

THE TAKINGS PROJECT REVISITED: A CRITICAL ANALYSIS OF THIS EXPANDING THREAT TO ENVIRONMENTAL LAW

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In 1998, Douglas T. Kendall and Charles P. Lord warned of “a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda.” Their article presciently described a growing trend—what they termed “The Takings Project”—of ideologically motivated judges, developers, foundations, and non-profit “public interest” organizations intent on fighting the regulatory state through constitutionally protected development rights originating in the Takings Clause. In particular, Kendall and Lord observed a recent and dramatic shift in Just Compensation doctrine that began in the 1980s. This wave of litigation successfully began to “use the takings clause of the Fifth Amendment as a severe brake on federal and state regulation of business and property.”

This Note argues that the Takings Project has grown in strength and breadth since the turn of the century. The Project now pursues impact litigation on the Just Compensation Clause, the Clean Water Act, the Endangered Species Act, and a variety of other bedrock environmental laws. This litigation threatens core government tools to protect the environment and public health. Part I analyzes a series of Just Compensation and Clean Water Act cases to show the growth of the Takings Project since Kendall and Lord’s article. These cases together reveal the mechanisms that the Takings Project uses to advance its anti-regulatory aims. Part II examines the ways the Takings Project successfully navigates the legal system. Part III assesses the progress and success of the Takings Project as a whole since Kendall and Lord’s article. Finally, Part IV proposes potential responses to the threat posed by the Takings Project.

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INTRODUCTION

More than twenty years ago, Douglas T. Kendall and Charles P. Lord warned of “a large and increasingly successful campaign by conservatives and libertarians to use the federal judiciary to achieve an anti-regulatory, anti-environmental agenda.”¹ Their article presciently described a growing trend—what they termed “The Takings Project”—of ideologically motivated judges, developers, foundations, and non-profit “public interest” organizations intent on fighting against the regulatory state through constitutionally protected development rights originating in the Takings Clause.² The aim of the Takings Project, they posited, was to limit government regulation and create constitutionally protected development rights.³ The authors described in extraordinary detail how the moneyed interests comprising the Project masquerade as civil rights activists, portraying themselves as “champions of the small landowner when the primary objective of the Project is, and has always been, the advancement of an anti-regulatory, anti-environmental political agenda.”⁴

In particular, Kendall and Lord observed a recent and dramatic shift in Just Compensation⁵ doctrine that began in the 1980s.⁶ This wave of litigation successfully started to “use the takings clause of the Fifth Amendment as a severe brake on federal and state regulation of business and property.”⁷ While

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1. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 510 (1998).
 2. *Id.* at 510–14.
 3. *See id.* at 511.
 4. *Id.* at 513.
 5. This Note will refer to the clause of the Fifth Amendment of the U.S. Constitution that prevents “private property [to] be taken for public use, without just compensation” as the Just Compensation Clause rather than the Takings Clause. U.S. CONST. amend. V.
 6. Kendall & Lord, *supra* note 1, at 509–10.
 7. *Id.* at 509 (quoting CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 183 (1991)).

the government previously held nearly unquestioned authority to regulate property and development to protect the environment and public health, a series of U.S. Supreme Court cases in the late 1980s and early 1990s introduced new interpretations of the Just Compensation Clause that would limit the government's reach. Kendall and Lord traced the ideological, academic, and financial history of the movement in an attempt to reveal its threat to the public. They hoped to stop this legal trend that they believed "would sink this country in a constitutional crisis as serious as that brought about by the economic due process jurisprudence of the *Lochner*-era Supreme Court."⁸ Kendall, a passionate progressive legal activist and founder of the Constitutional Accountability Center,⁹ and his co-author expressed the hope that the piece would "stop [the Takings Project] before it goes much further."¹⁰

Kendall and Lord's attempt to stop this movement failed. In fact, the Takings Project has only grown in strength and breadth since the turn of the century. For a contemporary example of Takings Project litigation, we can look to the recently decided U.S. Supreme Court case *Knick v. Township of Scott, Pennsylvania*.¹¹ The case featured an appealing story of the underdog property-owner facing a threatening government.¹² Petitioner, the elderly Rose Mary Knick, lived in "rural, western Pennsylvania" on property her family has owned for nearly fifty years.¹³ The local government enacted an ordinance to open access to any "cemetery" found on private land, and the township gave Ms. Knick notice that they suspected there was a cemetery on her land.¹⁴ As a consequence, Ms. Knick, who lived alone on her farm, would have to provide public access to her land.¹⁵ When Ms. Knick tried to challenge the action, she was denied access to the courts through what her legal team described as "a Kafkaesque litigation process,"¹⁶ imploring the Supreme Court to protect her property from an overreaching government and the threat of intruders. Faced with this powerful narrative, the Court granted certiorari on the technical jurisdictional question she raised and ultimately ruled to give landowners more venues through which to challenge government regulations.¹⁷

8. *Id.* at 510; *see also id.* at 509–14.

