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Murr v. Wisconsin and the Supreme Court's Regulatory Takings Jurisprudence

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ABSTRACT

This paper reviews the last thirty years of the Supreme Court's regulatory takings jurisprudence and the implications for it of the Court's latest decision in Murr v. Wisconsin*. Building on revelations from the author's previous analysis of the papers of the late Justices Marshall and Blackmun, it concludes that the Court is more sharply divided in regulatory takings cases than it was in 1986 when Justice Scalia joined the Court and Justice Rehnquist became Chief Justice. The paper explores tensions between the Court's regulatory takings jurisprudence and its efforts to revive constitutional limits on federal power. Noting that Justice Kennedy has been in the majority in all ten regulatory takings cases decided while he has been on the Court, the paper concludes that after he retires his successor could have a profound effect on the future of regulatory takings jurisprudence.*

Introduction

On June 23, 2017, the U.S. Supreme Court decided *Murr v. Wisconsin,* the last of thirteen cases challenging state or local regulations of real property as regulatory takings the Court decided after Justice Antonin Scalia joined it in 1986.[1] *Murr* was the last of these cases the Court agreed to hear while Justice Scalia was alive[2] and

[1] Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (1987); 1st English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994); Suitum v. Tahoe-Sierra Regional Planning Agency, 520 U.S. 735 (1997); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002); Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005); Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. 702 (2010); Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013); Murr v. Wisconsin, 137 S.Ct. 1933 (2017).

[2] Murr v. Wisconsin, cert granted 136 S.Ct. 890 (Jan. 15, 2016).

the first to be decided after his death. On February 13, 2016, less than a month after the Court agreed to review *Murr*, Justice Scalia died suddenly, leaving the Court with only eight justices for more than a year. The Court then repeatedly delayed scheduling oral argument in *Murr*, leading many observers to believe that it was waiting for the confirmation of Justice Scalia's successor. After the Republican-controlled Senate refused to consider President Obama's March 16, 2016 nomination of Judge Merrick Garland, the Court eventually scheduled the *Murr* oral argument for March 20, 2017, eighteen days before Judge Neil Gorsuch was confirmed by the Senate. The Court ultimately decided *Murr* without Justice Gorsuch's participation in the case.

This paper reviews *Murr* in the context of the Supreme Court's regulatory takings jurisprudence. After reviewing the origins of the doctrine and the seminal 1978 *Penn Central* decision, it considers the Court's three 1987 decisions that portended the doctrine's revival. The paper then examines regulatory takings decisions in the final decade of the twentieth century that broke new ground, only to have the Court return to *Penn Central* in its 21st century decisions. It then examines *Murr* and its implications for regulatory takings doctrine in the post-Scalia era. The paper concludes that the Court is more sharply divided than ever on regulatory takings issues with Justice Kennedy holding the decisive vote. The pragmatic, moderate approach he applied in *Murr* shows respect for the important role states play in shaping property law, but its durability depends largely on who succeeds Justice Kennedy after he retires from the Court.

The Early Development of Regulatory Takings Doctrine

The Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." Although it was well understood that the Takings Clause required the government to compensate property owners for government action that physically invaded their property, it was not until 1922 in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), that the concept of regulatory takings was born. A statute prohibiting the mining of coal in a manner that could cause the subsidence of homes on the surface was held to be a taking because it effectively abolished the value of underlying mineral rights. Justice Holmes declared that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. While noting that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law," Holmes argued that the prospect that coal removal could damage residences on the surface was not the kind of public nuisance that must yield to the state's police power. In dissent, Justice Brandeis argued that the regulation was not a taking, but rather "merely the prohibition of a noxious use."

In subsequent decades, the federal courts had a difficult time articulating a principled method for determining when regulation "goes too far" and constitutes a taking. In Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), the Supreme Court conceded that it had been unable to develop any "set formula" for defining a regulatory taking. The case involved a challenge to New York City's historic landmark preservation law that prohibited a railroad from building a 55-story office building above Grand Central Terminal, a landmark designated under the law. After considering the economic

impact of the regulation on the claimant, the extent to which the regulation has interfered with "distinct investment-backed expectation," and "the character of the governmental action," the Court rejected the takings claim.

Justice Rehnquist dissented in an opinion joined by Chief Justice Burger and Justice Stevens. Rehnquist argued that the historic landmark law unfairly singled out one-tenth of one percent of all buildings in New York City without providing them the "reciprocity of advantage" that zoning ordinances provide because zoning typically is applied to all property in a designated area.[3] The Court majority rejected the notion that Penn Central had been singled out, noting that the law was part of "a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city," and that it had been applied to 400 structures and 31 historic districts.[4]

The 1987 Trilogy: *Keystone, First English & Nollan*

On September 17, 1986 Antonin Scalia was confirmed as an Associate Justice of the Supreme Court by a vote of 98-0 on the same day that William H. Rehnquist had been confirmed as Chief Justice by a vote of 65-33. In the Supreme Court term that commenced two weeks later, the Court signaled renewed interest in developing its takings jurisprudence when it decided three regulatory takings cases.

