Murr* is that it continues the Court's regulatory takings approach and failed to provide any clarity to what some perceive as a particularly messy area of law.[58] For example, it has been argued that the Court has failed to resolve an inherent tension between a state's ability to "define the contours of property rights" and the federal courts' interest in identifying and resolving regulatory taking issues.[59] In other words, although the Court gives much deference to states to define and shape the nature of property rights, the Court cannot give the states a "*carte blanche* to regulate away all the value of private property[, and doing otherwise] would render the protection provide by the Fifth Amendment's Taking Clause a dead letter."[60] This tension was reflected in *Murr* because of the State's merger provision which functionally resulted in a substantial devaluation of the siblings' interest, but the Court did not find that a regulatory taking occurred because of the merger provision.[61] Instead of solely deferring to state property law or holding "that property rights are not so malleable that the state can erase them simply because title changes hands," like in the case of the Murrs, it is argued that the Court

56. *Id.* at 1945-46.

57. *Id.* at 1948-50.

58. *See* Nicole Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, Cato Sup. Ct. Rev., 2016-2017 (2017) [hereinafter Garnett].

59. *Id.* at 132.

60. *Id.*

61. *Id.*

unnecessarily complicated things.[62] The Court turned regulatory taking law from a "muddle" to a "mudslide" because it "articulate[d] a multifactor balancing test that seeks, for the first time, to define 'property' as a *matter of federal constitutional law*."[63]

It is argued that this "mudslide" is problematic for a couple of reasons. First, when read in conjunction with the Court's holding in *Lucas*,[64] which indicates that a plaintiff will be more successful if they can prove a "total taking," *Murr* now incentivizes landowners to "define the relevant 'private property' narrowly [which] threatens the careful balance between property rights and government authority that our regulatory takings doctrine strikes . . . ."[65] Now, courts generally have a default position in not finding a taking where a plaintiff's property has not been *completely* taken. Surely, though, finding no taking should not be the outcome in a takings case when a person's property has been *substantially* devalued by a government regulation. The second reason it is argued that this "mudslide" is problematic is the fact that the Court had never before addressed the question of what the relevant parcel is in the context of a regulatory takings action where the State changed the parcel's boundaries through a merger provision.[66] This is problematic because it departs from an existing guidepost in the regulatory takings muddle—underlying state law.[67] Federal courts fundamentally defer to state law on issues concerning the contours and definitions of property interests.[68] That question, however, is now a subjective and potentially cumbersome analytical hurdle federal courts will now have to address which "decidedly tips the scales in favor of the government, further undermining the Takings Clause's already limited protection against regulatory excess."[69]

Similar to the "mudslide" issue, *Murr*'s critics also argue that the Court's decision endangers the concept of "property federalism."[70] This criticism

62. *Id.* at 133.

63. *Id.* For further discussion on the confusion Murr v. Wisconsin creates for the Supreme Court's approach to regulatory takings cases, *see generally* Lynn E. Blais, *The Total Takings Myth*, 86 Fordham L. Rev. 47 (2017).

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

65. Garnett, *supra* note 58, at 138 (citing *Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting)).

66. *Id.*

67. *Id.* at 139.

68. *See id.*

69. *Id.*

70. *See* Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, U. Pa. L. Rev. Online 53, 55-56 (2017).

rests on the concept that "the Constitution protects different interests in different jurisdictions, depending on the *content of state-specific law*."[71] For example, despite the traditional divide between the scope of federal and state protections, Brady argues that the first factor of *Murr*, which "invites courts to examine the treatment of property under 'reasonable' state and local law" does nothing more than inject other states' concepts of property law into a different state.[72]

Furthermore, another criticism of *Murr*, like those described by Garnett, is that *Murr* unnecessarily complicates regulatory takings law. At the core of that argument is this: *Murr* failed to return takings law to first principles.[73] The alleged departure from first principles stems from the Court's interpretations of the takings clause in cases like *Mahon* and *Penn Central* because those cases completely lack "*any* textual foundation in the takings clause."[74] According to Epstein, these cases are not sufficiently grounded in the text because they go too far beyond *physical* takings, which he argues is problematic because it "systematically encourage[s] the government to impose regulations with public benefits that are less than private costs imposed on the landowner."[75]

To correct the problem that the Court created with its regulatory takings approach, Epstein proposes a new, comprehensive test for the Court to adopt for its Takings Clause cases.[76] That test comprises of four questions to be addressed in chronological order:

> *First*, has there been a taking of private property? *Second*, if so, is it justified under the police power so that no compensation need be paid? *Third*, if not, has the taking been for a public use? *Fourth*, if so, has compensation, be it in cash or in-kind, been provided?[77]

In support of this four-question approach, Epstein alludes to Justice Roberts' dissent in *Murr* where the Chief Justice claimed that the recurring

71. *Id.* at 56 (emphasis added).

