Volume 30 | Issue 1 Article 5

3-1-2019

How to Decide Whose Bank Pays: The Impact of Supreme Court Takings Jurisprudence on Environmental Regulations

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HOW TO DECIDE WHOSE BANK PAYS: THE IMPACT OF SUPREME COURT TAKINGS JURISPRUDENCE ON ENVIRONMENTAL REGULATIONS

I. INTRODUCTION

The Fifth Amendment to the United States Constitution, in part, prohibits the federal government from taking private property "for public use, without just compensation."[1] This provision, known as the Takings Clause, also applies to state governments through the Fourteenth Amendment's Due Process Clause, which states that "[n]o State shall . . . deprive any person of . . . property without due process of law."[2] The purpose of the Takings Clause is to ensure that the government does not place a disproportionate economic burden on a private person.[3]

In the early years of the United States' history, courts viewed takings as "physical acquisitions of property by the government."[4] This physically-oriented view of takings began to change in the early twentieth century when the Supreme Court of the United States decided *Pennsylvania Coal Co. v. Mahon*.[5] *Pennsylvania Coal* intro-

1. U.S. CONST. amend. V (defining rights pertaining to civil legal procedures).

2. U.S. CONST. amend. XIV, § 1 (extending Takings Clause limits to state laws).

3. Armstrong v. United States, 364 U.S. 40, 49 (1960) (explaining Fifth Amendment's Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S 104, 123 (discussing need to create test to determine when public action creates economically disproportionate burden between public and private land owner); Arnold v. United States, 137 Fed. Cl. 524, 549-50 (2018) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001)) (discussing how purpose of Takings Clause is to preclude government from unjustly placing public burdens on private property owners).

4. Courtney Harrington, Comment, *Penn Central to Palazzolo: Regulatory Taking Decisions and Their Implications for the Future of Environmental Regulation*, 15 TUL. ENVTL. L.J. 383, 385 (2002) (describing changes in application of takings doctrine).

5. Pa. Coal Co. v. Mahon, 260 U.S. 393, 412-13 (1922) (discussing detrimental impact of Kohler Act on property rights); *see* Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings*, U. CONN. DEP'T OF ECON. WORKING PAPER SERIES, 2-3 (2011), http://web2.uconn.edu/economics/working/2011-16.pdf (discussing how *Pennsylvania Coal* introduced concept of regulatory takings by creating diminution in value test). Before *Pennsylvania Coal*, the Supreme Court showed hostility to the idea of a regulatory taking. *See* Mugler v. Kansas, 8 S. Ct. 273, 282-83 (1887) (holding claim that liquor law diminished brewery owner's property value in violation of the Fifth Amendment would not "be seriously entertained.").

duced the concept of a "regulatory taking," where the government is required to compensate a private property owner when a regulation decreases the value of that owner's property.[6] Following *Pennsylvania Coal*, later cases developed greater restrictions on government actions by expanding the definition of a regulatory taking.[7] In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[8] the Supreme Court determined a taking may occur when a regulation temporarily impedes the use of property.[9] Additionally, in *Nollan v. California Coastal Commission*,[10] the Court placed greater scrutiny on the relationship between the regulation at issue and the public interest, which increased the likelihood a regulatory taking would be found.[11]

In the 1970s, an increase in strong environmental laws sparked a disagreement between property rights advocates and environmentalists, which ultimately led to the emergence of the property rights movement.[12] Property rights advocates, including the late Justice Scalia, claim environmental regulations can unduly harm the national economy and interfere with landowners' rights to use their property however they desire.[13] In contrast, environmentalists have seen the property rights movement as a threat to modern environmental laws and responsible for promoting "a corporate 'right to pollute'."[14]

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6. *See* Miceli & Segerson, *supra* note 5, at 3-4 (discussing how *Pennsylvania Coal* changed Takings Clause doctrine by holding taking could be found if property value was sufficiently diminished).

7. *See Penn Central*, 438 U.S. at 123-24 (describing factors identified in prior decisions that are used to determine whether regulatory taking occurred).

8. 482 U.S. 304 (1987).

9. *Id.* at 322 (holding takings could be found when temporary regulation was implemented).

10. 483 U.S. 825 (1987).

11. *Id.* at 841-42 (holding regulation's connection to public interest was insufficient to justify California's failure to compensate affected property owners).

12. *See* Harrington, *supra* note 4, at 387-88 (discussing how land rights activists felt regulations placed unjust burden for promoting environmental protection on landowners).

13. *See* Douglas T. Kendall, *The Limits to Growth and the Limits to the Takings Clause*, 11 VA. ENVTL. L.J. 547, 548 (1992) (discussing positions of property rights advocates challenging environmental regulations).

14. *See* B.J. Bergman, *Ronald Reagan's Revenge: The 'Takings' Campaign and How It Grew Anti-Environment, Anti-Taxpayer, Anti-Democratic*, SIERRA CLUB (1994), https://vault.sierraclub.org/planet/199407/takings.asp (discussing President Reagan Administration's weakening of environmental regulations and environmental activists' response).

The Supreme Court's interpretation of the Takings Clause has continued to evolve since *Pennsylvania Coal*.[15] This Comment examines the evolving definition of a regulatory taking under the Takings Clause and its potential impact on environmental laws by focusing on Clean Water Act (CWA) dredge and fill permits.[16] Section II provides a background of the major cases interpreting the Takings Clause.[17] Section III discusses trends reflected in the Supreme Court's changing interpretation of a regulatory taking under the Takings Clause.[18] Section IV assesses the impacts of the Court's changing definition of a regulatory taking on CWA dredge and fill permits to show potential impacts on environmental regulations.[19]

II. DEVELOPING THE METHOD TO DETERMINE WHOSE BANK IS USED: SUPREME COURT REGULATORY TAKING CASES

Starting with *Pennsylvania Coal* in 1922, the Supreme Court has decided a series of cases that have significantly impacted the definition of a regulatory taking.[20] The first major case after *Pennsylvania Coal* was *Penn Central Transportation Co. v. City of New York*,[21] which established the first test to assess whether a regulatory taking has occurred.[22] Following *Penn Central*, the Court created a second regulatory takings test in *Agins v. Tiburon*.[23] The Court later invalidated the *Agins* test in *Lingle v. Chevron*.[24]

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15. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1943-47 (2017) (describing how to determine unit of land to be assessed in a regulatory takings analysis); Daniel A. Farber, *Murr v. Wisconsin and the Future of Takings Law*, 2017 SUP. CT. REV. 115, 164-67 (2017) (discussing how *Murr* shifts takings jurisprudence in favor of environmental regulations).

16. For a discussion of general trends in regulatory takings law, see *infra* notes 202-264 and accompanying text.

17. For a summary of major Supreme Court cases interpeting the Takings Clause, see *infra* notes 20-197 and accompanying text.

18. For a description of Supreme Court Takings Clause case trends, see *infra* notes 198-232 and accompanying text.

19. For a discussion of the Supreme Court takings cases' impact on dredge and fill permits, see *infra* notes 233-264 and accompanying text.

20. *See infra* notes 38-197 and accompanying text (discussing *Pennsylvania Coal* and cases following it).

21. 438 U.S. 104 (1978).

22. *See infra* notes 53-75 and accompanying text (discussing *Penn Central* and its influence on Supreme Court takings jurisprudence).

23. 447 U.S. 255 (1980) (announcing decision on claims that particular zoning ordinances constituted regulatory takings).

24. *See infra* notes 89-95 and accompanying text (discussing *Agins*' and *Lingle*'s impacts on regulatory takings).

The 1980s saw a series of three cases that reaffirmed *Pennsylvania Coal* and expanded the definition of a regulatory taking.[25] The first case, *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[26] reaffirmed *Pennsylvania Coal*'s diminution in value test.[27] Later in *Nollan*, the Supreme Court placed greater limits on a government's ability to use its police powers to implement environmental regulations.[28] In *First English*, the Court held an interim regulation could be considered a temporary taking.[29] In 2002, the Court declined to create a per se takings category for a temporary taking in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[30]

After the 1980s, the Court continued to refine the regulatory taking analysis.[31] In *Lucas v. South Carolina Coastal Council*,[32] the Court created a per se takings category for a regulation that deprives a private property owner's land of all value.[33] After *Lucas*, the Court held in *Palazzolo v. Rhode Island*[34] that a regulatory taking can be found even if the regulation exists before the private property owner buys the land.[35] The last major regulatory taking case, *Murr v. Wisconsin*,[36] resolved the question of what portion of the property at issue should be assessed when determining the property's lost economic value.[37]

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25. *See infra* notes 97-126 and accompanying text (discussing *Keystone*, *Nollan*, and *First English*'s holdings and impacts on definition of regulatory taking).

26. 480 U.S. 470 (1987).

27. *See infra* notes 97-104 and accompanying text (discussing *Keystone* and its influence on regulatory takings).

28. *See infra* notes 105-115 and accompanying text (explaining *Nollan* and its move towards favoring private property rights).

29. *See infra* notes 116-126 and accompanying text (discussing *First English* and its creation of temporary takings).

30. *See* 535 U.S. 302, 341-42 (2002) (holding *First English* should not be extended to create per se takings category for temporary takings).

31. *See infra* notes 144-197 and accompanying text (discussing *Lucas v. South Carolina Coastal Council*, *Palazzolo v. Rhode Island*, and *Murr v. Wisconsin* and their impacts on regulatory takings doctrine).

32. 505 U.S. 1003 (1992).

33. *See infra* notes 144-159 and accompanying text (discussing *Lucas* and its creation of current basic structure used in takings cases).

34. 533 U.S. 606 (2001).

35. *See infra* notes 160-174 and accompanying text (explaining *Palazzolo* and its impact on regulatory takings jurisprudence).

36. 137 S. Ct. 1933 (2017).

37. *See infra* notes 175-197 and accompanying text (discussing *Murr* and its creation of denominator test).