In Keystone Bituminous Coal v. DeBenedictis, 480 U.S. 470 (1987), the Court held, by a 5-4 margin on facts virtually identical to those of *Pennsylvania Coal*, that a law restricting the exercise of mineral rights was not a taking because it was designed to protect public health and safety by preventing subsidence of surface areas. In First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), the Court held that a state could not escape liability for damages if a development restriction constituted a temporary taking. California law provided that the only remedy in an inverse condemnation action was invalidation of the regulation rather than the payment of damages. Owners of a summer camp for handicapped children that had been destroyed by flood challenged a county's decision not to let them rebuild. Although the first draft of Chief Justice Rehnquist's majority opinion declared that the county was required to pay compensation for a temporary taking, he later changed this to state that the Court was not holding as a matter of law that a temporary taking had occurred.[5] This proved significant on remand because the California courts held that no taking had occurred because the regulation was designed to prevent harm to the public from floods.

In Nollan v. California Coastal Commission, 483 U.S. 825 (1987), the third regulatory takings case decided by the Court in 1987, the Court ruled that the California Coastal Commission had engaged in an unconstitutional regulatory exaction by conditioning approval of a permit to build a beachfront structure on the property owner granting a physical easement to make it easier for the public to reach the beach. Writing for the Court, Justice Scalia declared that there was no "essential nexus" between the requested

[3] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 138-140 (Rehnquist, J. dissenting).
[4] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 132.
[5] Robert V. Percival, Environmental Law in the Supreme Court: Highlights from the Blackmun Papers, 35 Envt'l L. Rep. 10637, 10653 (2005).

exaction, which made it easier for the public to reach the beach, and the impact of the development – impairment of the public's view of the beach. This case served as the foundation for the Court's subsequent decisions in Dolan v. City of Tigard, 512 U.S. 374 (1994), and Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013), which expanded the concept of unconstitutional regulatory exactions.

Breaking New Ground: *Lucas* and *Dolan*

The retirement of Justice Thurgood Marshall and the confirmation in October 1991 of Justice Clarence Thomas as his successor produced a distinct, conservative shift in the Court. This became apparent in regulatory takings cases decided in 1992 and 1994. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Court created a new class of categorical takings for regulations that deprived land of all economic value. A trial court in South Carolina had made the unusual holding that the state's Beachfront Management Act had rendered an undeveloped lot "valueless" by prohibiting construction on it. Writing for the majority, Justice Scalia declared that such a regulation was a *per se* regulatory taking unless it could be shown that the common law of nuisance would have barred all development. In an important opinion concurring in the judgment, Justice Kennedy disagreed. "The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." He stated that "[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."[6]

Lucas seemed to signal an aggressive new posture for the Court's regulatory takings jurisprudence that was eager to embrace claims by property owners while dismissing rationales for regulation proffered by state and local governments. But because it only applied to cases where regulation wiped out all economic value of real estate, it proved more symbolic than practical. Indeed, Justice Scalia in a memorandum to his colleagues advised the court to denz review in the two regulatory takings cases the Court had held pending resolution of *Lucas* because they did not involve findings of total deprivation of economic value.[7] Remarkably, one petition challenged the same South Carolina regulation that Lucas challenged.[8]

In Dolan v City of Tigard, 512 U.S. 374 (1994), the Court expanded on its 1987 *Nollan* decision by holding that a city could not condition approval of a variance to allow construction of a larger structure than zoning regulations allowed on a property owner's agreement to dedicate land for green space and a public bike path. Writing for the Court majority in the 5-4 decision, Chief Justice Rehnquist declared that regulatory exactions must meet not only *Nollan*'s "essential nexus" test, but also that the government must prove that the size of the exaction to be "roughly proportional" to the impact of the development.

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[6] Lucas v. South Carolina Coastal Council, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment).
[7] Percival, *supra* note 2, at 10655.
[8] Esposito v. South Carolina Coastal Council, 939 F.3d 165 (4th Cir. 1991), cert denied 505 U.S. 1219 (1992).

In May 1997, the U.S. Supreme Court reversed the Ninth Circuit's dismissal on ripeness grounds of a takings challenge to regulations issued by the Tahoe Regional Planning Agency (TRPA). Suitum v. Tahoe Regional Planning Agency, 520 U.S. 735 (1997). The Court concluded that a landowner's claim that regulations effected a regulatory taking by denying her the right to develop her own property in return for receiving transferable development rights (TDRs) that could be used elsewhere, was not rendered unripe because she had failed to try to sell the TDRs.

Two years later the Court again ruled that a regulatory takings claim was ripe for review after a city repeatedly disapproved development plans, while inviting their resubmission. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). It also held that regulatory takings claims brought against cities in federal court can be submitted to juries, though it clarified that *Dolan*'s "rough proportionality test" applied only to decisions to condition the approval of development on the dedication of private property to public use.

Returning to *Penn Central: Palazzolo, Tahoe-Sierra & Lingle*

In June 2001, the U.S. Supreme Court rejected the notion that post-regulation acquisition of property serves as an automatic bar to regulatory takings claims. In Palazzolo v. Rhode Island, 533 U.S. 606 (2001), the Court, by a 5 to 4 vote, reversed a decision by the Supreme Court of Rhode Island that had rejected a regulatory takings claim by a landowner who had acquired ownership of waterfront property after enactment of a state coastal protection law. After the state twice denied the landowner's proposals to develop the wetland portion of the property, he filed an inverse condemnation action in state court. The Rhode Island Supreme Court held that the claims were not ripe, that they were barred by the landowner's post-regulation acquisition of the property, and that they failed to meet the *Lucas* test because the upland portion of the property retained $200,000 in development value.