72. *Id.* at 66.

73. Richard A. Epstein, *Disappointed Expectations: How the Supreme Court Failed to Clean Up Takings Law in Murr v. Wisconsin*, 11 N.Y.U. J.L. & Liberty 151, 183-84 (2017).

74. *Id.* at 193.

75. *Id.*

76. *Id.* at 194.

77. *Id.*

focus of the Supreme Court's Takings Clause cases is on private property rights.[78]

Epstein goes further in his argument favoring a physical property focused Takings Clause by noting the difference in analysis between physical and regulatory takings in the compensation portion of the analysis. Unlike the regulatory taking context, Epstein notes that the compensation calculation for physical takings "does *not* include 'any supposed benefit that the owner may receive common with all from the public uses to which his private property is appropriated."[79] Valuing such benefits would pose a heavy burden on the condemnation system and it is unnecessary in the physical taking context because the person from whom the government is taking may also enjoy the public benefit of that taking.[80] On the other hand, the valuation analysis for the compensation portion of the Takings Clause becomes a more difficult question because "compensation is not needed when [the regulations] in question [secure] 'an average reciprocity of advantage' among all the relevant players."[81] Because this 'balancing' of costs and benefits to those being regulated, cash compensation would be less likely and, therefore, the government would be more inclined to engage in regulatory takings—the avoidance of which Epstein urges.[82]

V. Defense of the Court's Regulatory Takings Approach

A substantial portion of the literature responding to the Supreme Court's decision in *Murr* and previous regulatory takings cases is negative. However, completely abandoning the principles underlying the Court's current regulatory takings approach for a physical-taking approach would be inconsistent with the Court's jurisprudence. Simply put, the basic premise that the Takings Clause applies to situations where governmental regulation negatively impacts the value of property should remain. In fact, *Murr* presents a great example of why this premise should remain true.

Opponents to the Court's regulatory takings approach claim that the purpose of the Takings Clause is to protect against physical takings only. However, there is a problem with arguments like these and like those proffered by Epstein: Although the regulation in *Murr* is indeed just that, a

78. *Id.* (citing *Murr*, 137 S. Ct. at 1950 (Roberts, C.J., dissenting) ("Our decisions have, time and again, declared that the Takings Clause Protects private property rights as state law creates and defines them.")).

79. *Id.* (citing Monogahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893)).

80. *Id.* at 198-99.

81. *Id.* at 199 (citing Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922)).

82. *Id.*

regulation, limiting the Takings Clause ignores tangible consequences suffered by landowners that are tantamount to a physical taking.

Here, Justice Kennedy found that no compensable regulatory taking occurred, but a different outcome in a different case is just as plausible under the Court's framework for identifying the relevant parcel. Indeed, Uncle Sam did not overtly commandeer the Murr's property, but his intrusion was no less intimate. Just as if Wisconsin had annexed one of the lots the Murr's owned, the merger provision prohibited them from moving the cabin in the way in which they wanted.[83] Wisconsin has functionally removed one of the sticks in the Murr's bundle of rights as a matter of federal constitutional law. For that, and for the accompanying decrease in property value, they should be compensated if a court determined that the impact on their property value was greater than it was here. Such an outcome is nothing more than a reflection of the progression of property law in this country—we have moved towards recognizing increasingly abstract notions of what property is. Therefore, because the Court's framework provides for the possibility of a regulatory taking being found in a different case, the decision should stand. Even though the Supreme Court correctly adheres to its earlier regulatory takings approach, *Murr* presents some interesting challenges for Oklahoma energy regulation entities and property owners.

VI. The Oklahoma Corporation Commission (OCC)

A. OCC General Authority

Broadly speaking, the OCC has exclusive jurisdiction over promulgating and enforcing regulation over Oklahoma's oil and gas industry.[84] Specifically, the OCC enjoys the following jurisdiction, powers, and authority:

> The Corporation Commission is vested with exclusive jurisdiction, power and authority, and it shall be its duty, to make and enforce such rules and orders governing and regulating the handling, storage and disposition of saltwater, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing and operating of oil and gas wells and brine wells within the state as are reasonable and necessary for the purpose

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

84. *See generally* Okla. Stat. Ann. tit. 52, § 139 (West 2017).

