

## I. MURR

Murr v. Wisconsin, argued before the SCOTUS, 20 Mar. 2017, decided 23 Jun. 2017.

For an aerial view of the property click [here](#).

1. What is the Murrs' 'total deprivation' argument?
2. How does the majority answer that argument?
  - a. Begins (IIA) with a summary of takings law which boils down to Lucas and Penn Central.
  - b. (IIB) conceptual severance is no good (Penn Central) but state-law definitions of the relevant parcel must not always be accepted (Palazzolo).
  - c. Multi-factor analysis of what is the property (IIIA): (i) how the land is bounded or divided under state law, (ii) physical characteristics of the land, (iii) effect of the reg on the value of the property with reference to to the effect also on other holdings.
  - d. (IIIB) the state's position that the state law controls the definition of the parcel and the parcel has now been defined as lots E and F together, that in turn goes to expectations, the regs were in effect when the merger occurred. The petitioners position also no good, because it denies to the state the power to change the lot lines. The merger provision is reasonable. Everybody does it.
  - e. (IV) defining the property in question as Lots E and F combined, the case is a piece of cake: (a) could have been anticipated; (b) physical characteristics; (c) they get some benefit from the merger; (d) 10% reduction in value or F=\$373,000 with cabin, E-\$40,000 as undevelopable lot vs. \$698,300 combined.
3. Is Chief Justice Roberts' dissent really a dissent? So what's his beef?
4. Thomas' separate dissent.
5. Should the paranoid planner be concerned?

## II. KELO

*Kelo* (5–4, Stevens writing for himself Kennedy, Souter, Ginsburg, Breyer; Kennedy in a separate concurring opinion; O'Connor for herself, Rhenquist, Scalia and Thomas in dissent; Thomas in dissent all by himself)

Mrs. Kelo's property today? <https://www.google.com/maps/@41.3453818,-72.0958996,3a,75y,180h,90t/data=!3m4!1e1!3m2!1seuQs9rQdMOn-aRie5lGEXw!2e0>

1. Two cases lurking in the background of *Kelo*: *Berman v. Parker* (1954) and *Hawaii Housing Authority v. Midkiff* (1984). *Berman* involved a slum-clearance project in Southeast Washington, D.C. It is important both because it holds that planners may take into account aesthetics, at least when they are determining how large an area to clear using the condemnation power, and that the fact that Berman's building was not itself slum housing—it was an up-to-code commercial building—did not mean that they could not take it along with surrounding properties if that made redevelopment easier to achieve. *Midkiff* was more complicated. It involved a huge land redistribution scheme, making use of the eminent domain power, that the state undertook in order to reduce the concentration of power that had accrued to relatively few landowners in the state.
2. Granted that *Berman* and *Midkiff* were on the books, who's got the better of the argument between Stevens and O'Connor?

3. Justice O'Connor not only joined in the majority opinion in *Hawaii Housing Authority v. Midkiff*; she wrote it. Did she just get more conservative after 21 years?
4. “In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State’s land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State’s most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 232, 81 L. Ed. 2d 186, 104 S. Ct. 2321. The Hawaii Legislature had concluded that the oligopoly in land ownership was ‘skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare’, and therefore enacted a condemnation scheme for redistributing title. *Ibid.*”
5. What do we make of Justice Kennedy’s concurrence? (Note he was necessary to make up the majority in addition to Stevens, Souter, Breyer, Ginsburg, but he says that he concurs in the majority opinion.)
6. That brings us to Thomas all by himself. In parsing the words of the constitution he has one good point (about negative inferences) and one bad one (the original meaning of the word ‘use’).
7. “nor shall private property be taken for public use, without just compensation.”
8. He would neither (i) interpret use broadly nor would he (ii) defer to the legislature. Thus, he would overrule both *Berman* and *Midkiff*. This is radical stuff, and I think it highly unlikely that the court will go that far.
9. Now that we’ve got some better idea of what may be at stake here, can we see how this case relates to the regulatory takings cases with which we have been dealing? How do the majority and dissents differ on this on this question?
10. Many states have a more limited eminent domain power whether as a matter of prior state constitutional law (written in or interpreted) or as a matter of a reaction to this case, which was quite extreme.
11. The fact is that just compensation doesn’t justly compensate.