9. *See Doug Kendall (1964–2015): Founder and CAC's First President*, CONSTITUTIONAL ACCOUNTABILITY CENT., <https://perma.cc/P3LD-HMUR>.

10. Kendall & Lord, *supra* note 1, at 513.

11. 139 S. Ct. 2162 (2019).

12. *See* Petition for Writ of Certiorari at 5, *Knick*, 139 S. Ct. 2162 (No. 17-647).

13. *Id.* at 5–6.

14. *Id.* at 6–8.

15. *See id.*

16. *Id.* at 33.

17. *See Knick*, 139 S. Ct. at 2167–68. Crucially, the new federal venue for takings claims also includes the potential to award reasonable attorney's fees. *See* 42 U.S.C. § 1983 (2018) (creating the civil action for deprivation of rights under the constitution). This will make lawyers

The narrative in *Knick* reflects the customary tools that the Pacific Legal Foundation (“PLF”) and other conservative, libertarian, and trade association groups in the Takings Project use to raise cases aimed at combatting federal, state, and local regulations.¹⁸ Ms. Knick’s story may appear appealing at the petition stage, but her narrative becomes complicated when tested. In reality, Ms. Knick based her case on a set of factual inconsistencies, unmentioned qualifications, and half-truths.¹⁹ This strategy worked—Ms. Knick won.²⁰ *Knick* does not reflect an isolated case of zealous advocacy; the Takings Project has systematically mischaracterized facts over the last three decades to reach the U.S. Supreme Court, only to have those facts come to light once in the Court’s spotlight. At that point, the Court cannot reconsider the facts. The skewed facts presented then facilitate outcomes that favor ideological actors and developers.

The Takings Project operates through ideological actors like PLF and moneyed interests like the National Association of Homebuilders (“NAHB”) that, this Note argues in part, achieve their aims by forcing courts to deal in meticulous fiction rather than fact. While successful advocates achieve results for their clients by crafting creative narratives, Takings Project attorneys go too far, omitting and altering facts to construct a compelling narrative and clean legal question. Conservative courts willing to overlook factual inconsistencies in the name of ideological victories aid in their efforts. This interplay between ideological litigants and ideological courts is particularly clear in the property law context because property can be investigated, mapped, and understood at a granular level, but it goes beyond the property context. *Knick* is not only a case about public access to cemeteries. It is also a case about whether local governments can promote public access to beaches, rivers, parks, and other public spaces of contemplation. *Knick* is one of many cases analyzed in this Note that promote the rights of developers and prevent government regulation of property. In doing so, they strike at the core of government ability and willingness at all levels to regulate land and water to preserve the environment, protect public health, and mitigate damage caused by climate change.

Kendall and Lord centered their analysis of the Takings Project on how well funded ideological groups influenced litigators, academics, and courts, but

far more willing to challenge state and local regulations that could qualify for just compensation.

18. On its website, PLF states that it “represents hundreds of Americans, free of charge, who seek to improve their lives but are stymied by government.” *About Pacific Legal Foundation*, PLF, <https://perma.cc/V9NL-2RPA>.
19. See *infra* Part I.H. For only one example, the cemetery on Ms. Knick’s property lies *across a two-lane road* from Ms. Knick’s residence, and contained “multiple grave markers/tombstones.” Brief for Respondents at 14, *Knick*, 139 S. Ct. 2162 (No. 17-647).
20. *Knick*, 139 S. Ct. at 2169–78 (overruling *Williamson Cty. Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)).

those actors are not the only reason for the Takings Project's litigation successes. This Note argues that the Project's success is also rooted in several legal, historical, and procedural factors that Kendall and Lord did not recognize or address. These factors include appellate procedure, the messiness of property history, lawyering mistakes below, and litigation driven by ideological actors including non-profits and the Court itself. It is also due to a fundamental legal misunderstanding of land, water, and ecology. Land is not a fixed commodity with fixed boundaries, but as ecologists have now long accepted, "it is a fountain of energy flowing through a circuit of soils, plants, and animals."²¹ The legal system fails to accept a dynamic vision of land and water that would better encompass the property and environmental disputes it faces.