> of preventing the pollution of the surface and subsurface waters in the state, and to otherwise carry out the purpose of this act.[85]

It is also worth noting that the Commission's authority under § 139 specifically includes governance over injection wells.[86] Under a plain reading of this statutory authority, the OCC should be considered the "state actor" regarding its rules and directives, especially those pertaining to injection wells and earthquakes.[87]

B. OCC and the Courts

In addition to the quasi-legislative and quasi-judicial authority delegated to the OCC, federal courts have deferred to it in litigation matters, including those arising out of disposal well operations.[88] One recent example of a federal court deferring to the commission comes by way of a case where an interest group sued disposal well operators for declaratory and injunctive relief, claiming that the increased number of earthquakes occurring in Oklahoma was caused by the operators.[89] Because of the OCC's expertise and specialization on such matters—and not the district court's expertise—the court dismissed the action.[90]

The OCC's authority to step in as a quasi-judicial entity is, however, limited in one important respect—its ability to preside over tort litigation. During an earthquake in 2011, a claimant said that she was injured when some debris fell from the fireplace in her living room.[91] The claimant filed a tort action for damages against injection well operators in the Lincoln County Oklahoma District Court; she claimed that because of the operators' actions, an earthquake caused her injuries.[92] The operators claimed the suit

85. *Id.* § 139(A).

86. *Id.* § 139(B)(1)(d)-(f).

87. *Id.* § 139.

88. *See* Sierra Club v. Chesapeake Operating, LLC, 248 F. Supp. 3d 1194 (W.D. Okla. Apr. 4, 2017); Adam Wilmoth, *Lawsuit dismissed over Oklahoma earthquakes*, THE OKLAHOMAN, (Apr. 5, 2017, 12:00 AM), http://newsok.com/article/5544276.

89. *Sierra Club*, 248 F. Supp. 3d at 1198.

90. *Id.* at 1207 ("The short of the matter is that the OCC, aided, if necessary, by other agencies (including the United States Geological Survey and Oklahoma Geological Survey) and researchers, is better equipped than the court to resolve the seismicity issues relating to disposal well activities, 'by specialization, by insight gained through experience, and by more flexible procedure.'") (citing Far E. Conference v. United States, 342 U.S. 570, 575 (1952)).

91. Ladra v. New Dominion, LLC, 353 P.3d 529, 530 (Okla. 2015).

92. *Id.*

should be dismissed because the OCC had exclusive jurisdiction over cases "concerning oil and gas operations."[93]

On appeal, the Oklahoma Supreme Court acknowledged the OCC's exclusive jurisdiction over "the exploration, drilling, development, production and operation of wells used in connection with the recovery, injection or disposal of mineral brines."[94] Despite this statutory authorization of exclusive jurisdiction over certain matters, the Oklahoma Supreme Court duly noted that the OCC's jurisdiction does *not* include "authority to hear and determine disputes between two or more private persons or entities in which the public interest is not involved."[95]

Therefore, while Oklahoma district courts may not impede "upon the orders, rules and regulations"[96] of the OCC, state district courts are inherently the appropriate venues in which to bring tort cases such as the one brought in Lincoln County.[97] Further still, it is beyond the OCC's jurisdiction to hear such tort cases.[98] In other words, while *regulation* of the oil and gas industry is the OCC's "turf," litigating and providing remedies for common law rights are the province of state district courts.[99]

C. OCC Oil and Gas Regulations

Acting under its broad authority, the OCC has issued a directive aimed specifically at the relationship between injection wells and increased earthquake activity in the state. Specifically, the Commission identified an "Earthquake Area of Interest" and intended to limit "the growth in future disposal rates" in this area.[100] Following such directives, the OCC claims that the number of earthquakes has decreased.[101] The OCC's efforts to reduce earthquake activity has gone beyond focusing on disposal to

93. *Id.*

94. *Id.* (citing Okla. Stat. tit. 17, § 52 (2011)).

95. *Id.* (citing Rogers v. Quiktrip Corp., 230 P.3d 853, 857 (Okla. 2010) (footnote omitted)).

96. Okla. Stat. tit. 52, § 111 (2011).

97. *Ladra*, 353 P.3d at 531.

98. *Id.* at 532 (citing Kingwood Oil Co. v. Hall-Jones Oil Corp., 396 P.2d 510, 512 (Okla. 1964)).

99. *Id.* (citing NBI Servs., Inc. v. Ward, 132 P.3d 619, 626 (Okla. Civ. App. 2006)).