### III. SUMMARY, SOME THEORY, AND THE FUTURE

1. Takings Overview
  - a. Purpose vs. method
  - b. General vs. specific
  - c. General vs. as applied
    - i. it’s not rationally applied – *Nectow*
    - ii. there’s been a total deprivation of value – *Mahon, Lucas*
    - iii. there isn’t a sufficient corresponding benefit – state cases holding wetlands zoning unconstitutional on these grounds; transfer development rights in *Penn Central*
2. Some theory – B. Ackerman, *Private Property and the Constitution* (1977)
  - a. utilitarian “scientific policy making”

Regulation should be judged on the basis of whether the sum of the benefits it produces exceeds the sum of the costs it produces.
  - b. Kantian “scientific policy making”

Begins with the same requirement as the utilitarian but adds the proviso “so long as no individual is made worse off as a result of the regulation.” (If this sounds to you more like Pareto than Kant, you are in good company.)

c. Under either what counts as a cost and what a benefit?

The utilitarian must take into account is the frustration of expectations that would result from depriving someone of the benefits that he or she expected to achieve or imposing costs that he or she did not expect to incur. The Kantian must take into account as a benefit the benefits that the person who bears the cost of the regulation gets. (The highway took away my front yard but I was able to sell the remaining property to a gas station for five times what I could have gotten for the whole thing prior to the highway.) The Kantian must also take into account the benefits that the person gets from living in an ordered society. (I may not get as much benefit from a residential-use only restriction as it costs me, but I get a lot of benefit from the efficient garbage collection in the town which all my neighbors help pay for.)

d. separation of powers – passive vs. activist

All judges in our system are bound to defer to what the legislature has done. For some (the “passive”) the deference is very strong. Whether they follow a utilitarian or a Kantian approach, their notion is that, by and large, the legislature is more likely to get it right than they are. For others (the “activist”) the deference is less strong. Whether they follow the utilitarian or the Kantian approach, their notion is that the legislature, though entitled to respect under a democratic system, may get it wrong a sufficient number of times that the inquiry is worthwhile. While passive and activist judges can be found in both the utilitarian and Kantian camps, Kantian judges are more likely to be activist because legislatures are more likely to submerge the individual in the collective.

e. process costs – institutional competence and hypothetical vs. real deals

All judges (and, indeed, all policy-makers) must take into account the fact that we cannot always determine where the benefits and the costs lie, and even if we can determine this, we cannot always make the adjustments that our theory demands (what Ackerman calls “process costs”). Process costs have a number of implications. The first has to do with whether the judge is likely to take an activist or a passive stance. Neither the legislature nor the judiciary is likely to be able overcome the process costs of determining the exact sums of the benefits and the costs, but many judges feel that the comparative advantage lies with the legislature, both because it can ask questions that are traditionally prohibited to judges and also because the way in which the legislature is chosen is more likely to reflect people’s reactions to the choices that legislators have and will make. The second effect of process costs is more specifically on the Kantians. Suppose that we determine that there is group of individuals who will be made worse off by a given regulation. We also know, however, that the sum of the benefits from the regulation far exceeds the sum of the costs and that, if there were a way to do it, transfer of some of those benefits to the individuals who bear the costs would make them more than whole. The problem is that accomplishing this would eat up more in process costs than the transfer is worth. The Kantians may now be divided between those who will accept the hypothetical transaction (the Kaldor-Hicks modification to Pareto) even though it cannot be achieved in practice and those who insist that the regulation be struck down if the transfer cannot be achieved.

3. Why were we not talking about these cases in those terms?

While we may disagree about issues of deference and process costs and about whether one should take a basically utilitarian or a basically Kantian approach, we have the sense that we are dealing with the real issue when we speak in these terms. We aren’t,

of course, dealing with the real issue because the law is so far away from being able to speak in these terms. The reason that it is so far away is that the legal conception of “property” is far away from the “benefits” of both utilitarian and Kantian analysis.

