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Another bleak Supreme Court decision for property rights

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Property owners have long suffered under the Supreme Court's erratic rulings. It got worse last Friday when the court ruled against owners who wanted simply to sell their property.

Both facts and law in *Murr v. Wisconsin* are complicated. But in a nutshell, the Murrs, four siblings, inherited adjoining lots on the St. Croix River that their parents had purchased at separate times in the 1960s, building a home on one and keeping the other as an investment. Deeded and taxed separately, the two lots remained so to the present.

But in 1975 a local zoning ordinance combined the lots. The effect, as the Murrs discovered in 2004 when they sought to sell the investment lot (valued at $410,000), was to prohibit them from doing so unless they sold the other lot and house with it. So they sued under the Fifth Amendment's Takings Clause, which prohibits the government from taking private property for public use without just compensation.

In effect, the ordinance had taken their right to sell that lot, one of the basic rights of property. The case is no more complicated than that. Under the Constitution's Takings Clause they should have been compensated for their loss.

So, why did they lose? Here things get really complicated because the Court's "regulatory takings" law is a morass. A 1922 decision, for example, held that if a regulation goes "too far" it constitutes a taking. Things haven't gotten much clearer since, and Friday's decision, written by Justice Anthony Kennedy, made it only worse.

In brief, to decide *Murr* the Court turned mainly to a 1978 decision, *Penn Central v. New York*, which had introduced a three-part "balancing test" to determine whether a taking has occurred. Under it, a court must weigh a regulation's economic impact on the property, its interference with investment-backed expectations, and the character of the government action. And the crucial point here: Those factors must be applied to "the parcel as a whole."

No one knows what those factors mean or how to apply them. But hold that last point, because a second precedent has to be considered.

In a 1992 decision, *Lucas v. South Carolina Coastal Council*, the Court held that an ordinance prohibiting the plaintiff from virtually all rightful uses of his property constituted a taking

because it wiped out all of the property's value. The problem with this "wipeout" rule, of course, is that most regulations leave at least some value in the property. When the dissent objected to the rule, Justice Antonin Scalia, writing for the Court, responded tersely, "Takings law is full of these ‘all or nothing' situations."

Go back now to the Murrs. If their lots are treated separately, as the separate deeds and taxes have long implied, then all value in the investment lot has been wiped out by the 1975 ordinance and the Murrs, under *Lucas*, are entitled to compensation for the taking. But with the two lots combined as one, value remains in "the parcel as a whole," under *Penn Central*. So putting the two precedents together, the state can escape paying the Murrs any compensation unless the *Penn Central* balancing test saves them.

It did not, said Justice Kennedy in an opinion that muddied the waters even further. In his dissent for himself and Justices Clarence Thomas and Samuel Alito (Justice Neil Gorsuch took no part), Chief Justice Roberts dissected Kennedy's opinion but did little more. In fact, Roberts wrote that the Court's holding "does not trouble him," only its reasoning. He would have vacated the judgment below and sent the case back for that court to identify the "relevant property" (the single, or the combined lots) using Wisconsin property law.

But that law is precisely the problem. If the state can wipe out pre-existing rights simply by issuing a later ordinance, and thereby escape the requirements of the Takings Clause, that guarantee is a dead letter.

Only Thomas seemed to appreciate that. He joined the dissent because, as he wrote, "it correctly applies this Court's regulatory takings precedents." But he went on to say that the Court should take a fresh look at those.

Why? Because the Court "has never purported to ground [its] precedents in the Constitution as it was originally understood."

Therein lies the problem with so many of the Supreme Court's decisions, and not only in the area of property rights. There is all the difference in the world between modern "constitutional law" and the Constitution itself.

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