The Takings Project threatens environmental regulation at an unrecognized level by targeting core regulatory tools through the Just Compensation Clause, the Clean Water Act ("CWA"), the Endangered Species Act ("ESA"), and other bedrock environmental laws. It does so at a time of true vulnerability as we approach a crossroads in our ability to address and mitigate the damage of climate change, and the growth of an increasingly conservative judiciary. As recent research has shown, our planet and our society can only withstand so much climate change,²² and our window for action is closing.²³ Takings Project cases prevent the local, state, and federal government from regulating and mitigating damage to the very lands that are most at risk from climate change through construction limits or land use regulations.²⁴ These legal efforts represent one of many fronts pursued by moneyed interests to prevent action to

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21. ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 216 (1949).
 22. See generally ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2015) (describing mass extinctions in our time, including estimated flora and fauna loss by the end of the 21st century between twenty and fifty percent of all living species on Earth); MARK LYNAS, *SIX DEGREES: OUR FUTURE ON A HOTTER PLANET* (2008) (describing how life would change if Earth became six degrees warmer); NATHANIEL RICH, *LOSING EARTH: A RECENT HISTORY* (2019) (describing the nearly successful federal attempts to regulate greenhouse gas emissions and their ultimate failure); DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER WARMING* (2019) (describing the expected disastrous outcomes of current status quo projections of warming).
 23. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *GLOBAL WARMING OF 1.5°C* (2018) (describing the impact of warming at 1.5°C); Jeff Tolefson, *Can the World Kick Its Fossil-Fuel Addiction Fast Enough?*, 556 *NATURE* 422, 422–25 (2018) ("Little time remains for the world to get its emissions under control."); David Roberts, *The World's Bleak Climate Situation*, in *3 Charts*, *VOX* (May 1, 2018), <https://perma.cc/P3SF-JGWA> ("There is a revolution in clean energy . . . but it's not happening fast enough.").
 24. See, e.g., Amanda Reilly, *How a 1992 High Court Ruling Eroded Regulatory Might*, *E&E NEWS* (June 30, 2017), <https://perma.cc/R4ZF-9K46> ("The bottom line is that the *Lucas* precedent and the threat of sea-level rise are on a collision course. It's inevitable. . . . You have development proceeding in very dangerous coastal areas, and regulators feel powerless to deal with it.").

combat responses to climate change.²⁵ Further, the Trump Administration is reshaping the federal judiciary,²⁶ making federal courts far more likely to endorse the aims of the Takings Project. This perfect storm could limit our ability to deal with climate change at the *exact moment when the need to do so is greatest*.

This Note serves as a warning and a call to action. The Takings Project has grown, but it is within our power to act. In the late 1990s, Kendall and Lord argued that the Supreme Court had “handed Project advocates important, but narrow, victories, containing both the foundation for a more dramatic expansion of takings law, and, potentially, the seeds of the Project’s defeat.”²⁷ Regulatory proponents have made little progress, and the Takings Project has made critical progress in its own aims. But there is still hope—we can stem the tide of this project through a combination of sunlight, individual action, and reform.

Part I introduces a series of Just Compensation and CWA cases to show the growth of the Takings Project since Kendall and Lord’s article. These cases together reveal the narratives and litigation tactics that the Takings Project uses to advance its anti-regulatory aims. Part II summarizes some of the reasons that the Takings Project has successfully navigated the legal system. Part III assesses the progress and success of the Takings Project as a whole since the publication of Kendall and Lord’s article. Finally, Part IV proposes a series of potential solutions to this threat.

I. THE TAKINGS PROJECT IN ACTION

This Part presents a series of Just Compensation and CWA cases to highlight the trend of ideologically motivated and—in many cases—sensationalized or fictionalized cases at the U.S. Supreme Court that make up the Takings Project effort. Kendall and Lord presented a similar anecdotal set of cases in their own article.²⁸ This Note updates their dataset to the current day, presents further case details, and provides explanation for the cases covered.

I selected Just Compensation and CWA cases to catalogue because they rely on fact-specific analyses to determine such questions as the boundaries of the particular property, the physical and hydrological characteristics of the

25. See generally NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* (2010) (providing a detailed analysis of how fossil fuel companies and other interests used research and lobbying efforts to obfuscate climate science and prevent action on climate change).

26. Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018), <https://perma.cc/VV5N-J5F7>.

27. Kendall & Lord, *supra* note 1, at 513.

28. See *id.* at 555–82.

property, the history of regulation in the region, and the other factors.²⁹ Consequently, these cases tend to highlight key trends in the Takings Project: the development of a selectively manicured record below; the presentation of a clean academic question that provides the Court with the opportunity to adopt a categorical rule or broader jurisdictional restriction even when the underlying facts may not actually present such an opportunity; and an ideological and commercial motivation on the part of parties, litigants, and courts alike. These cases tend to fit into the same narrative paradigm of a sympathetic property owner who is the victim of government overreach.³⁰ The Takings Project portrays its litigation as the vindication of “civil rights” for small landowners, but the true objective is the advancement of an anti-regulatory, anti-environmental agenda.³¹

While there are other cases worthy of treatment beyond those below,³² this Note highlights the most high-profile cases of the last few decades and centers the analysis on the U.S. Supreme Court. As a result, this brief survey provides a view of the tip of the iceberg.

*A. Nollan v. California Coastal Commission*³³

PLF’s filing for an appeal to the U.S. Supreme Court in *Nollan* centered on a classic narrative of a family fighting against the overreaching state regulator. According to the filing, the Nollan family owned a 3800-square-foot beachfront lot in Ventura County, California, and wanted to develop the land with a new structure because the “abuse of summer renters, winter vandals, and

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29. Any other litigation subjects are beyond the scope of this Note. Any future examination of Takings Project cases should include the ESA, the National Environmental Policy Act, and any other statutes that create hurdles to development, as well as courts beyond the U.S. Supreme Court.
 30. Interestingly, this posture has even developed its own visual language, with organizations like PLF staging photographs of the sympathetic landowner in front of their “domain.” For only a few such examples from the cases discussed in this Note, see Photo of Mr. Lucas (<https://perma.cc/7MSH-PPGT>); Photo of Mr. Palazzolo (<https://perma.cc/S6NU-ZERJ>); Photo of the Sacketts (<https://perma.cc/LJG2-22KC>); Photo of Mr. Rapanos (<https://perma.cc/BA9G-94QR>); Photo of Ms. Knick (<https://perma.cc/HK2P-EWH7>); and Photo of Mr. Robertson (<https://perma.cc/5BLA-BBXR>).
 31. Kendall & Lord, *supra* note 1, at 513.
 32. For example, research for this Note revealed the following cases for future examination due to their subject matter, the litigants involved, and potential factual issues that came to light: *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702 (2010); *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015); *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *People for the Ethical Treatment of Landowners v. U.S. Fish & Wildlife Serv.*, 852 F.3d 990 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018).
 33. 483 U.S. 825 (1987). This was the first case Kendall and Lord presented in their own examination of the Takings Project. See Kendall & Lord, *supra* note 1, at 555–56. It is also the first case PLF highlights in its own history as an organization. See *History*, PLF, <https://perma.cc/XDZ5-72WD>.

the natural elements had taken their toll” on the “small bungalow” currently on the lot.³⁴ The Nollan family applied for a development permit from the California Coastal Commission to replace the bungalow.³⁵ The Commission approved the permit with the condition that the Nollans grant an easement to let the public pass along the beach below a sea wall that separated the Nollans’ house from the ocean.³⁶ The Nollans challenged this decision in state court and argued that their development did not decrease beach access, and so this condition violated the Just Compensation Clause—the state trial court agreed.³⁷ The Coastal Commission won at the appellate level.³⁸ Following that decision, the Nollans bypassed the California Supreme Court and appealed directly to the U.S. Supreme Court, which ultimately ruled in the Nollans’ favor.³⁹ Justice Scalia wrote in the majority opinion that there must be a “nexus between the condition and the original purpose of the building restriction” and that this “out-and-out plan of extortion” did not qualify as a valid nexus.⁴⁰

The Supreme Court ignored a series of procedural and factual obstacles. First, the Court had to ignore questions about whether the Nollans even owned the land the state allegedly took.⁴¹ As California indicated across multiple filings, it only sought a passageway that was frequently below the mean high tide mark.⁴² This placement arguably made the land state property.⁴³ Eban Moglan, then a law clerk to Justice Thurgood Marshall, wrote: “Not content with granting [Supreme Court review] in all takings cases in which the state wins, the Court has now moved on to granting review in takings cases which aren’t cases at all.”⁴⁴ Second, the Court unquestioningly accepted PLF’s characterization of the Nollans’ plans as a simple trade of one building for another. In actual fact, the Nollans sought to triple the size of their house.⁴⁵ Such conversions, in ag-