The U.S. Supreme Court held that the takings claims were ripe and that post-regulation acquisition of property does not automatically bar a regulatory takings claim. Writing for the Court majority, Justice Anthony Kennedy declared:

> "Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."[9]

But the Court rejected the landowner's claim that he had incurred a *per se* taking under *Lucas*, noting the trial court's finding that the uplands portion of the parcel retained $200,000 in development value. It remanded the case for consideration of whether it was a taking under *Penn Central.* In an important concurring opinion, Justice Sandra Day O'Connor argued that post-regulation acquisition of property, while not dispositive, was an important factor to consider in determining the reasonableness of investment-backed expectations under *Penn Central.* This was sharply disputed by Justice Scalia in a

[9] Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

separate concurring opinion. Scalia argued that it would be better for sharp investors to profit from post-regulation acquisition of property rather than rewarding the government that had caused the unfairness. Most lower courts applying *Palazzolo* have followed Justice O'Connor's approach instead of Justice Scalia's. On remand the Rhode Island courts had no trouble dismissing the takings claim under *Penn Central* because the property retained very substantial development value.

A year after it decided *Palazzolo*, the Court gave a rare victory to a government entity in a regulatory takings case. In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), the Court rejected a claim that a lengthy, but temporary moratorium on land development adopted by the Tahoe Regional Planning Agency (TRPA) constituted a *per se*, temporary taking under *Lucas* and *First English*. The TRPA, created by interstate compact to regulate development around Lake Tahoe, which sits on the California/Nevada border, imposed a moratorium on most residential and all commercial construction on environmentally sensitive land near streams and wetlands. The moratorium, which first became effective on August 24, 1981, was to last only until new land use regulations became effective. However, due to lawsuits challenging the regulations, their effective date ultimately was postponed from 1984 to 1987. A group of 450 landowners ultimately brought suit, claiming that the moratorium constituted a *per se* temporary taking of their property rights. The Court refused to adopt a categorical rule that even a lengthy moratorium constituted a *per se* temporary taking. Writing for the Court in the 6-3 decision, Justice Stevens stated that "the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case." The Court concluded that "the circumstances in this case are best analyzed within the *Penn Central* framework." It stated that a "rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[10] TRPA was represented successfully in the case by future Chief Justice John Roberts. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

Like its *Palazzolo* decision, the Court's *Tahoe-Sierra* decision appears to have diminished the importance of *Lucas* while reinforcing the importance of *Penn Central*. While rejecting the notion that a lengthy moratorium on development can be a *per se* regulatory taking, the *Tahoe-Sierra* Court indicated that the landowners could have raised a takings claim under *Penn Central*'s ad hoc approach, a strategy that the landowners eschewed in the lower courts. While not ruling out the possibility that some moratoria could be deemed a regulatory taking under *Penn Central*, Justice Stevens's majority opinion in *Tahoe-Sierra* indicated that this determination would require careful examination of all relevant circumstances, including the length of the moratorium, its purpose, how broadly it was applied, the landowners' reasonable expectations and the moratorium's actual impact on property values.

In May 2005, the U.S. Supreme Court eliminated an unexpectedly burgeoning line of regulatory takings jurisprudence when it repudiated the notion that government regulation of private property effects a taking if it "does not substantially advance

[10] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, at 321, 335 (2002).

legitimate state interests." Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005), The "substantially advance" test had worked its way into regulatory takings doctrine largely through repetition in several takings cases of a phrase that first appeared in the Court's decision in Agins v. City of Tiburon, 447 U.S. 255 (1980). The *Lingle* case involved the question whether a Hawaii law effects a regulatory taking by limiting the rent that oil companies can charge dealers who lease company-owned service stations. After hearing evidence that the law would not have the economic effects intended by the state, a federal district court ruled that the law constituted a regulatory taking because it did not substantially advance the legitimate state purpose of lowering consumer gasoline prices. After the U.S. Court of Appeals for the Ninth Circuit affirmed. the Supreme Court unanimously reversed the Ninth Circuit's decision. Writing for the Court, Justice O'Connor acknowledged the strange provenance of the "substantially advance" test. ("On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined.") Recognizing that this test was essentially a due process concept, the Court repudiated it as an element of takings doctrine.