A. Declaring Potential for the Government's Bank to Be Used Instead of Private Property Owner's: *Pennsylvania Coal Co. v. Mahon*

Leading to *Pennsylvania Coal*, the Pennsylvania legislature passed the Kohler Act, which prohibited coal mining that caused subsidence of "any structure used as a human habitation."[38] Before the passage of the Kohler Act, the Pennsylvania Coal Company (Pennsylvania Coal) conveyed surface rights to the plaintiff in a deed, but retained subsurface rights to mine the coal beneath the surface.[39] When Pennsylvania Coal attempted to mine the coal, the plaintiffs brought suit, claiming the Kohler Act precluded Pennsylvania Coal from mining the coal.[40] Pennsylvania Coal defended its right to mine by challenging the Kohler Act, arguing the law violated the Takings Clause because it destroyed Pennsylvania Coal's contractual right to mine on its property.[41]

The Supreme Court ruled in favor of Pennsylvania Coal and held the Kohler Act was invalid because it constituted a taking of subsurface coal mining rights.[42] The Court stated the government may regulate property "to a certain extent," but if the "regulation goes too far it will be recognized as a taking."[43] Additionally, the Court stated that if a regulation has diminished the economic potential of the affected private property to "a certain magnitude," the government is understood to have exercised eminent domain and must reimburse the private property owner.[44] The Court noted this inquiry, known as the diminution in value test, should be fact specific, and courts should afford great deference to the legislature's judgment.[45]

When the Court applied the diminution in value test in *Pennsylvania Coal*, it determined that all economic value in Pennsylvania Coal's subsurface coal rights had been extinguished by the Kohler

38. Pa. Coal Co. v. Mahon, 260 U.S. 393, 412-13 (1922) (describing boundaries of Kohler Act).

39. *Id.* at 412 (describing deed executed by Pennsylvania Coal Company).

40. *Id.* (discussing contract Pennsylvania Coal Co. made to mine coal).

41. *See id.* at 412-13 (describing suit brought against coal company for violating Kohler Act and coal company appealing unfavorable state court decision).

42. *See id.* at 415-16 (finding Kohler Act's application to Pennsylvania Coal constituted a taking and discussing generally how regulations could be considered takings).

43. *Pa. Coal Co.*, 260 U.S. at 415 (explaining why regulation could be considered taking).

44. *Id.* at 413 (placing limitations on state's police power).

45. *Id.* (discussing factors to consider when determining diminution of property).

Act.[46] Specifically, the Kohler Act's restrictions made it economically impractical for Pennsylvania Coal to extract the coal.[47] The Court noted the only value in subsurface rights to coal was the ability to mine the coal for a profit.[48] Consequently, Pennsylvania Coal's inability to mine the coal for a profit had almost "the same effect for constitutional purposes as appropriating or destroying it."[49]

While the Supreme Court created the diminution in value test, it also created ambiguity in the regulatory takings analysis.[50] By suggesting that the takings analysis was fact specific, the Court neglected to create a more precise test to determine when a regulation would diminish the economic potential of a property enough to justify a takings claim.[51] This left courts guessing as to what factors to consider when determining whether a regulation had diminished the value of the property enough to constitute a regulatory taking.[52]

B. First Method for Determining Whose Bank is Used: *Penn Central Transportation Co. v. City of New York*

The next major Supreme Court case to address regulatory takings was decided more than five decades later in *Penn Central Transportation Co. v. City of New York*.[53] In *Penn Central*, New York City passed the Landmarks Preservation Law to protect historic landmarks from being destroyed or having a landmark's character fundamentally altered.[54] Pursuant to this purpose, the Landmarks Preservation Commission (Commission) labeled designated historic buildings as a "landmark" on a "landmark site."[55] After the

46. *Id.* at 414-15 (concluding Kohler Act effectively eliminated Pennsylvania Coal's right to mine coal).

47. *Id.* at 414 (discussing what makes ownership of coal valuable).

48. *Pa. Coal Co.*, 260 U.S. at 414 (explaining why Kohler Act extinguished value of Pennsylvania Coal's mining rights).

49. *Id.* (explaining how economic use of plaintiff's property was diminished).

50. *See infra* notes 51-52 and accompanying text (discussing ambiguity left in regulatory takings analysis after *Pennsylvania Coal*).

51. *Pa. Coal Co.*, 260 U.S. at 413 (discussing how different facts can be considered to determine whether there was regulatory taking).

52. *See id.* (discussing how decrease in property value can become significant enough to become taking).

53. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978) (discussing factors to consider in regulatory taking analysis).

54. *Id.* at 108-09 (describing need to use Landmarks Act to protect historical sites).

55. *Id.* at 110-11 (describing how Landmarks Act is applied to protect historical structures).

Commission designated a site as a landmark, the Board of Estimate could change or reject the designation.[56] The property owner could then "seek judicial review of the final designation decision."[57] Once the owner had a building designated as a landmark, the owner was required to obtain approval from the Commission before the owner could make any changes to the outside of the building.[58] Owners who were unable to change a landmark could transfer their development rights to proximate lots.[59]

Under the Landmarks Preservation Law, the Commission, after holding a public hearing, designated Grand Central Terminal as a "landmark" on a "landmark site."[60] The owner, Penn Central Transportation Company (Penn Central), subsequently leased the landmark site to another company that wanted to build an office tower on top of the Terminal, but the Commission rejected Penn Central's plans.[61] Penn Central then sued the City of New York and claimed the Landmarks Preservation Law violated Penn Central's Fifth Amendment right to compensation for a taking of its property.[62]

To assess whether a regulatory taking had occurred, the Supreme Court identified three factors necessary for a regulatory takings analysis.[63] The factors included 1) the "economic impact of the regulation on the claimant"; 2) the interference with "investment-backed expectations"; and 3) the nature of the government's action, ranging from outright "physical invasion" to protection of "the common good."[64]

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56. *Id.* at 111 (describing process for designating landmark).

57. *Id.* (discussing property owner's options for protesting landmark ruling).

58. *Penn Central*, 438 U.S. at 112 (describing restrictions on property owner's land use after designation as landmark).

59. *Id.* at 114-15 (discussing alternatives that Landmarks Act provided for owners of landmark sites).

60. *Id.* at 115-16 (discussing how Grand Central became designated "landmark" under Landmarks Preservation Law).

61. *Id.* at 116 (describing Penn Central's attempt to lease area above Grand Central for construction and Commission's rejection of its construction plans).

62. *Id.* at 118-19 (describing Penn Central's claim against New York City for denying planned office building). Penn Central also brought a Fourteenth Amendment Due Process claim, but discussion of this claim is beyond the scope of this Comment. *Id.* at 118-19, 120-22 (discussing Penn Central's due process claim and why it was denied).

63. *Penn Central*, 438 U.S. at 123-24 (describing previous court decisions to consider when assessing whether there was regulatory taking).

64. *Id.* (describing factors to be considered when determining whether regulatory taking occurred).

The Court ultimately held Penn Central failed to show there was a taking.[65] When assessing the economic impact, the Court found that diminution in value alone was inadequate to find a taking.[66] The Court noted historical landmark designations were used nationwide, and invalidating New York City's landmark designations would invalidate "all comparable landmark legislation" in the United States.[67] Penn Central also failed to prove the Commission's landmark designation interfered with investment-backed expectations.[68] The Court noted Penn Central Station was always used as a railroad terminal, and Penn Central intended to keep using it as a railroad terminal.[69] Lastly, the both parties agreed the government had a valid public interest in "preserving structures and areas with special historic, architectural, or cultural significance."[70]

While the Court provided greater guidance on how to assess a regulatory takings claim, the Court failed to remedy the ambiguity of the regulatory takings analysis.[71] Specifically, the Court neglected to provide guidance on how to balance each factor and what standards to use to determine when a factor would weigh in favor of a taking.[72] The lack of guidance on assessing the economic impact of a regulation has led to the use of various tests, such as the "with and without approach" and "regulated-value-minus-investment" test.[73] Moreover, the ambiguous nature of *Penn Central*'s government action factor has generated concern because of its

65. *Id.* at 138 (concluding *Penn Central* failed to show there was taking).

66. *See id.* at 131 (explaining prior decisions have rejected notion that diminution of all property value is sufficient to demonstrate regulatory taking).

67. *Id.* (explaining Penn Central's argument should be rejected because it would go against traditional landmark laws used in United States).

68. *Penn Central*, 438 U.S. at 136-38 (applying one factor of takings analysis to determine whether government had taken Penn Central's property).

69. *Id.* at 136 (distinguishing *Penn Central* from other takings cases to demonstrate New York City's landmark designations law "does not interfere in any way with the present uses of the [railroad terminal].").

70. *Id.* at 129 (discussing facts not in dispute in *Penn Central*).

71. *See id.* (discussing various fact-based arguments offered by Penn Central Transportation Company); Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 407, 409-10 (2013) (discussing difficulties with ambiguity created by *Penn Central*); Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 528-29 (2009) (discussing problems with analyzing *Penn Central*'s "character" factor).

72. *See* Eagle, *supra* note 71, at 409-10 (discussing how Court did not provide more guidance on how to apply *Penn Central* test).

73. *See id.*, at 417-23 (explaining general methods used to calculate economic impact of regulation on property value).

potential construction as a substantive due process test.[74] If used as a substantive due process test, the nature of the government action factor could appear to favor the private property owner or the government.[75]

C. Second Method for Determining Whose Bank is Used: *Agins v. Tiburon* and *Lingle v. Chevron*

The next major regulatory takings case was *Agins v. Tiburon*.[76] In *Agins*, the city of Tiburon, California passed zoning ordinances with density restrictions that, in effect, allowed the appellants to build only one to five single-family residences on their land.[77] Without attempting to obtain approval to develop the land, the appellants claimed the ordinances were facially unconstitutional under the Takings Clause.[78] The appellants asserted their property in Tiburon was highly valuable due to the "magnificent views of San Francisco Bay and the scenic surrounding areas."[79] They claimed the government's rezoning of the property "forever prevented [its] development for residential use" which "completely destroyed the value of [appellants'] property for any purpose or use whatsoever."[80] The Supreme Court disagreed and held zoning ordinances on their face do not take property without just compensation.[81] In its evaluation of the zoning ordinances, the Court created a new two-pronged test to determine whether a regulatory taking had occurred.[82] The test evaluated 1) whether the regulation "substan-

74. *See* Fenster, *supra* note 71, at 528-29 (discussing how *Penn Central* test might be used as substantive due process analysis).

75. *See id.* (explaining how character factor in *Penn Central* could favor government or private property owner).

76. Agins v. Tiburon, 447 U.S. 255, 259 (1980) (describing suit claiming zoning ordinance was regulatory taking).

77. *Id.* at 257 (describing creation of zoning ordinance to regulate land development).

78. *Id.* at 257-58 (describing plaintiffs' failure to follow typical judicial procedure and claim under Takings Clause).

79. *Id.* at 258 (citing Brief of Appellants at 3-4, Agins v. Tiburon, 447 U.S. 255 (1980) (No. 79-602)) (describing plaintiffs' claim that their property had been deprived of all value).