34. Jurisdictional Statement at 5, *Nollan*, 483 U.S. 825 (No. 86-133).

35. See *Nollan*, 483 U.S. at 828.

36. See *id.*

37. See *id.* at 828–30.

38. See *id.*

39. See *id.* at 837.

40. *Id.* at 837 (quotation and citation omitted).

41. Kendall & Lord, *supra* note 1, at 555.

42. See Brief for Appellee at 5–6, *Nollan*, 483 U.S. 825 (No. 86-133); Motion of Appellee to Dismiss at 3, *Nollan*, 483 U.S. 825 (No. 86-133); see also Motion of Appellee to Dismiss or Affirm at 4–5, *Nollan*, 483 U.S. 825 (No. 86-133) (revisiting the state’s interest in keeping open passageways that provide for public access to tidelands).

43. See Brief for Appellee at 5–6, *Nollan*, 483 U.S. 825 (No. 86-133).

44. Kendall & Lord, *supra* note 1, at 555 (citing Brief for Appellee at 6, *Nollan*, 483 U.S. 825 (No. 86-133); Bench Memorandum at 3, *Nollan*, 223 Cal. Rptr. 28 (Cal. Ct. App. 1986) (Civ. B-D04663)).

45. Motion of Appellee to Dismiss or Affirm at 4, *Nollan*, 483 U.S. 825 (No. 86-133) (describing the replacement of a seasonally used “one story, 521 square foot, one bedroom, substandard beach house” with a “two story, three bedroom, 1,674 square foot [permanent] residence with attached two-car garage”).

gregate with similar construction in the region, *would* alter public access to the beach.⁴⁶ Third, beyond that mischaracterization, by the time of the appeal to the Supreme Court, the Nollans had *already built the house without a permit*.⁴⁷ The Nollans did not notify the state,⁴⁸ and as California indicated in its filings, this illegal, unilateral action constituted a waiver of the right to challenge the permit conditions under state law.⁴⁹ Finally, the Nollans sought an appeal directly to the Court, bypassing the California Supreme Court.⁵⁰ At the time of the appeal, the jurisdictional statute at issue provided the Court with jurisdiction when there was a challenge that “question[ed] the validity of a statute of any state on the ground of its being repugnant to the Constitution.”⁵¹ As the Coastal Commission pointed out in a filing with the Court, there was no statute under challenge: this was a challenge about the factual application of a permit decision by a state agency.⁵² The Court should not have had jurisdiction over this appeal.

Despite the above issues, the Court took the case and ruled in favor of the Nollans. As counsel, PLF took several risks in this case, presenting a flawed set of facts in a strange procedural posture to support a novel Just Compensation theory—but those risks paid off with the result of a new precedent that would limit the kinds of permit conditions regulators could use. This early success of the Takings Project showed the potentially potent combination of an ideological litigant and an ideological court. Justice Scalia and his conservative majority willfully ignored the procedural and factual abnormalities in this case. As a result, California lost a tool to “protect publicly-owned tidelands and the people’s right of access to those lands,”⁵³ and other regulators lost a tool to do similarly. *Nollan* introduced a tidal wave of Takings Project cases that would spread across the judiciary.

46. See Brief for Appellee at 17–18, *Nollan*, 483 U.S. 825 (No. 86-133).

47. Jurisdictional Statement at 5 n.1, *Nollan*, 483 U.S. 825 (No. 86-133).

48. See *Nollan*, 438 U.S. at 830.

49. See Brief for Appellee at 13, *Nollan*, 483 U.S. 825 (No. 86-133); Motion of Appellee to Dismiss at 8–11, *Nollan*, 483 U.S. 825 (No. 86-133).

50. See Jurisdictional Statement at 2–3, *Nollan*, 483 U.S. 825 (No. 86-133).

51. *Id.* (invoking the Court’s jurisdiction under 28 U.S.C. § 1257, which at the time provided jurisdiction “[B]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity”).

