



Supreme Court Confusion Could Cost a Family \$410,000

The justices have an opportunity to clarify the muddle of 'regulatory takings' law.

Roger Pilon

March 20, 2017

As confirmation hearings begin this week for Judge Neil Gorsuch, the Supreme Court will be considering one of the most important property-rights cases to come before it in a long time. The pity is that without Judge Gorsuch on board, a 4-4 court could leave in place decades-old precedents that have made a mash of the Fifth Amendment's Takings Clause, which prohibits government from taking private property for public use without just compensation.

Monday's case, *Murr v. Wisconsin*, was brought by four siblings, the Murrs, who inherited two contiguous 1.25-acre lots on the St. Croix River. Their parents had built a home on the first lot and later purchased the second lot as an investment.

The trouble began in 2004, when the Murrs sought to sell the second lot, valued at \$410,000. They planned to use the proceeds to upgrade their ancestral home. But they were blocked by a local zoning ordinance, passed years after the original purchases. Because the two lots were contiguous and in common ownership, the ordinance treated them as one—even though they had long been deeded and taxed separately.

Under the ordinance, the Murrs had to sell the lots together or not at all. And they couldn't build on the second lot, even though homes could be built on similar lots nearby that had been grandfathered in. In short, they were out \$410,000.

This is a classic "regulatory takings" case, with a twist. When government condemns property for public use, such as to build a road, it has to compensate the owner. But what if it simply takes

most of the land's uses through regulation, leaving the owner with a virtually worthless title? That has been happening in America for decades.

Owners rarely are compensated because a 1978 Supreme Court decision, *Penn Central v. New York*, provided a complicated “balancing test” that nobody understands. As Justice Anthony Kennedy wrote in a 1998 decision: “Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.”

For the Murrs, another of the court's errant “regulatory takings” decisions also comes into play—one in which the plaintiff won, no less. In *Lucas v. South Carolina Coastal Council* (1992), a 5-4 court held that David Lucas was entitled to compensation because a newly enacted state law prohibiting him from building on his property had effectively wiped out all of the land's value.

The problem with this “wipeout” rule is that most regulations do not destroy all value. Justice John Paul Stevens, dissenting in *Lucas*, called the rule “arbitrary” since “the landowner whose property is diminished in value 95% recovers nothing.” Justice Antonin Scalia, writing for the court and citing *Penn Central*, responded tersely: “Takings law is full of these ‘all-or-nothing’ situations.”

The “wipeout rule” would seem to work in the Murrs' favor. But here's the twist: *Penn Central*'s balancing test must be applied to “the parcel as a whole,” not to some portion of it. If the Murrs' two lots are treated separately, as they are deeded and taxed, then the value of the second lot has been eliminated and they are entitled to compensation. But if the lots are combined, as the zoning ordinance does, then the total parcel retains some of its value, and no compensation is owed. Thus, the question is whether the state can duck paying the Murrs simply by treating the two parcels as one.

A court interested in straightening this law out would revisit both *Penn Central* and *Lucas*. Treatises have been written on the ad hoc rulings that followed *Penn Central*, although as one scholar has observed, “the muddle never quite seems to stop the government from winning.”

And *Lucas*'s “wipeout rule” has things upside down. Lawyers often liken property to a “bundle of sticks” to describe the countless legitimate uses that can be made of it. That is how “property” is understood in every area of the law except regulatory takings. Courts should not wait for the last stick to be taken, and all value wiped out, before requiring compensation under the Fifth Amendment.

Judge Gorsuch—having studied natural law, from which the common law of property grew, at Oxford—understands these issues. His presence on the court will be a welcome development.

Mr. Pilon is vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.