80. *Id.* (citing Brief of Appellants at 5, 7, Agins v. Tiburon, 447 U.S. 255 (1980) (No. 79-602)) (describing plaintiff's argument that rezoning diminished all of plaintiffs' property value).

81. *Agins*, 447 U.S. at 259 (holding zoning ordinance did not constitute a facially unconstitutional regulatory taking).

82. *Id.* at 260 (describing procedure to assess whether regulatory taking occurred).

tially advance[s] legitimate state interests"; and 2) whether the "regulation denies an owner economically viable use of his land."[83]

This new test announced in *Agins* further complicated the regulatory takings analysis by creating a second standard for courts to use when assessing a takings claim.[84] Significantly, the Court neglected to clarify when courts should use the *Agins* test rather than the *Penn Central* test.[85] This led to other courts having to guess whether to apply the *Agins* test or the *Penn Central* test.[86] The *Agins* test also complicated the analysis by incorporating substantive due process principles, whereby courts would conduct a review of the law's purpose and the connection between that purpose and the law's function.[87] By treating the takings analysis like a substantive due process test, the *Agins* test placed greater scrutiny on the government's action and increased the likelihood a taking would be found.[88]

In 2005, *Lingle v. Chevron* solved these problems when the Supreme Court determined the *Agins* test should not be used to evaluate whether a regulatory taking has occurred.[89] In *Lingle*, Hawaii passed a statute that limited the rent oil companies could charge the dealers who leased service stations from those companies.[90] Applying the *Agins* test, lower courts held the statute was invalid be-

83. *Id.* (discussing factors to assess when determining whether regulatory taking occurred).

84. *See infra* notes 85-88 (discussing complications caused by *Agins*, which included failing to specify when to use the *Agins* test and conflating takings with substantive due process).

85. *See Agins* 447 U.S. at 260-61 (describing rationale to apply to takings analysis).

86. *See* Darren Botello-Samson, Comment, *You Say Takings, and I Say Takings: The History and Potential of Regulatory Taking Challenges to the Endangered Species Act*, 16 DUKE ENVTL. L. & POL'Y F. 293, 312-13 (2006) (discussing problems created by holding in *Agins*). Courts generally favored using the *Penn Central* test over the *Agins* test. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (noting "[t]he *Penn Central* factors . . . have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules."); *see, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 611, 616 (2001) (applying *Penn Central* test to determine whether government agency's denial of waterfront property owner's plans to develop his land violated Takings Clause); Ruckelhaus v. Monsanto Co., 467 U.S. 986, 990, 1005 (1984) (applying *Penn Central* principles to determine whether provision in Federal Insecticide, Fungicide, and Rodenticide Act requiring companies to disclose certain data constituted regulatory taking).

87. *See Lingle*, 544 U.S. at 540-42 (explaining how *Agins* test was derived from due process cases, as opposed to takings cases).

88. *See* Fenster, *supra* note 71, at 537-39 (describing Ninth Circuit cases using *Agins* and how *Agins* favored plaintiffs in those cases).

89. *See Lingle*, 544 U.S. at 532 (concluding *Agins* test should not be applied when court conducts regulatory takings analysis).

90. *Id.* (discussing lower courts' use of *Agins* to assess Hawaii rent cap statute).

cause the statute did not "substantially advance" the state's interests "in controlling retail gasoline prices."[91] Consequently, both the district court and the circuit court determined that Hawaii conducted an uncompensated taking that violated the Takings Clause.[92]

In *Lingle*, the Supreme Court rejected the application of the *Agins* test in regulatory takings cases because the "substantially advances" requirement was a question of substantive due process, rather than a question of whether a taking was lawful.[93] The Court also determined the *Agins* test was inappropriate because it could be interpreted as demanding a "heightened means-ends review of virtually any regulation of private property."[94] According to the court, this review would require courts to usurp the role of agencies and legislatures by examining whether regulations serve their intended purposes.[95]

D. The 1980s Takings Trilogy

During the 1980s, three major Supreme Court cases helped refine the Court's Takings Clause jurisprudence.[96] The first case the Supreme Court decided during this period was *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[97] In *Keystone*, Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (Subsidence Act) prohibited coal mining that caused subsidence damage to pre-existing public buildings, dwellings, and cemeteries.[98] In addition, a Pennsylvania Department of Environmental Resources (DER) regulation created under the Subsidence Act required fifty-percent of coal under protected structures to remain in place to provide surface

91. *Id.* (discussing lower courts' findings that gasoline rent cap violated Fifth and Fourteenth Amendments).

92. *Id.* at 534-36 (describing lower courts' applications of *Agins* test).

93. *Id.* at 540 (explaining *Agins* is improper test to apply in regulatory takings cases).

94. *Lingle*, 544 U.S. at 544 (discussing how requirement for public benefit does not determine whether taking has occurred).

95. *See id.* at 544 (explaining consequences of applying *Agins* test to regulatory takings claims).

96. *See infra* notes 97-126 and accompanying text (discussing takings cases in 1980s); *see also* Mark W. Cordes, *The Land Use Legacy of Chief Justice Rehnquist and Justice Stevens: Two Views on Balancing Public and Private Interests in Property*, 34 ENVIRONS ENVTL. L. & POL'Y J. 1, 12-19, 22-27 (2010) (detailing 1987 cases and differences of opinion between Chief Justice Rehnquist and Justice Stevens).

97. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 478-79 (1987) (describing underlying facts of complaint alleging parts of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act were unconstitutional).

98. *Id.* at 476 (describing Subsidence Act's limits on coal mining).

support.[99] Coal companies filed a complaint against officials of the DER, and alleged Sections 4 and 6 of the Subsidence Act, as applied through the DER regulation, constituted a taking of private property without compensation.[100]

Applying the *Penn Central* test, the Supreme Court held no regulatory taking occurred because the challenged provisions of the Subsidence Act did not make the mines unprofitable or undermine the coal companies' "investment-backed expectations."[101] The Court emphasized the connection between the Subsidence Act and the public interest, and the principle that the greater the reduction in the entire property value, the more likely a regulatory taking would be found.[102] In articulating this principle, the Court reaffirmed *Pennsylvania Coal*'s diminution in value test and placed greater emphasis on the public interest than the Court did in *Pennsylvania Coal*.[103] As the Court explained, the Takings Clause does not require the government to compensate a private property owner who uses his or her property in a manner that harms the community.[104]

Another regulatory takings case in the 1980s favoring private property owners' rights was *Nollan v. California Coastal Commission*.[105] The California Coastal Commission granted the Nollans a building permit on the condition that they allow an easement to pass across their beach.[106] The purposes of the easement were 1)

99. *Id.* at 476-77 (describing DER regulation limiting amount of coal to be mined).

100. *Id.* at 478-79 (discussing claim that two sections of Subsidence Act violated Fifth and Fourteenth Amendments). Section 4 "prohibit[ed] mining that cause[d] subsidence damage to three categories of structures that were in place on April 17, 1966: public buildings and noncommercial buildings generally used by the public; dwellings used for human habitation; and cemeteries." *Id.* at 476. Section 6 "authorize[d] the DER to revoke a mining permit if the removal of coal cause[d] damage to a structure or area protected by § 4 and the operator [did] not within six months either repair[ ] the damage, satisfy[ ] any claim arising therefrom, or deposit[ ] a sum equal to the reasonable cost of repair with the DER as security." *Id.* at 477.

101. *Id.* at 492-93, 499 (concluding coal companies failed to establish challenged provisions of Subsidence Acts violated Takings Clause).

102. *See Keystone*, 480 U.S. at 492, 497 (discussing impacts of purported interest Subsidence Act intends to serve and property value reduction on takings claim).

103. *See id.* (discussing significance of public interest and property value in regulatory taking analysis).

104. *See id.* at 491-92 (describing how requirements of Takings Clause do not overcome government's strong interest in preventing public harm).

105. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-42 (1987) (summarizing rationale for ruling in favor of Nollans).

106. *Id.* at 828 (discussing California Coastal Commission's condition for Nollans' permit).

to protect the public's ability to view the ocean, 2) "[to assist] the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront," and 3) to prevent overcrowding of beaches.[107]

The Nollans sued California and argued the easement violated the Takings Clause.[108] They claimed the condition should not have been attached to the permit because there was insufficient evidence to show the "proposed development would have a direct adverse impact on public access to the beach."[109] Using the *Agins* test, the Commission claimed "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[110] The Commission asserted protecting the public's view of the beach, helping the public overcome "the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches" were permissible state interests that demonstrated the constitutionality of the permit condition.[111]

Despite California's arguments to the contrary, the Supreme Court held the permit condition was an illegitimate exercise of California's police power.[112] As Justice Brennan summarized in his dissent, the majority reasoned the permit neglected to establish a "reasonable relationship between the effect of the development and the condition imposed."[113] The Court majority stated California was free to use eminent domain to create a program providing public beach access, but could not impose the burden of that pro-

107. *Id.* at 835 (detailing California Coastal Commission's rationale behind permit condition).

108. *Id.* at 828-31 (detailing history of Nollans' suit claiming permit condition violated Takings Clause).

109. *Id.* at 828 (describing Nollans' argument in their petition to Ventura Superior County Court).

110. *Nollan*, 483 U.S. at 836 (summarizing Commission's argument that permit condition did not violate Takings Clause).

111. *Id.* at 835 (describing Commission's assertion that its restriction was justified by various public policy concerns).

112. *See id.* at 836-37, 841-42 (discussing California's justification for its permit condition and subsequently concluding justification was insufficient). A police power "is the fundamental power of the government to secure our rights, the power to protect members of the community against harm from each other, as defined by our rights against each other, or against harm from outsiders." Stephen J. Eagle, *The Birth of the Property Rights Movement, Policy Analysis No. 558,* CATO INST., 10 (2005), https://object.cato.org/sites/cato.org/files/pubs/pdf/pa558.pdf.