The *Lingle* decision represents a powerful vindication of Justice Rehnquist, as the papers of the late Justice Harry Blackmun pertaining to the *Agins* case reveal. In *Agins* the Court unanimously upheld a zoning ordinance that allowed only single-family dwellings and open space on certain land overlooking San Francisco Bay. Vigilant to protect state and local prerogatives, Justice Rehnquist was concerned that Justice Powell's opinion suggesting that regulation "effects a taking" if it "does not substantially advance legitimate governmental goals," implied a kind of means-ends test for takings. In a memorandum sent to Justice Powell, Justice Rehnquist offered to join Powell's draft majority opinion if it replaced the "substantially advance" language to state, quoting *Village of Euclid v. Ambler Realty*, that the ordinance could only be declared unconstitutional if it were "[c]learly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." This, Rehnquist argued, would "allow[] the states somewhat more latitude" than the "substantially advance legitimate governmental goals" test. Justice Powell declined to make such a change, noting that the majority opinion already referred to *Euclid* as the "seminal" decision while twice referencing the pages of that decision where the language favored by Justice Rehnquist appeared. Despite Powell's refusal to make the change, Justice Rehnquist joined his opinion for the Court, explaining that "[t]he 'nuance' which troubles me is probably not worth a separate concurring opinion in this case." But the "nuance" acquired a life of its own as it was repeated in subsequent decisions until the Court disavowed it in *Lingle*.

The Roberts Court and Regulatory Takings

The retirement of Justice Sandra Day O'Connor and the death of Chief Justice Rehnquist resulted in the confirmation of Chief Justice John Roberts by a vote of 78-22 on September 29, 2005 and Associate Justice Samuel Alito by a vote of 58-42 on January 31, 2006. The Roberts Court initially showed little inclination to further develop regulatory takings doctrine. Yet four years into its tenure the Roberts Court flirted with dramatically expanding the concept of regulatory takings to embrace "judicial takings." In Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection, 560 U.S. 702 (2010), four Justices endorsed the notion that a state *court* could effect a

"judicial takings" by interpreting state law in a manner than deprived landowners of property rights.

Stop the Beach involved a challenge to a Florida beach replenishment program by a group of beachfront property owners who claimed that it constituted a taking of their property without payment of just compensation. Under Florida's Beach and Shore Preservation Act, prior to the state funding a beach replenishment project, an "erosion control line" is set at the mean high water line, the existing boundary between state-owned and private property. The Act provides that any accretions of land seaward of the erosion control line (including those caused by the project pumping additional sand) then belong to the state, but beachfront property owners are guaranteed continued access to the water over the state-owned accretions. Beach replenishment programs are expensive, but popular with most owners of beachfront land because they prevent erosion of their property.[11] However, a group from Destin, Florida argued that the program was a regulatory taking because it deprived them of a common law right to continued contact with the water and ownership of future accretions, which the owner claimed should include the sand the state pumped seaward of the existing property line.

Justice Stevens, who owns beachfront property in Florida, recused himself from the case. All eight other Justices agreed that the Florida Supreme Court had properly interpreted state property law in holding that the law did not deprive the property owners of any rights, thus rejecting the regulatory takings claim. Nevertheless, Chief Justice Roberts and Justices Alito and Thomas joined Justice Scalia's plurality opinion that explicitly endorsed the notion of "judicial takings." While conceding that the framers of the Constitution never contemplated judicial takings, Justice Scalia's plurality opinion maintained that the text of the Takings Clause is not addressed to a specific branch of government. "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."

The other four Justices participating in the *Stop the Beach* case refused to embrace the notion of judicial takings. In separate concurrences by Justice Kennedy and Justice Breyer they argued that it is not necessary to decide whether there can be such a thing as a "judicial taking" in light of the Court's unanimous rejection of Stop the Beach's takings claim. Justice Kennedy, joined by Justice Sotomayor, suggested that judicial decisions changing established property rights could be struck down as "arbitrary or irrational" under the Due Process Clause, an approach that Justice Scalia derided as a return to substantive due process. Justice Breyer, joined by Justice Ginsburg, warned that the plurality's approach threatens federalism by inviting a flood of litigation asking federal courts to second guess state property law decisions.

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[11] At oral argument in *Stop the Beach* even Justice Scalia expressed skepticism at the property owners' claim. "I'm not sure it's a bad deal," because "the State has prevented further erosion of [your] land. I mean, if I had a place and it's being -- it's being eroded by hurricanes constantly, you know, I -- I'm not sure whether I wouldn't -- wouldn't want to have the sand replaced, even at the -- at the cost of having a 60-foot stretch that the State owns." Oral argument in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Conservation, Dec. 2, 2009, https://www.oyez.org/cases/2009/08-1151 (at 21:44 and 22:01).

Three years after *Stop the Beach* the Roberts Court significantly expanded the doctrine of unconstitutional regulatory exactions in Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586 (2013). By a 5-4 vote the Court held that a government agency could not require the funding of offsite mitigation projects on public lands as a condition for obtaining a permit to develop wetlands unless the government's mitigation demand had an "essential nexus" to, and was "roughly proportional" in magnitude, to the expected impact of the development. This decision extended to development fees the "essential nexus" and "rough proportionality" requirements that previously had only applied to permit conditions requiring a dedication of real property to public use. In his majority opinion Justice Alito dismissed arguments that the decision would jeopardize land use regulation, noting that many states already applied similar limits on monetary exactions sought from developers. In dissent Justice Kagan claimed that the decision will subject local government to a flood of litigation by extending the Takings Clause "into the very heart of local land-use regulation and service delivery." Justice Alito emphasized that the decision "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."