52. Motion of Appellee to Dismiss or Affirm at 2, *Nollan*, 483 U.S. 825 (No. 86-133).

53. See *id.* at 2.

B. *Lucas v. South Carolina Coastal Council*⁵⁴

Lucas is one of the most well known and well studied U.S. Supreme Court Just Compensation cases.⁵⁵ It provides one of the only per se just compensation rules in Supreme Court jurisprudence,⁵⁶ and it covers a broad set of legal topics including property, common law nuisance, and state power over environmental regulation. *Lucas* was also one of the early warning signs of the Takings Project: Kendall and Lord centered a significant portion of their article on the case.⁵⁷

In his petition for certiorari, David Lucas presented a clear narrative of state government overreach encroaching on his property rights. Mr. Lucas purchased two beachfront lots on the Isle of Palms in 1986 for almost one million dollars in total.⁵⁸ He planned to build a house on each lot, keep one for his family, and sell the other.⁵⁹ A year and a half later, the South Carolina Beachfront Management Act came into force, and the South Carolina Coastal Council drew lines along the coast where homes could no longer be constructed.⁶⁰ Both of Mr. Lucas' lots fell on the wrong side of that line, so he could not build the houses.⁶¹ As he describes it, Mr. Lucas was completely surprised by this development,⁶² and responded by filing a lawsuit alleging that the regulation "restricted his ownership rights" in such a way that "it amounted to a taking of his property without just compensation" in violation of the state and federal constitutions.⁶³ Mr. Lucas won at the trial court but lost on appeal to the South

54. 505 U.S. 1003 (1992).

55. See, e.g., Lynn E. Blais, *The Total Takings Myth*, 86 *FORDHAM L. REV.* 47 (2017); Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 *IOWA L. REV.* 1847 (2017); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 *STAN. L. REV.* 1369 (1993); Kendall & Lord, *supra* note 1; Richard L. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 *STAN. L. REV.* 1411 (1993); Luke Wake, *The Enduring (Muted) Legacy of Lucas v. South Carolina Coastal Council: A Quarter Century Retrospective*, 28 *GEO. MASON U. C.R.L.J.* 1 (2017).

56. See *Lucas*, 505 U.S. at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

57. See Kendall & Lord, *supra* note 1, at 538–39, 556–58.

58. Petition for a Writ of Certiorari at 3, *Lucas*, 505 U.S. 1003 (No. 91-453).

59. See *id.*

60. See *id.*

61. See *id.*

62. DAVID LUCAS, *LUCAS VS. THE GREEN MACHINE* 78–80 (1995) (describing his frustration and "shock" with the new development line). In Mr. Lucas' words, "it was not certain that my lots would be affected by the legislation. I would have to wait and see where the line fell. The bad news wasn't long in coming. They got me." *Id.*

63. Petition for a Writ of Certiorari at 3, *Lucas*, 505 U.S. 1003 (No. 91-453).

Carolina Supreme Court.⁶⁴ The U.S. Supreme Court granted certiorari⁶⁵ and ruled in Mr. Lucas's favor.⁶⁶

The trial court found, curiously in light of the facts discussed below, "that the Act had worked a permanent and total loss in the value of Mr. Lucas's property."⁶⁷ The Court accepted this finding,⁶⁸ and the majority was sympathetic to Mr. Lucas's plight, denying that he should have "to sacrifice *all* economically beneficial uses in the name of the common good" without just compensation.⁶⁹ Justice Scalia, writing for the majority, decried the regulation as a "servitude on Lucas' land" in order to "achieve the 'benefits' of an ecological preserve."⁷⁰

Yet the facts and narrative were far more complicated than Lucas' petition had let on. Mr. Lucas was no ordinary landowner—he was an appraiser and developer who at one point owned and developed the entire Wild Dunes real estate development where the two lots he purchased were located.⁷¹ This was no unsophisticated landowner surprised by a sudden regulatory change; this was a man who was party to what he proclaimed was "the largest real estate transaction in the history of . . . South Carolina,"⁷² and who purchased beachfront property because it was becoming "more and more restricted."⁷³ The land itself was "virtually a mirage . . . immediately adjacent to the shore . . . [s]ubject to the daily action of the tide and erosion from storms."⁷⁴ In fact, Mr. Lucas' lots were "entirely under water as recently as 1963, and partially covered by ocean ponds as late as 1973."⁷⁵ These are exactly the kinds of properties that the South Carolina legislature sought to regulate through the Beachfront Management Act: lands that were susceptible to dangerous flooding from storms. Beyond those facts, it seems hard to believe there would be *no valuable use for the*

64. *See id.*

65. *See Lucas v. S.C. Coastal Council*, 502 U.S. 966 (1991) (granting cert).