113. *Nollan*, 483 U.S. at 842 (Brennan, J., dissenting) (discussing majority's conclusion that permit condition could not be justified through California's police power).

gram on coastal residents without providing compensation.[114] The potential effect of this ruling was increased scrutiny on local governments' abilities to regulate land use through their police powers by requiring a closer relationship between the regulation and the private property use.[115]

E. Problems with Temporary Regulatory Takings

Deviating from *Keystone*, the Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* imposed greater restrictions on the government's ability to pass environmental regulations affecting property interests without compensating property owners.[116] After a major flood, the County of Los Angeles passed an interim ordinance prohibiting the construction or reconstruction of any structure or building in certain flooded areas.[117] The purpose of the interim ordinance was to ensure the "immediate preservation of the public health and safety."[118] The flood had destroyed First English Evangelical Lutheran Church of Glendale's (Church) campground, and the moratorium prohibited the Church from rebuilding.[119]

The Church filed a complaint, which claimed the interim ordinance constituted a regulatory taking.[120] Specifically, the Church argued the ordinance deprived the campground of all economic use by precluding the Church from rebuilding the campground, and the California Supreme Court erred in interpreting *Agins* as prohibiting compensation for a temporary taking.[121] The defen-

114. *Id.* at 841-42 (explaining comprehensive plan was not valid reason for failing to compensate Nollans after imposing regulation on their property).

115. *See id.* (placing greater limits on states' abilities to exercise police powers); David Schultz, *Scalia, Property, and Dolan v. Tigard, the Emergence of a Post-Carolene Products Jurisprudence*, 29 AKRON L. REV. 1, 14, 18-19, 29-31 (1995) (discussing multiple property rights opinions written by Justice Scalia and Justice Scalia's support for greater scrutiny of government regulations impacting property rights).

116. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 306-07 (1987) (reversing California Court of Appeal's decision and ruling in favor of property owner).

117. *Id.* at 307 (describing reason for imposing moratoria on building).

118. *Id.* at 307 (stating Los Angeles' rationale for passing ordinance that was effective immediately).

119. *Id.* (describing issues leading to flooding of Lutherglen).

120. *See id.* at 308 (discussing content of Church's complaint against Los Angeles).

121. *See First English*, 482 U.S. at 308, 310 (describing Church's claims against government in state court and argument used in appeal to U.S. Supreme Court). The Church originally had two claims. *Id.* at 308. The first claim asserted "the defendants were liable under Cal. Govt. Code Ann. § 835[ ] for dangerous conditions on their upstream properties that contributed to the flooding of Lutherglen." *Id.* The second claim requested recovery "from the Flood Control District

dant countered that the ordinance was only temporary and takings claims did not cover temporary regulations.[122]

The Supreme Court ultimately held that, although the interim ordinance was temporary, the ordinance still constituted a taking and the government was required to provide compensation.[123] The Court determined that when the regulation temporarily altered use of the land, it changed the property owner's interest by reducing it from "full ownership to one of temporary use and occupation."[124] According to the Court, "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[125] Treating the facts of the allegation as true, the Court held the County of Los Angeles was required to compensate the Church because the interim ordinance impeded the Church's ability to use its campground for "a considerable period of years."[126]

Property rights advocates attempted to construe *First English* to indicate a temporary regulation limiting land use should be considered a per se taking.[127] The Supreme Court considered this interpretation of *First English* in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[128] The Tahoe Regional Planning Agency (TRPA) placed temporary moratoria on construction in the Lake Tahoe Basin for thirty-two months.[129] The TRPA planned to create a comprehensive land-use plan during the moratoria's operation to ensure development around Lake Tahoe was "environmen-

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in inverse condemnation and in tort for engaging in cloud seeding during the storm that flooded Lutherglen." *Id.* The California Court of Appeal condensed the claims and interpreted the complaint as alleging the County of Los Angeles engaged in an uncompensated taking of the Church's property. *Id.* at 309.

122. *See First English*, 482 U.S. at 319-20 (describing prior cases defendant cited to support its argument that compensation was not required for temporary regulation).

123. *Id.* at 322 (stating rationale behind holding that Church's Fifth Amendment right was violated).

124. *Id.* at 318 (quoting United States v. Dow, 357 U.S. 17, 26 (1958)) (discussing previous Supreme Court cases where government temporarily employed its right to use private property).

125. *Id.* (analyzing prior case law and concluding temporary takings are equivalent to permanent takings under Takings Clause).

126. *Id.* at 322 (explaining rationale for requiring Los Angeles to compensate Church for meritorious takings claim).

127. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306, 320 (2002) (discussing landowners' advocacy for adoption of per se rule).

128. *Id.* (describing need to determine whether per se takings had occurred when temporary regulation was imposed on landowners).

129. *Id.* at 306 (describing temporary moratoria implemented by TRPA).

tally sound."[130] Landowners filed suit against the TRPA and claimed the moratoria constituted uncompensated regulatory takings that violated the Fifth Amendment by forbidding them from building on or altering their property.[131] TRPA countered, contending the building restrictions were "reasonable temporary planning moratoria" that should not constitute a per se taking of all economic value.[132]

The landowners argued a per se taking occurs anytime a regulation deprives the owner of all economic use, regardless of how long the regulation would be in place.[133] The Court ultimately rejected this per se takings approach because the rule would broadly apply to delays from "obtaining building permits, changes in zoning ordinances, variances . . . as well as [from] orders temporarily prohibiting access to crime scenes, businesses that violate health codes, fire-damaged buildings, or other areas that we cannot now foresee."[134] Moreover, as the Court explained, if a per se rule were adopted, it would "require changes in numerous practices that have long been considered permissible exercises of the police power."[135] Instead, the Supreme Court determined the appropriate method of evaluating temporary takings claims is to apply the *Penn Central* test.[136]

Ultimately, the Court refused to find that a moratorium delaying land use for more than a year violates the Takings Clause.[137] Although a moratorium's duration is not dispositive of a taking, the Court noted duration is a significant factor that should be consid-

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130. *Id.* (explaining purpose of temporary moratoria was to create land use plan for area surrounding Lake Tahoe). Over the years preceding *Tahoe-Sierra*, Lake Tahoe experienced significant development that led to nutrient pollution and Clean Water Act violations. *Id.* at 307-09.

131. *See id.* at 306, 312 (describing landowners' complaint alleging temporary moratoria violated Takings Clause).

132. *Tahoe-Sierra*, 535 U.S. at 316 (describing district court's ruling against government).

133. *See id.* at 320-21 (detailing landowners' argument that per se rule for temporary takings should be adopted).

134. *Id.* at 334-35 (concluding proposed per se takings rule "surely [could not] be sustained.").

135. *Id.* at 334-35 (discussing whether new categorical rule would be better than *Penn Central* test).

136. *See id.* at 342 (holding *Penn Central* test should be applied in temporary regulatory takings cases).

137. *Tahoe-Sierra*, 535 U.S. at 341-42 (concluding that regulation lasting more than one year is not necessarily "constitutionally unacceptable."). Despite this holding, the Court noted regulations that are effective for longer than one year "should be viewed with skepticism." *Id.*

ered in a regulatory takings analysis.[138] According to the majority, to hold otherwise would impede state legislatures' abilities to create effective land-use plans due to financial and time constraints.[139]

The Supreme Court exercised well-reasoned judgment in *Tahoe-Sierra* when it held there should not be a per se taking for a regulation depriving the landowner of certain land uses.[140] To find otherwise could have damaged the government's ability to make land use decisions that could improve the environment.[141] Using *Tahoe-Sierra* as an example, the government needed to conduct a long-term study to determine how to prevent pollution around Lake Tahoe and to satisfy Clean Water Act requirements.[142] If a per se rule had been adopted for a temporary taking, the government would have been required to choose between paying a significant sum of money to compensate the landowners or violating the Clean Water Act.[143]

F. When the Private Property Owner's Land Cannot Put Extra Money in the Bank: *Lucas v. South Carolina Coastal Council*

The next major case to alter the Supreme Court's regulatory takings jurisprudence was *Lucas v. South Carolina Coastal Council*.[144] In *Lucas*, the South Carolina legislature passed the Beachfront Management Act (BMA), which precluded Lucas from building any "permanent habitable structures" on his two immediately adjacent

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138. *Id.* at 342 (describing important factors to consider in *Penn Central* test). The Court found that to consider only the property during the regulation's effective period would, in essence, ignore *Penn Central*'s central tenet that the parcel be considered as a whole. *Id.* at 331.

139. *See id.* at 334-35, 342 (describing potential impacts of per se rule).

140. *See id.* at 334-35 (describing detrimental impact on government if per se rule adopted for temporary takings); *see* Charles V. Dumas III, Comment, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency: The Supreme Court Reaffirms the Importance of Land-Use Planning and Wisely Refuses to Set Concrete Outer Limits*, 53 CATH. U. L. REV. 209, 236-38 (2003) (concluding that *Tahoe-Sierra* was correctly decided because bright-line rule for determining temporary taking would impede governments' abilities to develop effective land-use planning).

141. *See Tahoe-Sierra*, 535 U.S. at 334-35, 342 (describing problems with adopting per se rule).

142. *See id.* at 307-12 (describing Lake Tahoe's pollution problems and need to create comprehensive plan to address them).

143. *See id.* at 307-13 (discussing Lake Tahoe's environmental issues and noting multiple plaintiffs in suit).

144. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006-07 (1992) (deciding whether Beachfront Management Act's application to Lucas' property constituted taking in violation of Takings Clause).

parcels on a barrier island.[145] Lucas sued the South Carolina Coastal Council, claiming the BMA, as applied to his parcels, violated the Takings Clause because the BMA deprived his property of all economic value.[146]

In an opinion authored by Justice Scalia, the Supreme Court ruled in favor of Lucas and defined two per se categories in the takings claim analysis.[147] The first category includes instances when the government physically invades the property.[148] The second category constitutes circumstances "where regulation denies all economically beneficial or productive use of land."[149] According to the Court, these regulatory takings claims would not be subject to *Penn Central*'s or *Agins*' "case-specific inquiry into the public interest advanced in support of the restraint."[150] Instead, these claims would be considered per se regulatory takings and the government would have to compensate the affected landowners.[151] Despite its adoption of this new categorical takings rule, the Court also noted the government may avoid compensating the affected landowner if it proves the landowner's proposed action would already be precluded under nuisance law.[152] The Court reasoned a new law should not be considered a taking if the landowner's proposed conduct is already unlawful under pre-existing state property and nuisance law.[153]

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145. *Id.* at 1007-09 (detailing impact of Beachfront Management Act on Lucas' request for permit to build on property he owned on barrier island near Charleston).

146. *Id.* at 1009 (describing Lucas' claim that BMA completely deprived his property of value and he was entitled to compensation from South Carolina).

147. *Id.* at 1015 (describing two per se regulatory takings categories).

148. *Id.* (describing per se physical invasion takings category).