Murr **and the Post-Scalia Era of Regulatory Takings Jurisprudence**

As noted above, *Murr v. Wisconsin* was the last regulatory takings case in which Justice Scalia participated in the Court's decision to grant review. It appeared to be an opportunity for the Court to address the long-debated issue of what constitutes the "relevant parcel" for purposes of regulatory takings analysis. Owners of riverfront property that consisted of two contiguous lots sought to sell the second lot in order to raise money to renovate a home on the first lot. However, a local zoning ordinance, enacted after the properties were purchased, prohibited building on the second lot on the ground that it was not large enough to develop on its own and the two lots had been "merged" into one that already had a home. The owners claimed that the ordinance constituted a regulatory taking as applied to them because it deprived them of the value of the second lot.

As noted above, the Court delayed scheduling oral argument in *Murr*, perhaps hoping for swift confirmation of a successor to Justice Scalia. When that did not happen, oral argument ultimately was held more than 14 months after the Court agreed to review the case. On June 23, 2017, the Court rejected the regulatory takings challenge in a 5-3 decision authored by Justice Kennedy without the participation of Justice Neil Gorsuch who was confirmed a few weeks after the argument. Murr v. Wisconsin, 137 S.Ct. 1933 (2017). Writing for the Court, Justice Kennedy emphasized that a "central dynamic of the Court's regulatory takings jurisprudence . . . is its flexibility." He declared that "no single consideration can supply the exclusive test for determining" the relevant parcel for takings analysis. Instead, he wrote that "courts must consider a number of factors" including "the treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land." This "should determine 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." Kennedy described this inquiry as "objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition." Applying these

factors, Justice Kennedy rejected the property owners' claims that the takings inquiry should be limited to a parcel they had not been allowed to develop instead of both that parcel and contiguous land they owned. Significantly, Justice Kennedy's majority opinion acknowledged that land use restrictions can add significant value to property. "Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty."[12]

In dissent, Chief Justice Roberts joined by Justices Thomas and Alito, wrote that the majority's "bottom-line conclusion" that there is no regulatory taking "does not trouble me; the majority presents a fair case that the Murrs can still make good use of both lots, and that the ordinance is a commonplace tool to preserve scenic areas, such as the Lower St. Croix River, for the benefit of landowners and the public alike." But he criticized the majority for "concluding that the definition of the 'private property' at issue in a case such as this turns on an elaborate test looking not only to state and local law, but also to (1) 'the physical characteristics of the land,' (2) 'the prospective value of the regulated land,' (3) the 'reasonable expectations' of the owner, and (4) 'background customs and the whole of our legal tradition'."[13] In another portion of his dissent Chief Justice Roberts recognized the risk of "strategic unbundling" and "gamesmanship" by landowners who might try to subdivide property so that the portion that cannot be developed is a separate lot. But he maintained that "such obvious attempts to alter the legal landscape in anticipation of a lawsuit are unlikely and not particularly difficult to detect and disarm."[14]

In a separate dissent Justice Thomas noted that the original understanding of the Takings Clause extended only to physical appropriation of property or its functional equivalent. He advocated taking "a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment."[15]

Voting Records of the Justices in Regulatory Takings Case

The voting records of the Justices in the thirteen regulatory takings decisions reviewed above are presented in Table 1 below. A case-by-case breakdown of the votes is presented in Table 2. The data show that property owners won eight of the thirteen cases; governments won five. Three of the cases were decided unanimously, though in one of those cases four Justices embraced the concept of "judicial takings." Six of the cases were decided by 5-4 votes, three by 6-3 margins, and one (*Murr*) by 5-3. One striking finding that emerges from the table is that Justice Anthony Kennedy is the only Justice who was in the majority in all of the regulatory takings cases in which he participated (10 of 10). Chief Justice Rehnquist and Justices Scalia and Thomas were the most consistently supportive of property

[12] 137 S.Ct. at 1945.
[13] 137 S.Ct. at 1949 (Roberts, C.J., dissenting).
[14] Id. at 1953.
[15] 137 S.Ct. at 1957 (Thomas, J., dissenting).

owners while Justices Ginsburg, Breyer, Stevens, Souter and Blackmun were the most consistent supporters of the government.

TABLE 1. VOTING RECORDS OF THE JUSTICES IN THIRTEEN REGULATORY TAKINGS CASES DECIDED FROM 1987-2017

JUSTICE	Voted for Property Owner	Voted for Government	Voted with Majority
BLACKMUN	0	5	1 of 5
REHNQUIST, C.J.	9	1	8 of 10
STEVENS	2	8	5 of 10
O'CONNOR	6	4	7 of 10
SCALIA	10	2	10 of 12
KENNEDY	6	4	10 of 10
SOUTER	1	6	3 of 7
THOMAS	8	2	8 of 10
GINSBURG	1	8	5 of 9
BREYER	1	7	5 of 8
ROBERTS, C.J.	2	1	2 of 3
ALITO	2	1	2 of 3
SOTOMAYOR	0	3	2 of 3
KAGAN	0	3	2 of 3