66. *See Lucas*, 505 U.S. at 1031–32 (1992).

67. *See* Petition for a Writ of Certiorari at 3, *Lucas*, 505 U.S. 1003 (No. 91-453).

68. Rather than accept this fact as given, perhaps the Court could have remanded for more fact finding on the subject or could have asked for briefs to be filed on the subject to update the value of the property. Justice Blackmun was particularly disturbed by this factual finding, sarcastically asking at argument, "so you feel it was completely worthless. . . . Would you be willing to give it to me?" Transcript of Oral Argument at 4, *Lucas*, 505 U.S. 1003 (No. 91-453).

69. *Lucas*, 505 U.S. at 1019.

70. *See id.* at 1024.

71. *See Voices of American Law: Lucas v. South Carolina Coastal Council*, DUKE LAW, <https://perma.cc/E4GX-Z3SX>; *see also Property Rights and the Fifth Amendment*, C-SPAN (Mar. 7, 1992), <https://perma.cc/F9NB-QQJJ>.

72. *Voices of American Law*, *supra* note 71.

73. *See id.*

74. Lazarus, *supra* note 55, at 1422.

75. *Id.*

land whatsoever. While Mr. Lucas mentioned a number of sarcastic examples of non-use in interviews,⁷⁶ there were other uses to be which the lots could be put, including camping and sale to neighbors for recreational use, improved views, and greater lot size.

Finally, Mr. Lucas arguably lacked a legal injury-in-fact to provide standing. While he certainly owned land affected by the regulation, he had not yet applied for a permit to develop those lands.⁷⁷ He sat by for a year and a half without developing his land and testified that he was “in no hurry . . . because the lot was appreciating in value.”⁷⁸ Then he sued the Coastal Commission to fight the regulation. The Court ignored the procedural posture, even though mere days before the opinion in *Lucas* was released, Justice Scalia penned an opinion denying standing to an environmental organization in *Lujan v. Defenders of Wildlife*⁷⁹ on the premise that “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”⁸⁰ Ignoring that holding, Justice Scalia accepted Mr. Lucas’ claims of a taking, even though Mr. Lucas had not applied for a special permit to develop his lots—Justice Scalia seemed “determined, and impatient, to issue a ruling favorable to the landowner.”⁸¹

There are a number of reasons for the discrepancies in the factual record. While PLF was only an amicus in this case and in the hearing below,⁸² Mr. Lucas was himself an ideologically motivated actor who wanted to “stop government from encroaching on individual liberty.”⁸³ As Mr. Lucas described, his was “the story of an American who was able to grasp a rung on that ladder [to the American Dream] only to have his own government threaten his climb. . . . [T]hrough unnecessary and oppressive regulation, governments stifle and many

76. Mr. Lucas mentioned options including “I can just sit here and pay a million dollars and eat sandwiches on the lot—and pay taxes by the way,” see C-SPAN, *supra* note 71, and that he could “build a gazebo to go out and have a picnic on,” see *Voices of American Law*, *supra* note 71.

77. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012–13, 1012 n.3 (1992).

78. See *Lucas*, 505 U.S. at 1043 n.5 (Blackmun, J., dissenting). This testimony would suggest that the trial court erred in finding that Mr. Lucas had lost all economically beneficial uses for his land. In fact, the trial court made no findings that Mr. Lucas “had any plans to use the property” in the years leading up to his lawsuit. *Id.* This would contradict the finding of no economic value, and may even suggest that Mr. Lucas himself believed there was value to be found.

79. 504 U.S. 555 (1992).

80. *Id.* at 564.

81. Lazarus, *supra* note 55, at 1420–21; see also *Lucas*, 505 U.S. at 1062 (Stevens, J., dissenting) (noting that the majority was “eager to decide the merits” of Mr. Lucas’s claim).

82. Petition for a Writ of Certiorari at ii, *Lucas*, 505 U.S. 1003 (No. 91-453); Brief Amicus Curiae of Pacific Legal Foundation, *Lucas*, 505 U.S. 1003 (No. 91-453).