149. *Lucas*, 505 U.S. at 1015-16, 1030-32 (reversing lower court decision favoring South Carolina Coastal Council and describing circumstances that constitute categorical takings in violation of Takings Clause). Litigation ended in this case when the Council purchased Lucas' lot for $1,575,000. Aaron N. Gruen, *Takings, Just Compensation, and the Efficient Use of Land, Urban, and Environmental Resources*, 33 URB. LAW. 517, 536 (2001) (describing ultimate outcome of underlying litigation in *Lucas*). The Council later sold the land to another private party who was allowed to develop the land. *Id.*

150. *Lucas*, 505 U.S. at 1015 (explaining two "categories of regulatory action" where public interest need not be considered in takings analysis). After *Lucas*, the Court overruled *Agins* in *Lingle v. Chevron* leaving *Penn Central* as the only test used to conduct a fact-specific inquiry in a takings analysis. *See supra* notes 89-95 and accompanying text.

151. *Lucas*, 505 U.S. at 1015-16, 1019 (concluding regulations depriving property of all economic value are categorical takings mandating compensation).

152. *Id.* at 1029-32 (discussing nuisance exception to finding of categorical taking when regulation deprives affected property of all economic value).

153. *See id.* at 1029-30 (discussing how takings claim is invalid if property use would be public nuisance).

In *Lucas*, the Court noted the "deprivation of all economically feasible use" rule it created left open the question of how to determine the portion of land "against which the loss of value is to be measured."[154] By leaving this question open, the Court made it difficult for lower courts to determine whether the value of the property diminished enough to constitute a taking.[155] If only part of the property was impacted by the regulation, then basing a takings analysis only on the value of that part would facilitate a finding that there was a taking.[156] If instead the court considered the value of the entire property, the part of the property that was still valuable could provide enough compensation to determine there was no taking.[157] The Supreme Court avoided answering the denominator question because the property in question was "an estate with a rich tradition of protection at common law" and the lower court had already determined the entirety of the property's economic value had been lost.[158] The Supreme Court later resolved this issue in *Murr v. Wisconsin*, as discussed in Subsection H of this section.[159]

G. Knowing Regulations Before Property Purchase: *Palazzolo v. Rhode Island*

Palazzolo v. Rhode Island followed *Lucas*, resulting in another victory for property rights advocates.[160] Prior to Palazzolo owning the property, the Rhode Island Coastal Resources Management Council (RICRMC) designated the majority of his property as a coastal wetland.[161] The RICRMC subsequently passed regulations in 1971 that significantly limited development on coastal wet-

154. *Id.* at 1016 n.7 (describing denominator issue to be decided in later case).

155. *See Farber*, *supra* note 15, at 118-25 (discussing denominator question created by *Pennsylvania Coal* and other Supreme Court cases that mention problems created by denominator question).

156. *See Lucas*, 505 U.S. at 1016 n.7 (explaining example of how denominator question makes it difficult to assess economic value loss of property when only part of property is impacted).

157. *Id.* (discussing denominator question still left open by *Lucas*).

158. *Id.* (explaining why Court in *Lucas* did not address denominator question).

159. Murr v. Wisconsin, 137 S. Ct 1933, 1945-46 (2017) (detailing how to determine denominator in takings analysis).

160. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001) (explaining passage of regulation before property ownership was not bar to regulatory takings claim); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 27, 64 (2002) (discussing how *Palazzolo* facilitated plaintiff's ability to show takings claim is ripe).

161. *Palazzolo*, 533 U.S. at 614 (detailing passage of laws limiting development on beachfront properties).

lands.[162] Palazzolo later attempted to obtain permits to develop his property, but the RICRMC denied his application for permits.[163]

After his application was denied, Palazzolo filed a complaint, alleging the denial of his application was a regulatory taking that violated the Fifth and Fourteenth Amendments because he had not been compensated.[164] The Supreme Court of Rhode Island eventually ruled the application denial was not a "taking" because the regulations that applied to Palazzolo's property were passed prior to Palazzolo obtaining the property.[165] The court reasoned Palazzolo, as a new property owner, should have been on notice of the regulation when he obtained the property.[166]

After granting certiorari, the United States Supreme Court first concluded that one's acquisition of title after regulations are promulgated does not bar a takings claim.[167] The Court noted that such a bar would result in an "expiration date on the Takings Clause," leaving new owners unable to contest land use regulations.[168] The Supreme Court then held Palazzolo failed to show the property had been deprived of all economic use because Palazzolo was still allowed to build a large residence on the property.[169] The Court then remanded the trial to have the lower court apply the *Penn Central* test.[170]

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162. *Id.* (describing impact of regulations aiming to protect coastal wetlands).

163. *Id.* at 614-15 (describing Palazzolo's repeated attempts to obtain building permit). RICRMC's final permit denial under review in *Palazzolo* was based on a finding that the petitioner's application was deficient, given the nature of his proposed project. *Id.* at 615. RICRMC determined the project did not "serve 'a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests.'" *Id.*

164. *Id.* at 615-16 (describing Palazzolo's claims against RICRMC for denial of permit application).

165. *See id.* at 616 (discussing Rhode Island Supreme Court decision to rule against Palazzolo).

166. *See Palazzolo*, 533 U.S. at 616 (explaining Rhode Island Supreme Court's rationale that Palazzolo held "'no reasonable investment-backed expectations that were affected by [the wetlands] regulation' because it predated his ownership" of the property).

167. *See id.* at 616, 627-29 (reversing Rhode Island Supreme Court's determination that enactment of challenged regulations prior to property ownership bars takings claim).

168. *Id.* at 627 (discussing Rhode Island Supreme Court's decision would unjustly deprive future property owners of ability to challenge regulations under Takings Clause).

169. *Id.* at 631 (explaining why Palazzolo's land was still economically valuable).

170. *Id.* at 632 (remanding to lower court because lower court did not originally apply *Penn Central* test).

The decision in *Palazzolo* represented a significant victory for property rights owners.[171] In particular, *Palazzolo* created the opportunity for more land owners to bring takings claims by allowing new owners to sue the government for pre-existing regulations.[172] Had the Court held the opposite, it is likely the government would have still been subject to increased takings claims.[173] Specifically, property owners would have had "a compelling incentive to challenge regulations whenever they [were] passed," as buyers would have been less willing to purchase property saddled by regulations that could not be challenged post-purchase.[174]

H. Balancing the Checkbook: *Murr v. Wisconsin* and Determining the Denominator

After *Palazzolo*, the Supreme Court did not hear a major case involving the Takings Clause until over ten years later in *Murr v. Wisconsin*.[175] In *Murr*, the Court faced the challenge of defining the "unit of property against which to assess the effect of [a] challenged governmental action."[176] The underlying case concerned the impact of Wisconsin rules that prohibited developing or selling adjacent lots under common ownership as separate building sites, unless the lots had at least one acre of land capable of development.[177] Together, the petitioners, a group of siblings in the Murr family, owned two adjacent parcels near the Lower St. Croix River in Troy, Wisconsin.[178] The petitioners wanted to develop one lot and sell the other, but were prohibited from doing so because there was less than one acre of developable land on the parcel.[179] The petitioners brought suit against the State of Wisconsin and St. Croix County, claiming Wisconsin's land use rules constituted a regula-

171. *See infra* notes 172-174 and accompanying text (discussing how *Palazzolo* impacted government and private property owners in regulatory takings cases).

172. *See Palazzolo*, 533 U.S. at 632 (holding Palazzolo's claim was ripe even though regulation existed before property purchase).

173. *See* Burling, *supra* note 160, at 44 (discussing problems government would have if private property owners were unable to bring regulatory takings claim when regulation existed before property purchase).

174. *See id.* at 44 (explaining potential incentive of private property owner seller to bring takings claim if purchaser could not).

175. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1939 (2017) (discussing regulatory takings issue considered by Court concerning regulations that impeded development on residential lot).

176. *Id.* at 1943 (describing question presented to Supreme Court).

177. *See id.* at 1940 (describing Wisconsin law banning sale of petitioners' land).

178. *Id.* at 1940-41 (describing ownership history of properties in question).

179. *Id.* at 1941 (discussing petitioners' failed attempts to develop and sell parts of their property due to Wisconsin land use rules).

tory taking without compensation because the rules effectively deprived petitioners of their ability to use their land.[180]

The Court's analysis centered on whether the petitioners' property should be defined as two separate parcels or one whole parcel.[181] In making this determination, the Court announced that the relevant property boundary for a regulatory takings analysis depends on "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts."[182]

According to the majority, courts should consider three factors to evaluate a landowner's reasonable expectations about property ownership.[183] First, "courts should give substantial weight" to state and local laws governing land division.[184] Second, courts must consider the "physical characteristics of the landowner's property."[185] Lastly, courts "should assess the value of the property under the challenged regulation."[186] According to the Court, "special attention" should be given to the "effect of burdened land on the value of other holdings."[187]

After applying its multifactor denominator test, the Court concluded the petitioners' two lots should be treated as one parcel.[188] When the Court assessed the property as a whole, it found the prop-

180. *Murr*, 137 S. Ct. at 1941 (describing petitioners' complaint and request for damages). Specifically, the petitioners' contended Wisconsin's land use rules impeded petitioners' use of their undeveloped lot because it could not be sold or developed separately from other, more developed lot. *Id.*

181. *See id.* at 1945-50 (discussing how to define property boundaries of Murr's property).

182. *Id.* at 1945 (outlining test to determine denominator for regulatory takings analysis).

183. *See id.* at 1945-46 (discussing multiple considerations necessary to determine proper denominator).

184. *Id.* at 1945 (describing first factor of denominator test).

185. *Murr*, 137 S. Ct. at 1945-46 (discussing second factor of denominator test).

186. *Id.* at 1946 (describing third factor of denominator test).

187. *Id.* (discussing need for courts to examine challenged regulation's impact on landowner's other properties).