100. OKLA. CORP. COMM'N, LOOKING AHEAD: NEW EARTHQUAKE DIRECTIVE TAKES AIM AT FUTURE DISPOSAL RATES 1 (2017), http://www.occeweb.com/News/2017/02-24-17%20FUTURE%20DISPOSAL.pdf.

101. *Id.*

activities like well completion operations;[102] it now claims that mitigation efforts regarding well completion operations have also had an impact on earthquake activity. In support of the OCC's migratory efforts, Dr. Jeremy Boak, Director of the Oklahoma Geological Survey claimed that where these mitigation efforts have taken place, "earthquake activity either stopped quickly or tapered off and stopped soon after" the directive was implemented.[103]

VII. Injection Well Regulation Under Murr's "Parcel-as-a-whole" Framework and the Courts' General Approach to Regulatory Takings.

A. Background

Continuing its trend of addressing the earthquake problem, the OCC has, for example, expanded its injection well volume reductions as of August 2017 to three wells in the Edmond area by ninety-five percent of their current injection.[104] It is unclear, and probably unlikely, that the *Murr* court contemplated the unique factual circumstances presented by injection well regulations. However, it appears that the "parcel as a whole" analysis would apply should a regulatory taking issue emerge. Having said that, one unique issue arises when considering well disposal regulation by the OCC because of the way it appears that the regulation measures who and what it will affect. For example, it appears that the Commission measures the area which injection will be reduced by the radius around the area where earthquake activity has been located.[105]

To more fully understand the issue posed by relying on the radius from a point at which an earthquake emanates, some background information on how injection wells work and are regulated is instructive. It is first worth mentioning that focusing on injection wells is appropriate because the OCC's preliminary evidence indicates that seismicity linked to deep injection—as opposed to well completion—is "more numerous and often [involves] far larger quakes."[106] As for the wells themselves, an "injection

102. Press Release, Oklahoma Corporation Commission, Managing Risk: OGS, OCC, Industry collaboration bears fruit, 1-2 (June 27, 2017), *available at* https://earthquakes.ok.gov/wp-content/uploads/2017/06/06-27-17-OCC_OGS-News-Release.pdf [hereinafter OCC Press Release].

103. *Id.*

104. OKLA. CORP. COMM'N, MEDIA ADVISORY – FURTHER REDUCTION IN EDMOND DISPOSAL WELL VOLUMES, http://earthquakes.ok.gov/wp-content/uploads/2017/08/08-09-17ADVISORY.pdf.

105. *Id.*

106. *See* OCC Press Release, *supra* note 102, at 1.

well" for purposes of this note will refer to several things. First, this note focuses primarily on the OCC's regulation of injection wells described in Title 52, section 139(B)(1) of the Oklahoma Statutes. Commonly, these injection wells are known as "Class II Wells."[107] A Class II Well is simply an injection well[108] that is related to Oil and Gas, but Class II wells are divided into three main types: (1) disposal wells, (2) enhanced recovery wells, and (3) hydrocarbon storage wells.[109] First, disposal wells reinject brines that previously brought to the surface during normal oil and gas extraction.[110] Also included in the disposal well category are those that involve wastewater injections associated with hydraulic fracturing.[111] Second, enhanced recovery wells are those wells that inject fluids into formations to recover oil.[112] Third, hydrocarbon storage wells, as the name might indicate, store liquid hydrocarbons in underground formations.[113]

Although there are several different "types" of injection wells, the Commission's regulations and directives regarding these wells in its effort to combat earthquakes appear unified by one thing—the radius from a point which earthquakes linked to injection well operations originate. Because *Murr* offers a new approach and a new balancing test to our understanding of "property" and relevant parcels in terms of the Takings Clause, several questions remain unanswered when considering the OCC's regulatory approach to injection wells as preventative measures against earthquake activity. For example, is the use of the radius from an earthquake's location a "reasonable expectation[] [that] an acquirer of land must acknowledge" in terms of expecting "legitimate restrictions affecting his or her subsequent use and dispensation of the property" when selecting a site for an injection well?[114] Moreover, do the other two *Murr* factors "fit" squarely with the OCC's "radius approach" to regulating injection wells? The fact that the "radius approach" fails to specifically address parcels owned by more than

107. Okla. Stat. Ann. tit. 52, § 139(B)(1)(f) (West 2017).

108. Defined as "A bored, drilled, or driven shaft whose depth is greater than the larges surface dimension; or, a dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system." 40 C.F.R. § 144.3 (2011).