TABLE 2. VOTING LINEUP OF JUSTICES IN THIRTEEN REGULATORY TAKINGS CASES DECIDED FROM 1987-2017

Case	For Property Owner	For Government
Keystone (1987)	WHR, LP, SDO, AS	WJB, BRW, TM, HAB, **JPS**
First English (1987)	WJB, BRW, TM, **WHR,** LP, AS	JPS, HAB, SDO
Nollan (1987)	BRW, WHR, LP, SDO, **AS**	WJB, TM, HAB, JPS
Lucas (1992)	BRW, WHR, SDO, **AS,** CT /AK	HAB, JPS, DS
Dolan (1994)	**WHR,** SDO, AS, AK, CT	HAB, JPS, RBG, DS
Suitum (1997)	WHR,JPS, AK,RBG,SB,SDO,AS,**DS,**CT	None
Del Monte Dunes (1997)	WHR, JPS, AK, CT / AS	DS, SDO, RBG, SB
Palazzolo (2001)	WHR, SDO, AS, **AK,** CT	JPS, RBG, DS, SB,
Tahoe-Sierra (2002)	WHR, AS, CT	**JPS,** SDO, AK, DS, RBG, SB
Lingle (2005)	None	WHR,JPS,**SDO,** AS, AK,CT, DS,RBG,SB
Stop the Beach (2010)	[For Judicial Takings: JR,AS,CT,SA]	JR,AS,AK,CT,RBG,SB,SA,SS,EK
Koontz (2013)	JR, AS, AK, CT, **SA**	RBG, SB, SS, EK
Murr (2017)	JR, CT, SA	**AK,** RBG, SB, SS, EK

Conclusions

Some conclusions can be drawn from this brief review of the history of the Supreme Court's regulatory takings jurisprudence. First, in regulatory takings cases the Court is sharply divided, but unlike the situation three decades ago, the votes of the Justices split much more predictably along a sharp ideological divide. This coincides with the increased politicization of the confirmation process with political parties and interest groups now seeking to achieve specific case outcomes by influencing the selection and confirmation of new Justices. Second, respect for

federalism has tempered the expansion of takings jurisprudence over the years, often in subtle ways revealed in internal memoranda from the Justices. Third, takings jurisprudence for now largely has returned to *Penn Central's* ad hoc approach with Justice Kennedy's flexible, pragmatic opinion for the Court in *Murr* representing the current state of the art. However, if Kennedy retires, chances that the Court would take up Justice Thomas's invitation to fundamentally rethink its takings jurisprudence may increase, depending upon the identity of his successor.

1. *The Ideological Transformation of the Court*

When I served as a law clerk for Justice Byron R. White during the Court's 1979-80 Term, it was difficult to predict the outcome of cases because few Justices had well-defined ideologies. Justices Brennan and Marshall refused to affirm any death sentences reviewed by the Court, but only Justice Rehnquist seemed to have a clear agenda – to revive constitutional limits on federal power and enhance state sovereignty. After 1986 when Rehnquist was elevated to Chief Justice and Justice Scalia joined the Court, the Court more frequently agreed to hear regulatory takings cases and it often supported property owners in them. But property owners won only two of the three regulatory takings cases the Court decided in 1987 and only Justices Powell, Rehnquist, and Scalia supported them in all three cases. The Marshall papers reveal that Justice Scalia initially voted for the government in *First English,* but subsequently changed his vote and belatedly join Justice Rehnquist's majority opinion.[16] Only Justices Blackmun and Stevens supported the government in all three cases, yet Stevens had joined Justice Rehnquist's dissent in the Court's landmark *Penn Central* decision nine years earlier. Thus, there were at least four "swing" Justices in takings cases – Brennan, Marshall, White and O'Connor – who did not automatically support one side or another. Today Justice Kennedy appears to be the only swing Justice in regulatory takings cases.

Speaking at Suffolk University Law School on February 3, 2016, Chief Justice John Roberts decried what he viewed as the increasing perception that the Supreme Court has become a political institution. "When you have a sharply political, divisive hearing process, it increases the danger that whoever comes out of it will be viewed in those terms. If Democrats and Republicans have been fighting so fiercely about whether you're going to be confirmed, it's natural for some member of the public to think, well, you must be identified in a particular way as a result of that process."[17] Ten days after the Chief Justice made those remarks, Justice Antonin Scalia died suddenly. What followed was a new low in the politicization of the confirmation process.

On March 16, 2016, President Obama nominated Judge Merrick Garland of the D.C. Circuit to succeed Justice Scalia on the Supreme Court. During the 293 days until the Garland nomination expired, the Republican-controlled Senate refused

[16] Percival, *supra* note 2, at 10653.
[17] Gintautus Dumcius, Supreme Court Chief Justice John Roberts on Judges: "We Don't Work as Democrats or Republicans," Masslive.com, Feb. 4, 2016, http://www.masslive.com/news/index.ssf/2016/02/supreme_court_chief_justice_jo.html

even to consider it. No confirmation hearings were held. No votes were taken in committee or on the Senate floor. This unprecedented politicization of the confirmation process (see Table 3 below) was rewarded when Donald Trump was elected president on November 8, 2016. On January 31, 2017, President Trump nominated Judge Neil Gorsuch of the Tenth Circuit to succeed Justice Scalia on the Supreme Court. Gorsuch was confirmed 66 days later on April 7, 2017 by a vote of 54-45 after Republican leaders exercised the "nuclear option" to allow a filibuster to be broken by only 51 votes instead of the previously-required sixty.