188. *Id.* at 1948 (applying denominator test to disputed property in *Murr*). Under the first factor, the Court found state and local law indicated the parcel should be treated as a whole because the merger provision "was for a specific and legitimate purpose" and "consistent with the widespread understanding that lot lines are not dominant or controlling in every case." *Id.* Under the second factor, the Court concluded the physical traits of the land supported the property's treatment as one lot because the lots were "contiguous along their longest edge," had difficult terrain and a narrow shape that a person could expect to limit the property's use, and were adjacent to a river under regulation by the government. *Id.* Under the third factor, the Court determined the lot had significant value when the two parcels were merged together. *Id.* at 1948-49.

erty's value had only decreased by ten percent under Wisconsin's land use rules.[189] Consequently, the Court found that no taking occurred under *Lucas* because the petitioners' property was not deprived of all economic value.[190] Finally, the Court held the petitioners also did not have a valid regulatory takings claim under the *Penn Central* test.[191] Because the rules at issue existed before the petitioners owned their property, the petitioners "[could not] claim that they reasonably expected to sell or develop their lots separately."[192]

Some commentators have viewed *Murr* as a major setback to the property rights movement by restricting a private property owner's ability to claim there was a total deprivation of value.[193] This view finds support in the first factor of the majority's denominator test, which requires courts to afford "substantial weight" to state and local law.[194] More specifically, serious concern was raised that this requirement inserts "public policy considerations into the definition of private property itself," which would lead courts to favor the government over the private property owner.[195] Others may argue this claim is unfounded, as the same test also requires courts to consider the regulation's impact on the affected property's value.[196] Because *Murr* was decided recently, it remains to be seen whether *Murr* will significantly shift the Supreme Court's regulatory takings jurisprudence in favor of environmental regulations.[197]

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189. *See id.* at 1949 (applying takings analysis to regulated property in *Murr*).

190. *Murr*, 137 S. Ct. at 1949 (describing impact of concluding land value only decreased by ten percent).

191. *Id.* at 1949-50 (applying *Penn Central* test to assess whether Murr had valid takings claim).

192. *Id.* at 1949 (explaining why petitioners could not prevail under *Penn Central* test).

193. *See* Nicolle Stelle Garnett, *From a Muddle to a Mudslide: Murr v. Wisconsin*, 2017 CATO SUP. CT. REV. 131, 133, 147-49 (2017) (criticizing Court's decision in *Murr* for giving too much deference to government and creating "mudslide" that could damage private property rights); Farber, *supra* note 15, at 166-67 (discussing narrowing of takings claims following *Murr*).

194. *Murr*, 137 S. Ct. at 1945 (describing first factor of denominator test and rationale behind it).

195. Stelle Garnett, *supra* note 193, at 147-48 (discussing risk that private property owners may have to "bear public burdens" when property use is regulated).

196. *See id.* at 1946 (noting need to consider impact on property's economic potential in regulatory takings analysis).

197. *See* Harvard Law Review Association, *Fifth Amendment—Takings Clause—Regulatory Takings—Murr v. Wisconsin*, 131 HARV. L. REV. 253, 260-62 (2017) (discussing how government and developers could each use third factor of *Murr* test to their advantage in future takings cases).

III. CHANGING METHODS IN BANK CHOICES: TRENDS IN SUPREME COURT DECISIONS

Cases decided since *Pennsylvania Coal* reveal general trends concerning the Supreme Court's interpretation of the Takings Clause.[198] First, although the Supreme Court has consistently stated a regulatory takings analysis should be an ad hoc, fact-specific analysis, the Court has slowly added factors that must be considered in the analysis.[199] Second, the Court's regulatory takings analysis has reflected a struggle to balance private property rights and the public interest.[200] Third, this struggle has resulted in an ideological divide in the Court, where conservative justices have generally favored private property rights, while liberal justices have typically afforded greater weight to the public interest.[201]

A. Clarifications in the Ad Hoc Analysis

Between *Pennsylvania Coal* in 1922 and *Murr* in 2017, the Court has insisted that takings analyses be "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances."[202] In 1922, *Pennsylvania Coal* limited the fact-specific nature of takings analysis by requiring courts to find a taking had occurred if a regulation diminished a property's value to "a certain magnitude."[203] Unfortunately, *Pennsylvania Coal* did not provide any guidance as to what magnitude of devaluation entitles an affected property owner to compensation.[204]

After *Penn Central*, the Supreme Court began to articulate special situations that could be considered regulatory takings.[205] The first was identified in *Lucas*, where the Court concluded if a regulation completely extinguished the economic potential of the af-

198. *See infra* notes 157-195 and accompanying text (discussing development of takings analysis in Supreme Court cases).

199. *See infra* notes 202-213 and accompanying text (detailing ad hoc analysis of takings claims and slow clarification of takings analysis).

200. *See infra* notes 214-226 and accompanying text (discussing Supreme Court's increasing focus on economic concerns in regulatory takings cases).

201. *See infra* notes 227-232 and accompanying text (explaining dichotomy between conservative and liberal justices regarding regulatory takings decisions).

202. *See Murr*, 137 S. Ct at 1942 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002)) (describing why ad hoc, fact-specific analysis has been applied in Supreme Court regulatory takings cases).

203. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (stating economics should be considered).

204. *See id.* (noting whether property has suffered sufficient loss of value as to require compensation "depends upon the particular facts.").

205. *See infra* notes 206-213 and accompanying text (discussing new category for takings analysis created in *Lucas*).

fected property, a Court would find a per se taking had occurred.[206] *Lucas* also provided the caveat of the nuisance exception, which upholds the constitutionality of a government regulation under the Takings Clause if, under common law, the property owner's proposed action would be a nuisance.[207] Later, in *First English*, the Court again constrained the fact-specific nature of the regulatory takings analysis, holding that even a temporary regulation could be considered regulatory taking.[208]

One problem that plagued the regulatory taking analysis was how to determine the portion of land against which the diminution in value would be measured.[209] Property rights advocates favored singling out the part of the land impacted by the regulation, which would increase the likelihood a Court would find the regulation constituted a taking.[210] This interpretation conflicted with *Penn Central*, where the Supreme Court stated the parcel should be considered as a whole.[211] The Court finally settled the denominator question in *Murr* by creating a three-factor test to determine the property boundary used in a regulatory takings analysis.[212] Notably, this three-factor test reflects the Court's longstanding preference for an ad hoc approach to a regulatory takings claim because the test's outcome depends largely upon the facts in each case.[213]

B. Private Property Owners v. Public Interest

A common theme in regulatory takings cases is the need to balance the private property owner's rights with the public inter-

206. *See supra* notes 144-159 and accompanying text (discussing how *Lucas* created a new category).

207. *See supra* notes 152-153 and accompanying text (discussing limitation to per se takings finding identified in *Lucas*).

208. *See* First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, 482 U.S. 304, 306-07 (1987) (stating disagreement with California Court of Appeal's ruling in favor of County of Los Angeles).

209. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (highlighting consequences of Court's failure to determine property boundaries assessed in regulatory taking claims).

210. *See supra* note 127 and accompanying text (discussing landowners' argument for adopting per se rule).

211. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978) (discussing how regulatory takings analysis evaluates impact on "parcel as a whole.").

212. *See supra* notes 175-192 and accompanying text (discussing Court's creation of denominator test).

213. *See* Farber, *supra* note 15, at 146, 148 (discussing Court's favoring of ad hoc approach to regulatory takings analysis).

est.[214] The Court has considered the economic impact on the property central to determining whether the private property owner's interests have been violated.[215] Two out of three factors in the *Penn Central* analysis focus on the economic consequences of a taking, including the impact on the private property owner's investment-backed expectations.[216] *Lucas* also placed strong emphasis on economic factors by creating a special category for private landowners who were deprived of all viable economic use of their land.[217]

The Supreme Court has also underscored the public interest as an important factor when assessing a regulatory takings claim, although not always consistently.[218] In *Nollan*, the Court noted that although a continuous strip of land allowing public access to beach could be in the public interest, this did not preclude the Court from finding a taking had occurred based on the underlying facts.[219] Later, in *Lucas*, the Court articulated the nuisance exception as a way to prevent economic concerns from taking precedence over the public interest.[220] As the Court explained, "the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land."[221]

The Court has recognized the "central dynamic" of the regulatory takings doctrine is the balance between private property rights and the public interest.[222] In *Murr*, Justice Kennedy, writing for the majority, emphasized the regulatory takings doctrine's purpose is

214. *See* Murr v. Wisconsin, 137 S. Ct 1933, 1943 (2017) (articulating property rights and public interest as two "persisting" interests in regulatory takings analysis); *see* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (discussing government's need to balance rights of private property owners with public interest when regulating land use).

215. *See infra* notes 216-217 and accompanying text (discussing role of economic value of property in Supreme Court's takings jurisprudence).

216. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (stating factors to consider in regulatory takings analysis).

217. *See supra* notes 149-151 and accompanying text (discussing Court's creation of new category for regulatory takings analysis).

218. *See infra* notes 219-221 and accompanying text (describing Court's consideration of public interest in regulatory takings analysis).

219. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841-42 (1987) (holding public interest in beach access insufficient defense to Nollans' takings claim).

220. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (discussing nuisance exception to *Lucas* category in regulatory takings analysis).

221. *Id.* at 1029 (demonstrating how property owner cannot prevail on regulatory takings claim when owner's use of land negatively impacts surrounding community).

222. *See* Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017) (discussing regulatory takings doctrine as a reconciliation between "two competing objectives").

the protection of property rights by "preserv[ing] freedom", and simultaneously, ensuring the government maintains its "well-established power to 'adjus[t] rights for the public good.'"[223] In dissent, Chief Justice Roberts also underscored the need for balance between private property rights and the public interest.[224] Chief Justice Roberts suggested that without this balance, property owners' rights would disappear because the government would be able to restrict property owners' use of their land without physically invading it.[225] He also expressed concern that property rights would be overlooked without this balance because a regulation is often created in response to a visible public policy issue, while the concept of protecting property rights is more abstract.[226]

C. Supreme Court Conservative Justices v. Liberal Justices

When evaluating the Court's attempt to balance private property rights and the public interest, a divide emerges between the conservative and liberal justices.[227] Justice Kennedy and Chief Justice Roberts espouse the view, which the Supreme Court has largely adopted over the years, that the regulatory takings doctrine should operate to protect the freedom that comes with property rights.[228] Chief Justice Rehnquist, another historically conservative Supreme Court justice, has focused on the extent of burdens on landowners resulting from land use restrictions.[229] Conversely, liberal justices, such as Justice Stevens, have often emphasized the property owner's duty to the community.[230] Regardless of whether a Supreme Court justice is conservative or liberal, all have agreed that private property rights are subject to the public interest to some degree.[231]

223. *Id.* (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)) (describing two interests that are balanced in regulatory takings analysis).

224. *Id.* at 1951 (Roberts, C.J., dissenting) (discussing how regulatory takings cases have balanced private property rights with the public interest).

225. *Id.* (discussing potential threat to protect private property rights).

226. *See id.* at 1955 (discussing additional concerns about private property rights).

227. *See infra* notes 228-232 and accompanying text (discussing differing views between liberal and conservative Supreme Court justices within regulatory takings cases).

228. *See* Farber, *supra* note 15, at 157-58 (discussing Chief Justice Roberts' and Justice Kennedy's rationale in support of regulatory takings doctrine that protects property rights).