109. Envtl. Prot. Agency, Underground Injection Control (UIC): Class II Oil and Gas Related Injection Wells, EPA.GOV, http://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells (last visited Mar. 24, 2018).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

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

one landowner complicates this question. It is doubtful that the Court in *Murr* contemplated these questions, so future litigation regarding this issue is quite unpredictable.

B. Application of Murr's Parcel-as-a-whole Concept

The newly adopted, federal approach to the parcel-as-a-whole concept presents a unique problem in the injection well context. To demonstrate the problem, suppose the following: An individual owns a rather large piece of land in Oklahoma that consists of more than one contiguous parcel, and the landowner uses it for different purposes. In this case, if the OCC implements a regulation prohibiting the use of injection wells on part of the parcel, and the landowner described has an injection well on *only one* small portion of one of the parcels due to the topography, usage, or some other limitation of the land, the landowner could be effectively prohibited from placing injection wells on all of her property. A scenario like this is arguably already within the Court's contemplations in *Murr*, but the fact that the Murrs did not prevail would give the above described landowner cause for concern that an OCC regulation may completely bar her from using injection wells on her parcels.[115]

Consider another example: A landowner has a small business operation which happens to have one injection well on the property. If the injection well is the only thing keeping the business operation viable and the OCC prohibits injection wells in that location, the business owner cannot say with any certainty that they are protected by *Murr*. *Murr* is, instead, concerned with the change in the overall value of the property, not whether someone's business fails because of regulation. Alternatively, suppose the worst. Even entertaining the idea of a situation where the OCC prohibits injection wells and all other oil and gas operations on all a landowner's property, the consequence of *Murr* is that the inevitable decrease in property value will be valued against the entire property's value. This calculation does not appear to change even though the landowner's mineral rights have been all but taken away. Admittedly, these would extreme and rare examples, but they demonstrate how flexible *Murr* allows a court's judgment to be in terms of whether a taking has occurred.

Another consequence of adopting the parcel-as-a-whole concept is that it appears to place a new burden of expectation on landowners. The question

115. To be sure, *Murr* is a bit different than this example because of the State merger provision, but the outcome in the case appears to indicate that landowners now have a harder time proving a regulatory taking has occurred.

that arises here is this: When the Court says in *Murr* that the "reasonable expectations of an acquirer of land [regarding] restrictions affecting his or her subsequent use"[116] of that land must be considered when determining the parcel relevant for takings analysis, what is a "reasonable expectation?" Further, is it really appropriate for a federal court—rather than a state legislature—to tell landowners what they should reasonably expect to encounter as a landowner?

Given the media coverage of earthquakes, fracking, and injection wells in Oklahoma, must a landowner now reasonably expect that their land will be regulated by the OCC for that purpose? If so, does such an expectation change the way OCC would value property in its compensation calculation? All these questions are unanswered by the court in *Murr*, thus leaving landowners and regulators with an uncertain future.

Notably, these complications are unlikely to be resolved in favor of landowners. Analogously, even before *Murr*, oil and gas operators engaging in hydraulic fracturing were unlikely to prevail in takings cases when regulators did not place complete bans on the practice.[117] Importantly, it does not appear that placing a total ban on injection well operations is a strategy the OCC has taken yet. This, combined with Oklahoma federal courts' deference to the OCC on regulatory matters, signals a challenge for Oklahoma landowners in the wake of *Murr*. Further still, the fact that the Supreme Court has now adopted the parcel-as-a-whole concept clouds any predictive analysis previously available to landowners thinking about suing the OCC.

VIII. Conclusion

To the extent that the Supreme Court adhered to fundamental principles underlying earlier Takings Clause cases, the Court correctly decided *Murr*. However, adding another multi-factor test to the equation while functionally adopting the parcel-as-a-whole concept as a matter of federal constitutional law will add complications for Oklahoma landowners. Whether the OCC will use *Murr* as a tool to regulate away injection wells to combat seismic activity is yet to be seen. Ultimately, if the OCC does

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

117. *See* Mark S. Barron, *Constitutional Protections for Mineral Interst Holders: Oil and Gas Regulation and the Takings Clause*, 61 ROCKY MT. MIN. L. INST. 13-1 (2015), *available at* http://www.bakerlaw.com/files/uploads/Documents/News/Articles/LITIGATION/2016/Energy/Barron-Ch-13-01-19-2016.pdf.

increase such regulations, landowners who choose to bring a regulatory takings case to federal court in Oklahoma face an uphill battle.