4. Legal vs. social property: the Highway Dep’t vs. the Air Force

The legal conception of property is also not completely in accord with the social conception of property. Ackerman gives the example of overflights as being a situation where the law sees a trespassory invasion whereas the social concept of property may not, unless the overflight is very close to the ground. If the Highway Department puts a road in my front yard, it has to pay for it. The legal and the social agree. If the Air Force (or United Airlines) flies over my property at 10,000 feet, few, if any, ordinary people would see that as a trespass. But it is a legal trespass if we take at all seriously that whoever owns the surface owns all the way to heaven and all the way to hell. It took some doing in the last century to arrive at the notion that airplanes flying above minimum altitude have an easement of passage. Ordinary people would probably find the *Causby* case a bit closer, because the flights were so close to the ground and did such obvious damage. It took a Supreme Court case to decide that compensation was owed here, but the problem for the Court was not whether this was a trespassory invasion; that was assumed; the problem was figuring out whether that trespassory invasion was privileged, because it was made by the government and in war time. Be that as it may be, the legal conception of property, as the following examples show, is a lot closer to the social than it is to the “benefits” of either type of scientific analysis.

5. Legal and social property vs. “scientific policy making”

a. The two Cadillacs

- i. one has to be turned over to the government
- ii. one is very heavily taxed
- iii. one has to be kept in the garage

Suppose that we finally decide that the dangers to the environment and the consumption of fuel caused by automobiles are simply too great. We’ve got to cut down on driving cars. In the first attempt to do so we pass a statute that says that everyone who owns two cars will turn one of them over to the government. Has there been a taking? Of course, in both the legal and the social senses. Now suppose that rather than having the second cars turned over to the government we simply impose a very heavy tax on the ownership of a second car, so heavy that the effect of the tax approximates that of requiring that it be turned in to the government. Has there been a taking? Almost certainly not, in both a legal and a social sense. Now suppose that instead of taxing second cars or having them turned in to the government a regulation is passed requiring that second cars be kept in the garage. A taking? Well, maybe. It’s certainly not as clear as the other two cases. Perhaps we might want to say that where the owner has been deprived of all reasonable use of his property there has been a taking. But from the point of view of “scientific policy-making” all three situations are virtually the same. The purpose of the regulations is the same; their effects are the same. Whether or not they meet the policy-makers’ criteria will not depend, normally, on the fact that appropriation is the mechanism used in the first case, taxation in the second and regulation of use in the third.

b. Hamburger Heaven and residential zoning

- i. Hamburger Heaven is already there
- ii. the land is undeveloped

A more realistic hypothetical. A small commercial establishment is operating in an area that is now zoned residential. If the establishment is required to shut down, has there been a taking? The question is not open-and-shut, but as we saw in our discussion of non-conforming uses, there is considerable uneasiness with land-use regulation that requires changes in existing uses. Now let us suppose the same piece of land in the same area, but the commercial establishment has not been built. The zoning regulation is passed. A taking? Certainly not. Yet I put to you that in terms of their effect on the landowner the two regulations are almost exactly the same. Certainly in terms of their effect on the value of the land (as opposed to the value of the fixtures, a somewhat different problem) the regulations are the same. From the point of view of “scientific policy-making,” the two situations will be treated as the same. From the point of view of legal and social property they are markedly different.

Our privileging of “property” expectations over other kinds of expectations and our intimate association of “property” with tangible things makes “scientific policy-making” in this area difficult, if not impossible.

6. The Future?

Where we go from here depends on five virtually unknown quantities: Roberts, Alito, Sotomaior, Kagan, Gorsuch, and Kavanaugh. One need not assume that the first two and last two named will lead to a move to more opposition to regulation. What we learned about the first four in *Murr*, however, does suggest that the crude conservative-liberal divide in this area is being maintained. The one thing that I think we can with a reasonable amount of certainty is that *Penn Central* is still good law. There were those who had their doubts after *Lucas*. It seems reasonably clear that *Lucas* will be confined to its facts, and those might not even be the facts of *Lucas*.