229. *See* Cordes, *supra* note 96, at 4 (discussing Chief Justice Rehnquist's view of regulatory takings analysis).

230. *Id.* (discussing Justice Stevens' view of regulatory taking analysis).

231. *Id.* at 3 (discussing point of agreement between Supreme Court justices regarding regulatory takings analysis).

These differing views suggest that a change in the Supreme Court's makeup could have a significant effect on future takings cases.[232]

IV. PROTECTING THE ENVIRONMENT AND THE GOVERNMENT'S BANK: THE TAKINGS CLAUSE AND THE ENVIRONMENT

Environmental regulations often interfere with the use of private property.[233] One major impediment to property development is the regulation of wetlands.[234] Wetland regulations often require a dredge and fill permit or local land use permit, with exactions to be issued before a property owner can alter a wetland.[235] Despite the potential for dredge and fill permit application denials to intrude on private property rights, lower federal courts generally have concluded such denials do not constitute unlawful takings.[236]

A. Takings Jurisprudence and Dredge and Fill Permits

Under Section 404 of the Clean Water Act (CWA), a dredge and fill permit is required "for the discharge of dredged or fill material into the navigable waters."[237] The CWA gives the Army Corps of Engineers (Corps) the responsibility of issuing permits.[238] Private property owners who want to build on their land may need to fill a wetland to begin construction.[239] The requirements of a dredge and fill permit can limit a property owner's ability to fill a wetland by either requiring mitigation of potential destruction to

232. *See supra* notes 227-231 and accompanying text (discussing different views between liberal and conservative Supreme Court justices).

233. *See* Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 153-54 (1990) (discussing private landowner trying to fill wetland on property being denied state and federal dredge and fill permits); *see* Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3, 4-5 (1988) (discussing issues caused by reconciling environmental regulations with Takings Clause).

234. Simeon D. Rapoport, Comment, *The Taking of Wetlands Under Section 404 of the Clean Water Act*, 17 ENVTL. L. 111 (1986) (discussing difficulties private property owners face when trying to develop wetlands).

235. *See infra* notes 261-264 and accompanying text (discussing CWA requirements for dredge and fill permits and usage of permit exactions to protect wetlands).

236. *See infra* notes 243-256 and accompanying text (describing Court of Federal Claims takings cases involving dredge and fill permits and analyzing their holdings).

237. Clean Water Act, 33 U.S.C. § 1344(a) (2012) (stating requirement to obtain permit before dredging and filling).

238. *Id.* §§ 1344(a), 1344(d) (giving Secretary of Army authority to issue dredge and fill permits).

239. *See* Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 153-54 (1990) (discussing private property owner's need to fill wetland to develop land).

the wetland or prohibiting building on the wetland.[240] When a property owner is denied a permit to fill land, courts have determined the property owner can file a Fifth Amendment takings claim against the Corps.[241] Property owners have often brought Fifth Amendment takings claims for dredge and fill permit denials since the 1970s, although generally they are not successful.[242]

To assess the potential impact of the Supreme Court's regulatory takings cases on the CWA, a review was conducted of twenty-one takings cases challenging dredge and fill permit decisions in the Court of Federal Claims.[243] The analysis included all dredge and fill takings cases in the Court of Federal Claims from 1980 to 2017 that resulted in a ruling on whether a taking had occurred.[244] The Court of Federal Claims was chosen because under the Tucker

240. *See id.* at 154 (discussing state fill permit requiring mitigation and Corps denying federal dredge and fill permit request).

241. *See id.* (discussing landowner filing suit claiming takings occurred without compensation); American Dredging Co. v. Dutchyshyn, 480 F. Supp. 957, 961-62 (E.D. Pa. 1979) (holding plaintiff could not obtain injunction to have dredge and fill permit approved and instead should file takings claim in Court of Claims, predecessor of Court of Federal Claims).

242. *See infra* notes 246-256 and accompanying text (discussing survey of dredge and fill permit takings cases in United States Court of Federal Claims between 1980 and 2017); Rapaport, *supra* note 234, at 117, 122-24 (1986) (discussing how land developers have brought takings claims when denied dredge and fill permits since 1970s and how takings claims are rarely successful).

243. *See infra* notes 244-260 and accompanying text (discussing survey of dredge and fill regulatory takings cases). The survey of cases included Lost Tree Village Corp. v. United States, 115 Fed. Cl. 219, 233 (2014); Mehaffy v. United States, 102 Fed. Cl. 755, 769 (2012); Brace v. United States, 72 Fed. Cl. 337, 358 (2006); Sartori v. United States, 67 Fed. Cl. 263, 277 (2005); Norman v. United States, 63 Fed. Cl. 231, 234 (2004); Palm Beach Isles Assoc. v. United States, 58 Fed. Cl. 657, 686 (2003); Bay-Houston Towing Co., Inc. v. United States, 58 Fed. Cl. 462, 478 (2003); Walcek v. United States, 49 Fed. Cl. 248, 249 (2001); Florida Rock Industr., Inc. v. United States, 45 Fed. Cl. 21, 23 (1999); Walcek v. United States, 44 Fed. Cl. 462, 468 (1999); Forest Properties, Inc. v. United States, 39 Fed. Cl. 56, 60 (1997); Good v. United States, 39 Fed. Cl. 81, 84 (1997); Marks v. United States, 34 Fed. Cl. 387, 403, 411 (1995); Bowles v. United States, 31 Fed. Cl. 37, 40 (1994); 1902 Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 576 (1992); Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334, 1357 (1992); Ciampitti v. United States, 22 Cl. Ct. 310, 311 (1991); Dufau v. United States, 22 Cl. Ct. 156, 157 (1990); *Loveladies Harbor,* 21 Cl. Ct. at 153; Deltona Corp. v. United States, 228 Ct. Cl. 476, 477-78 (1981); Jentgen v. United States, 228 Ct. Cl. 527, 528-29 (1981).

244. *See supra* note 243 (listing decisions made on whether there was regulatory taking when Army Corps denied dredge and fill permits). Regulatory takings claims for denial or delay of dredge and fill permits that were dismissed based on procedural grounds were not included because they did not conduct a full analysis on whether there was a taking. *See* Pax Christi Memorial Gardens, Inc. v. United States, 52 Fed. Cl. 318, 323-24 (2002) (dismissing regulatory takings claim for delay in issuing dredge and fill permit on ripeness grounds); Heck v. United States, 37 Fed. Cl. 245, 247 (1997) (dismissing regulatory takings claim for delay in reviewing dredge and fill permit application as not ripe).

Act, it has exclusive jurisdiction over claims against United States based on the U.S. Constitution.[245] In the 1980s, there were only two cases in which plaintiffs alleged the United States conducted a taking when the Army Corps of Engineers denied those plaintiffs' dredge and fill permit applications, *Deltona Corp. v. United States* and *Jentgen v. United States*; in both cases, the court ruled no taking had occurred.[246] The court in *Deltona* held the United States did not conduct a taking because multiple economic uses for the land remained, despite the permit denials' significant impact on the land's overall value.[247] In *Jentgen*, the court held no taking occurred because in spite of the permit denial, the property's approximate market value was consistent with the original purchase price and twenty acres of the property could still be developed.[248]

A sharp increase in dredge and fill takings cases occurred in the 1990s, where, in eight cases, the court determined there was no taking and, in three cases, there was a taking.[249] There was an overall decline in takings cases in the 2000s, resulting in only six Court of Federal Claims decisions.[250] In all six cases, the court found

245. 28 U.S.C. § 1491(a)(1) (2012) (granting United States Court of Federal Claims jurisdiction to hear cases against United States for claims based on Constitution, federal statute, or federal regulation). The Tucker Act is "a jurisdictional statute" that "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976).

246. *Deltona Corp.*, 228 Ct. Cl. at 477-78 (holding denial of dredge and fill permit was not taking); *Jentgen*, 228 Ct. Cl. at 528-29 (determining taking had not occurred).

247. *Deltona Corp.*, 228 Ct. Cl. at 482-84, 491-93 (discussing background of case and takings analysis of plaintiff's claim, and holding denial of "highest and best economic use" of plaintiff's property did not cause a taking).

248. *Jentgen*, 228 Ct. Cl. at 533-34 (discussing takings analysis of plaintiff's claim and holding property value had not diminished enough to find taking had occurred).

249. *Florida Rock Industries*, 45 Fed. Cl. at 23 (finding Corps effected a regulatory taking); *Walcek*, 44 Fed. Cl. at 468 (holding no temporary taking occurred); *Forest Properties*, 39 Fed. Cl. at 60 (finding no regulatory taking); *Good*, 39 Fed. Cl. at 84 (concluding no taking occurred); *Marks*, 34 Fed. Cl. at 411 (holding plaintiffs failed to demonstrate regulatory taking occurred); *Bowles*, 31 Fed. Cl. at 40 (holding taking of plaintiff's property occurred); *1902 Atlantic Ltd.*, 26 Cl. Ct. at 576 (holding no taking occurred); *Tabb Lakes*, 26 Cl. Ct. at 1357 (finding defendant was entitled to summary judgment on plaintiff's takings claim); *Ciampitti*, 22 Cl. Ct. at 311 (holding plaintiffs could not prevail on takings claim); *Dufau*, 22 Cl. Ct. at 157 (granting defendant's motion for summary judgment on plaintiff's takings claim); *Loveladies Harbor*, 21 Cl. Ct. at 153 (holding taking of plaintiff's property occurred).

250. *Brace*, 72 Fed. Cl. at 358 (holding no taking occurred); *Sartori*, 67 Fed. Cl. at 277 (finding no temporary categorical taking); *Norman*, 63 Fed. Cl. at 234 (concluding no taking occurred); *Palm Beach Isles Assoc.*, 58 Fed. Cl. at 686 (holding Corps did not engage in regulatory taking); *Bay-Houston Towing Company*, 58 Fed. Cl. at 478 (granting defendant's summary judgment motion for plaintiff's temporary takings claim); *Walcek*, 49 Fed. Cl. at 249 (holding no taking occurred).

there was no taking.[251] There was a further decline in takings cases from 2010 to 2017, resulting in only two takings cases.[252] In the first case, the court held there was no taking, and in the second case, the court concluded there was a taking.[253]

Between 1980 and 2017, there was no observable shift in the Court of Federal Claims' willingness to conclude takings had occurred in cases involving dredge and fill takings claims.[254] After the 1987 Supreme Court cases and *Lucas*, the court was still more likely to determine there was no taking in dredge and fill permit cases.[255] This finding suggests the Supreme Court cases did not have a large impact on the Court of Federal Claims' rulings in takings cases for dredge and fill permits.[256]

Significantly, there was a larger number of Court of Federal Claims dredge and fill permit takings cases in the 1990s and early 2000s.[257] It is possible the Supreme Court's decision *First English* contributed to the rise in these claims because it gave plaintiffs the opportunity to bring takings claims for temporary regulations.[258] In the 1980s before *First English*, the survey shows the Court of Federal Claims never ruled on a temporary takings claim.[259] After *First English*, seven cases in the 1990s and 2000s involved temporary takings claims, which constituted more than half of the total takings cases.[260]

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251. *See supra note* 250 (listing six decisions where court concluded there was no taking).