The refusal of the Republican-controlled U.S. Senate even to consider President Obama's nomination of Judge Merrick Garland and the swift confirmation of President Trump's nominee have undermined the U.S. Supreme Court's reputation as a non-political institution. Interest groups fiercely critical of environmental regulation helped select Trump's nominee and championed his confirmation through the elimination of Senate filibuster rules that was necessary for him to be confirmed. Although it is too soon to predict how Justice Gorsuch will decide regulatory takings cases, the Court is likely to remain sharply split on these and other important issues of environmental law.

Table 3. CONFIRMATION HISTORY OF CURRENT JUSTICES

JUSTICE	Year	Days to Confirmation	Confirmation Vote
KENNEDY	1987	65	97-0
THOMAS	1991	99	52-48
GINSBURG	1993	50	96-3
BREYER	1994	73	87-9
C.J. ROBERTS	2005	62*	78-22
ALITO	2006	82	58-42
SOTOMAYOR	2009	66	68-31
KAGAN	2010	87	63-37
GORSUCH	2017	66	54-45

*23 days after nomination as Chief Justice submitted

2. Tensions between Regulatory Takings and Federalism Jurisprudence

In the early 1970s the advent of federal regulatory programs to protect the environment spawned discussion about the implications of these programs for the doctrine of regulatory takings. In 1973 the Council on Environmental Quality

devoted an entire chapter of its fourth annual report to the takings issue.[18] Yet because land use regulation remains the one area of environmental law still left almost entirely to state and local governments, the Supreme Court's regulatory takings jurisprudence has focused entirely on state and local regulations.

From the very beginning of his tenure on the Court, Justice Rehnquist made restoring constitutional limits on federal power and enhancing state sovereignty his personal missions.[19] His respect for federalism was principled and consistent – he resisted preemption of state environmental initiatives, regardless of whether they came from the left or the right, voting to uphold California's moratorium on nuclear power plants and state laws restricting disposal of out-of-state hazardous waste. Yet there are inevitable tensions between the objective of enhancing state power and the Court's expansion of regulatory takings doctrine, an enterprise for which Justice Scalia often displayed more enthusiasm than Justice Rehnquist.

The papers of the late Justices Thurgood Marshall and Harry A. Blackmun provide some clues concerning how the Court handled these tensions. For example, as noted above, in *Agins* Justice Rehnquist cautioned against including the "substantially advance" test that later had to be repudiated in *Lingle* because it would authorize courts to second guess policy decisions by state and local government. The Marshall and Blackmun papers also reveal that Chief Justice Rehnquist amended his initial draft opinion in *First English* to remove a statement that "on the record in this case the Fifth and Fourteenth Amendments to the U.S. Constitution would require compensation."[20] Instead, the Chief Justice clarified that the Court was not holding as a matter of law that a temporary taking had occurred. This proved significant on remand because it enabled the California courts to find that the regulation barring rebuilding in a floodplain prevented a nuisance and thus did not constitute a taking.

In *Dolan v. City of Tigard*, Justice Blackmun's conference notes record Justice Stevens admonishing his colleagues for "how little confidence you have in state courts."[21] While Chief Justice Rehnquist's first draft opinion had not imposed very demanding requirements for state and local governments to justify on regulatory exactions, the Blackmun papers show that the Chief Justice stiffened these after receiving memoranda proposing this from Justices Scalia and Kennedy. This ultimately led to Justice Souter changing his conference vote from reverse to affirm and filing a dissent. Justice Souter argued that like Justice Stevens, he was "concerned about federal courts becoming micro-managers of state and local

[18] Council on Environmental Quality, Environmental Quality 149-50 (1973). CEQ concluded that changing conceptions of property rights in response to new knowledge of environmental concerns should help avoid most takings problems.
[19] Fry v. United States, 421 U.S. 542, 559 (1975) (Rehnquist, J., dissenting) ("Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments.")
[20] Percival, *supra* note 2, at 10653.
[21] Id. at 10656.

government zoning and permit decisions," and that such governments "should be permitted sufficient flexibility to do their jobs without interference from federal courts."[22] Chief Justice Rehnquist sought to justify *Dolan*'s "rough proportionality" test by maintaining that it was derived from the decisions of numerous state courts, reflecting his concern for preserving state prerogatives.

This paper has only reviewed the Court's decisions challenging as regulatory takings regulations that reduce the value of real estate. Thus it has not discussed a variety of other cases that involve physical takings[23] or the exercise of eminent domain to promote economic development.[24] Yet federalism concerns may help explain some of these other takings decisions. In Kelo v. City of New London, 545 U.S. 469 (2005), the Court ruled 5-4 that economic development could be considered a "public purpose" for which states properly could exercise their powers of eminent domain. The Court majority concluded that while the state could not take private land simply to confer a private benefit on a particular private party, economic development projects could satisfy the Fifth Amendment's "public use" requirement if they had a "public purpose." The Court stated that the judiciary should defer to legislative judgments that economic development projects will provide appreciable benefits to a community. Noting that promotion of economic development is a traditional and long-accepted government function, the Court concluded that there is no principled way to distinguish it from other public purposes.

