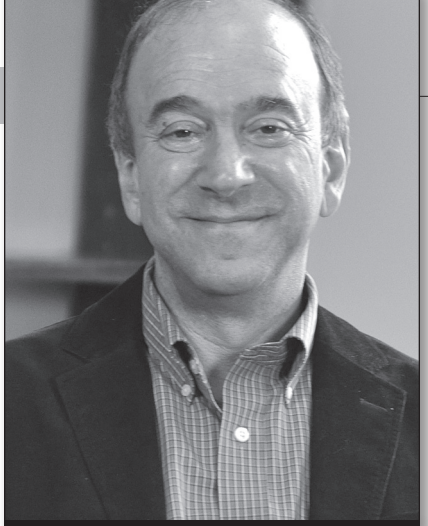
A Big Blow Against the "Regulatory Takings" Economic Loss Argument



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In *Murr v. Wisconsin & St. Croix County,* Justice Anthony Kennedy delivered this past June both a significant environmental law opinion for the Supreme Court and a reminder of the stakes should he follow through on his rumored plan to leave the bench next summer. (Disclosure: I served as counsel of record for respondent St. Croix County).

Petitioners in *Murr* argued that St. Croix County had unconstitutionally taken their property without just compensation by declining permission to build a house on each of their two contiguous lots bordering the St. Croix River, designated a Wild and Scenic stream under federal law. Neither lot, standing alone, had sufficient acreage to build a home under development restrictions first imposed by the county in the 1970s. But because both lots were created prior to the enactment of those restrictions, a grandfather clause allowed for construction notwithstanding the absence of sufficient buildable acreage. For this reason, had the two lots been owned by different people, those distinct owners could have built a home on each lot, just as the Murrs proposed to do.

But the grandfather clause contained its own limitation and did not apply when, as was true for the Murrs, the two substandard lots were both adjacent and commonly owned. Under Wisconsin law, in that circumstance, the two adjacent lots were "effectively merged" and the owner of the two lots could build only one house on either of the two lots (or straddling them both) but not a separate house on each. According to the Murrs, the county's denial of permission to build a house on each lot amounted to a regulatory taking of the lot on which no house was allowed.

The issue before the Supreme Court was how to measure the extent of petitioners' loss in evaluating the merits of their takings claim. The Murrs contended they had suffered a complete economic wipeout of whichever of the two lots they could not build upon.

The county and state both responded that the proper measure for the Murrs' economic loss was instead to compare the value of two lots together, with only one house allowed on the two lots, with the value of the two lots together assuming a house was allowed on each. Based on this second comparison, the Murrs had lost value — because the two lots would be worth more with two homes than one — but they had not suffered a devastating loss. Indeed, the state courts had found that there was only about a 10 percent reduction in value because prospective buyers would pay a premium for a larger (two lots joined) piece of property adjacent to the scenic St. Croix River.

But Justice Kennedy's potential departure would be a big loss for environmental litigants

The Supreme Court agreed with the state courts that it was appropriate to consider the value of the two lots together and that no regulatory taking had occurred. The Court's ruling is highly significant for at least two reasons.

First, the result was very different from that many anticipated when the Court granted review in January 2016. Then, Scalia was still on the Court and it was well known that he had long been looking for a case to embrace the very theory of measuring economic loss proffered by the *Murr* petitioners. There was also good reason to believe that Kennedy was on board, given that he had written an opinion for the Court in 2003 that pointedly questioned the validity of joining a landowner's distinct lots in evaluating a regulatory takings claims. In *Murr*, Scalia seemed to have both found his case and his majority.

Second, Kennedy's *Murr* opinion was far more than a lost opportunity for property rights advocates. The Court's rationale in favor of the broader geographic focus was sweeping. Kennedy rejected not only the landowner's argument but also the state of Wisconsin's narrow theory of affirmance. The latter, relying on peculiarities of Wisconsin law, included a poison pill that risked disadvantaging government regulators in the vast majority of future takings cases.

The *Murr* Court embraced the county's more flexible "objective" test for defining the geographic scope of property in measuring economic loss. The new test considers how "unity of use" enjoyed by some properties creates value when otherwise distinct properties are, like petitioners', joined. It also acknowledges that land use restrictions can promote economic value by preventing environmentally destructive development.

In 1992, Scalia authored the opinion in *Lucas v. South Carolina Coastal Council* that held that land use restrictions that cause an economic wipeout of landowner value are per se takings. But in *Murr*, almost 25 years later to the day, Kennedy, who declined to join the *Lucas* majority, announced a test for measuring economic value that sharply limits *Lucas*'s practical significance. *Murr* accordingly further burnishes Kennedy's environmental law legacy while also making clear the significance of his rumored departure from the Court, presumably at the end of the 2018 term.