252. *See Lost Tree*, 115 Fed. Cl. at 233 (determining dredge and fill permit caused taking); *Mehaffy*, 102 Fed. Cl. at 769 (holding denial of dredge and fill permit was not regulatory taking).

253. *See supra* note 252 and accompanying text (discussing outcomes of cases between 2010 and 2017).

254. *See supra* notes 246-253 and accompanying text (listing findings in takings cases for dredge and fill permits between 1980 and 2017).

255. *See supra* notes 246-253 and accompanying text (listing findings in takings cases for dredge and fill permits between 1987 and 2017).

256. *See supra* note 255 and accompanying text (describing court holdings after 1987).

257. *See supra* notes 249-251 and accompanying text (showing court holdings in dredge and fill permit takings cases from 1990 to 2017).

258. *See infra* notes 259-260 and accompanying text (discussing survey findings showing increase in temporary takings claims after *First English*).

259. *See supra* note 246 and accompanying text (discussing 1980s regulatory taking cases holdings).

260. *See supra* notes 249-253 and accompanying text (discussing regulatory taking cases holdings from 1990-2017); Sartori v. United States, 67 Fed. Cl. 263, 277 (2005) (no temporary regulatory taking); Norman v. United States, 63 Fed. Cl. 231, 234 (2004) (no temporary regulatory taking); Walcek v. United States, 44 Fed. Cl. 462, 468 (1999) (no temporary regulatory taking); Marks v. United States, 34 Fed. Cl. 387, 403, 411 (1995) (no temporary regulatory taking); Tabb Lakes, Inc. v. United States, 26 Cl. Ct. 1334, 1357 (1992) (no temporary regulatory taking); 1902

B. Takings Clause and Local Land Use Permits

The Supreme Court's takings cases may also indirectly limit the ability of local land regulations to protect wetlands.[261] Local land use permits often have exactions, which require the builder to set aside part of the property to be used in the public interest or pay a fee to the local government.[262] A study, which observed the impacts of the Supreme Court's takings jurisprudence on local land use decisions in California, found the Supreme Court cases may have made it more difficult for heavily developed communities with infrastructure issues to place exactions on developers.[263] This problem could lead to communities using impact fees over exactions, which would lead to "less wetlands and habitat protection."[264]

V. CONCLUSION

From *Pennsylvania Coal* in 1922 to cases like *Palazzolo* today, the Supreme Court has slowly strengthened property rights in regulatory taking cases at the expense of the public interest.[265] The clearest example of this occurred in *Lucas*, where the Court determined a regulation that completely diminished a property's economic value would constitute a categorical taking.[266] As the Court in *Lucas* explained, the legitimacy of land-use regulations to promote the public interest cannot be applied "to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."[267] Despite the Supreme Court's shift in favor of property rights, the Court's jurisprudence has not caused a ma-

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Atlantic Ltd. v. United States, 26 Cl. Ct. 575, 576 (1992) (no temporary regulatory taking); Dufau v. United States, 22 Cl. Ct. 156, 157 (1990) (no temporary regulatory taking).

261. *See infra* notes 262-264 and accompanying text (discussing concerns about Supreme Court takings jurisprudence on local land use decisions and wetlands).

262. MICHAEL A. ZIZKA ET AL., STATE AND LOCAL GOVERNMENT LAND USE LIABILITY § 18:2, Westlaw (database updated December 2018) (explaining concepts of exactions and impact fees and how courts determine whether they are legal).

263. *See* Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 156 (2001) (discussing Supreme Court takings jurisprudence impact on heavily developed communities).

264. *See id.* (discussing problems with using impact fees over exactions).

265. *See supra* notes 38-174 and accompanying text (discussing Supreme Court takings jurisprudence favoring property rights advocates).

266. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (identifying second circumstance entitling affected property owner to compensation "without case-specific inquiry into the public interest advanced in support of the restraint.").

267. *Id.* at 1018 (describing rationale for categorical takings rule).

jor impact on lower federal court rulings on regulatory takings claims.[268] This may be due to the ad hoc nature of the takings analysis, which still allows courts significant flexibility when deciding a takings case.[269]

The Supreme Court's takings cases may cause governments to avoid takings claims by passing fewer environmental regulations or issuing permits with fewer restrictions on land use.[270] This could greatly impact some areas of environmental law, particularly the CWA's dredge and fill permitting system.[271] Studies should be conducted to see if the Supreme Court's regulatory takings decisions have impacted permitting systems, like dredge and fill permits, and if impacted, to determine if there has been a decrease in mitigation measures required by the permits.[272] In the future, courts should be cautious and ensure that private property rights are not protected to the point of imposing unnecessary harm on the environment.[273]

The Supreme Court's takings jurisprudence could shift to some degree with a change of justices on the Court.[274] With younger, conservative Justices Gorsuch and Kavanaugh replacing Justices Scalia and Kennedy, respectively, on the Court, the conservative majority that favors private property rights will likely continue for the foreseeable future.[275] A conservative majority may not

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268. *See supra* notes 254-256 and accompanying text (discussing Court of Federal Claims decisions in regulatory taking cases pertaining to dredge and fill permits).

269. *See supra* note 202 and accompanying text (discussing trends in United States Court of Federal Claims cases between 1980 and 2017).

270. *See supra* notes 261-264 and accompanying text (discussing concerns about Supreme Court takings jurisprudence on local land use decisions and wetlands).

271. *See supra* notes 239-241 and accompanying text (discussing potential impacts of Supreme Court takings jurisprudence on dredge and fill permits).

272. *See* Carlson & Pollak, *supra* note 263, at 156 (showing impact on local land use decisions that suggest wetlands protection through permits may by weakened).

273. *See supra* notes 270-271 and accompanying text (discussing potential problems between Supreme Court takings jurisprudence and dredge and fill permits).

274. *See infra* notes 275-276 and accompanying text (discussing how changes in Supreme Court justices could impact regulatory takings doctrine).

275. *See* Richard Wolf, *Justice Gorsuch Confirms Conservatives' Hopes, Liberals' Fears in First Year on Supreme Court*, USA TODAY (Apr. 9, 2018, 9:45 PM), https://www.usatoday.com/story/news/politics/2018/04/08/justice-gorsuch-confirms-conservatives-hopes-liberals-fears-first-year-supreme-court/486630002/ (discussing various cases where Justice Gorsuch ruled on conservative side); *see* Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, NY TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html (reporting Judge Brett Kavanaugh's confirmation to Supreme

dramatically favor private property rights, as conservative justices have historically valued the regulatory takings doctrine's ad hoc, fact-specific approach.[276]

Over the years, there has been a constant fight between environmentalists and private property rights advocates.[277] Although private property rights movement has found success in recent years, there is a recognized need to find a middle ground between protecting valuable environmental regulations and important land and business developments.[278] While land and business development is necessary to promote a strong economy, it can come at the expense of maintaining a healthy environment.[279] A lack of federal environmental regulations could impose major costs on communities for necessary remedies, such as upgrades to water treatment facilities to prevent contamination or raising roads in coastal cities to combat rising sea levels.[280]

According to scholars James E. Holloway and D. Tevis Noelting, one way to deal with these challenges is to create "integrated sustainability regulation[s]."[281] These regulations would combine existing and new environmental regulations, while considering the needs of land and business developers.[282] By taking into consideration land and business developers' needs when creating environmental regulations, extensive litigation over takings claims could be

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Court and discussing how his confirmation will solidify conservative majority on Court).

276. *See* Farber, *supra* note 15, at 166-67 (discussing potential future of takings doctrine).

277. *See supra* notes 12-14 and accompanying text (explaining disagreements between environmentalists and private property rights advocates).

278. *See* James E. Holloway & D. Tevis Noelting, *Takings Clause and Integrated Sustainability Policy and Regulation: The Proportionality of the Burdens of Exercising Property Rights and Paying Just Compensation*, 29 VILL. ENVTL. L.J. 1, 3 (2018) (discussing need to reconcile landowner rights with environmental interests).

279. *See id.* (describing codependent nature of development and environmental policy concerns).

280. *See* Annie Sneed, *Trump's Order May Foul Drinking Water Supply*, SCIENTIFIC AMERICAN (Mar. 10, 2017), https://www.scientificamerican.com/article/trump-rs quo-s-order-may-foul-u-s-drinking-water-supply/ (discussing how revoking Clean Water Rule could require expensive upgrade to water treatment plants); Joey Flechas, *Miami Beach to Begin New $100 Million Flood Prevention Project in Face of Sea Level Rise*, MIAMI HERALD (Mar. 23, 2017, 6:03 PM), https://www.miamiherald .com/news/local/community/miami-dade/miami-beach/article129284119.html (describing Miami Beach's new project to raise roads).

281. *See* Holloway & Noelting, *supra* note 278, at 3 (discussing need to create "integrated national regulatory approach for sustainable development and environment for current and future generations.").

282. *See id.* at 3-4 (discussing how to create integrated sustainability regulations).

avoided, so long as these regulations are reasonable.[283] To avoid detrimental delays in development, policymakers should find an efficient way to create integrated sustainability regulations.[284] This may require state and local level legislators to take the lead, as policymakers at all levels of government have been slow to pass any environmental laws.[285] The best way to pass integrated sustainability laws is for private property rights advocates and environmentalists to bring their expertise together and provide necessary pressure on lawmakers.[286]

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283. *See id.* at 49 (discussing how regulations need to remember strength of per se takings rule from *Lucas*).

284. *See id.* at 3-11 (discussing how consideration of takings in creation of regulations could slow process of passing regulations).

285. *See id.* at 4-5 (discussing how current scheme of environmental regulation is insufficient address "interrelated economic, environmental and social harm caused by land development, energy production, climate change, and other activities.").

286. *See supra* notes 279-285 and accompanying text (explaining need for environmentalists to work with private property rights advocates).

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