The *Kelo* decision generated a strong outcry from the property rights movement, which used it to crusade for new legislative limits on state acquisition of private property. While it did not change existing law, property rights groups effectively harnessed the negative public reaction to it to promote legislation to restrict the use of eminent domain. Within five years of *Kelo* being decided, 43 states had adopted constitutional amendments or statutes to increase protection for property rights. But by refusing to constitutionalize the concept of "public use," *Kelo* enhanced state sovereignty even as it spurred states to take action to protect property owners. Thus, it may be understood as a decision in which the court put concern for federalism above the interests of property owners.[25]

The papers of the late Justice Blackmun reveal that when the Court decided *Dolan*, it already was considering its implications for monetary exactions frequently imposed by local governments as a condition for development approvals.[26] When the

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[22] Id.

[23] Loretta v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (requiring a landlord to permit installation of cable TV access is a physical taking); Arkansas Game & Fish Commission v. U.S., 568 U.S. 23 (2012) (federal release of water from dam caused physical invasion of state property).

[24] Kelo v. City of New London, 545 U.S. 469 (2005).

[25] See Robert C. Ellickson, Federalism and *Kelo:* A Question for Richard Epstein, 44 Tulsa L. Rev. 751 (2009).

[26] Percival, *supra* note 2, at 10657. In response to the Court's post-*Dolan* decision to vacate and remand a case involving a development fee, the California Court of Appeals struck down a $280,000 recreational impact fee, while upholding a requirement for

Court extended *Nolan* to development fees in *Koontz* nineteen years later, Justice Alito, writing for the majority, argued that it would not "work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees" because "[n]numerous courts – including courts in many of our Nation's most populous states" already were applying *Dollan* and *Nolan* to monetary exactions.[27] This is another example of the Court's efforts to reconcile expansions of its regulatory takings doctrine with its campaign to enhance state sovereignty.

Justice Kennedy's majority opinion in *Murr* did not embrace the state of Wisconsin's argument that it should have complete control over defining the property interest subject to a regulatory takings challenge. Arguably, it is less deferential to state and local governments than Chief Justice Robert's dissent maintaining that federal courts should respect existing parcel definitions. However, it upheld existing state and local law against a constitutional challenge, and illustrated the continued vitality of federalism concerns for informing regulatory takings decisions. As Professor Roderick Hills observed: "*Murr* merely ratify what we already really know: When it comes to property in land, the states are inevitably in charge, and it is there that we libertarians ought to direct our energies."[28]

3. Regulatory Takings in the Balance: Justice Kennedy and Murr

Murr does not significantly change the law of regulatory takings. Instead, it brushes aside an attempt to open up new avenues for property owners to game the system by subdividing their property to segregate out the portions subject to development restrictions. Chief Justice Roberts' lack of enthusiasm for the plight of the Murrs and his acknowledgment of the potential for "strategic unbundling" and "gamesmanship" by property owners, suggests that the divide between the majority and dissent in *Murr* is not that substantial.

Regulatory takings jurisprudence for now largely has returned to *Penn Central*'s ad hoc approach. Justice Kennedy's opinion for the Court in *Murr* represents the current state of the art. But with only five Justices in the majority, *Murr* also illustrates how sharply divided the Court remains on regulatory takings issues. Perhaps the most significant advance in *Murr* is the majority's explicit recognition that regulation can increase the value of property, a factor that should be highly relevant in assessing the validity of takings claims. The Blackmun papers reveal that in *Nolan* Justice Souter pressed his colleagues to acknowledge that the benefits regulation confers on landowners should be considered in assessing the net added burden of a proposed exaction on a landowner. Justice Kennedy has now acknowledged this in *Murr*, albeit without explicitly calling it a "regulatory giving."

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provision of public art. Ehrlich v. City of Culver City, 50 Cal. Rptr. 2d 242, cert. denied, 519 U.S. 929 (1996).

[27] Koontz v. St. Johns River Water Management District, 133 S.Ct. 2586, 2602 (2013).

[28] Roderick Hills, A Half-Hearted Two Cheers for the Victory of Federalism over Property Rights in Murr v. Wisconsin, PrawfsBlawg, June 23, 2017, http://prawfsblawg.blogs.com/prawfsblawg/2017/06/a-half-hearted-two-cheers-for-the-victory-of-federalism-over-property-rights-in-murr-v-wisconsin.html

Looking to the future, it is clear that when Justice Kennedy retires the Court will be at a fundamental crossroads on takings issues. Although one cannot confidently predict how Justice Gorsuch will decide regulatory takings cases, his enthusiastic support from property rights groups for now makes it reasonable to assume that he will emulate Justice Scalia's approach. It is not inconceivable that Justice Kennedy's replacement, perhaps joined by Justice Gorsuch, would take up the invitation in Justice Thomas's *Murr* dissent to fundamentally rethink the Court's takings jurisprudence. Despite the potential promise of a return to the original understanding of the Takings Clause as only applying to physical invasions of property, Justice Thomas's enthusiasm for natural law, the Privileges and Immunities Clause and due process concepts could well lead to a more expansive doctrine of regulatory takings in the future.