83. *Voices of American Law*, *supra* note 71.

times destroy economic activity, wealth and individual initiative.”⁸⁴ He met a friendly audience in the conservative Supreme Court majority, which accepted his anti-government narrative and ignored the factual inaccuracies and gaps, and the lack of injury-in-fact. A trial court’s strange finding of a complete economic wipeout created a new nationwide per se just compensation rule. Mr. Lucas’s personal financial stake in—and his sophisticated understanding of—coastline development did not factor into the decision at all.

Each of these errors is small, but together they combined to limit the ability of South Carolina to regulate development on coastline at risk of environmental disaster. *Lucas* is an example of clear success for the Takings Project because it limits state power and empowers landowners who can develop a record showing economic wipeout. This new categorical just compensation rule lies in direct contrast to traditional just compensation jurisprudence that examined three factors to determine if a regulation qualified as a taking: the economic impact on property, interference with investment-backed expectations, and the character of the government action.⁸⁵ Under that test, Mr. Lucas as a developer should have known that his investment property fell within the scope of the coastal regulatory scheme. Instead, the Court created the new categorical *Lucas* rule that complete economic wipeout is per se a taking—and the *only* way the Court could arrive at this position was by taking the remarkable steps of overlooking procedural issues and factual errors in Mr. Lucas’s case history.

C. *Palazzolo v. Rhode Island*⁸⁶

In this case, PLF took an extremely complicated factual record and attempted to create a clean narrative to establish a new takings precedent. According to the petition for certiorari, Anthony Palazzolo acquired an 18-acre coastal property in Rhode Island between 1959 and 1969, and he attempted to develop that property “[f]or more than four decades.”⁸⁷ Unfortunately, “nearly all” of his property consisted of wetlands, and each of his four applications to fill those wetlands to the Coastal Resources Management Council (“CRMC”) and its predecessor state agencies were denied.⁸⁸ He filed an inverse condemnation action alleging that the CRMC’s fill permit denials constituted a regulatory taking, which ultimately failed at state trial court and the Rhode Island Supreme Court.⁸⁹ At the certiorari stage, PLF mentioned only in passing that Mr. Palazzolo had acquired the land from his solely owned corporation in 1978, *after* the regulations creating the CRMC and prohibiting wetland filling

84. LUCAS, *supra* note 62, at 7.

85. See Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978).

86. 533 U.S. 606 (2001).

87. Petition for a Writ of Certiorari at 2, *Palazzolo*, 533 U.S. 606 (No. 99-2047).

88. See *id.* at 2–3.

89. See *id.* at 3.

were adopted.⁹⁰ As a consequence, the state supreme court had held that “a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property” because the regulation becomes a part of the “reasonable investment-backed expectations” that transfer with the property.⁹¹ PLF also noted that the state supreme court ruled on ripeness grounds, holding that Mr. Palazzolo needed to file further applications to fill his wetlands in spite of decades of attempts.⁹² As a result, PLF wrote, “Mr. Palazzolo now ‘owns’—if that term can be used ironically—nominally private property that has actually been ‘pressed into some form of public service under the guise of mitigating serious public harm.’”⁹³ In reality, there were a number of factual and procedural infirmities that the Court chose to overlook when it took the case.

To return to the facts, Mr. Palazzolo’s solely owned corporation, Shore Gardens, Inc. (“SGI”), acquired approximately 18 acres of coastal property in 1959.⁹⁴ Mr. Palazzolo, presumably on behalf of SGI, submitted nearly identical permit applications in 1962 and 1963 to dredge the property, and a separate permit application in 1966 to develop a private beach facility.⁹⁵ The state denied all three permits.⁹⁶ In 1976, the CRMC adopted the coastal management plan to limit development on the coastline.⁹⁷ SGI’s corporate charter was revoked in 1978 because of failure to pay taxes, so the corporation’s assets passed to its sole shareholder—Mr. Palazzolo.⁹⁸ Mr. Palazzolo went on to file yet another identical dredge permit application with the state in 1983, and after its rejection, filed an application in 1985 to create a private beach facility that was nearly identical to the 1966 permit application.⁹⁹ This permit was also denied, and in response Mr. Palazzolo filed a legal challenge, alleging multi-million-dollar damages based on a development plan to fit 74 homes on his property *that he had never actually presented to the state* in any of the prior applications.¹⁰⁰

This was a messy case. Mr. Palazzolo’s permit applications were denied repeatedly, even under the more relaxed pre-coastal management plan regime, and a court could have considered his failure to appeal previous permit denials a

90. *See id.* at 2 (“The state courts put great stock in the fact that he owned the property by means of a sole-shareholder corporation until February of 1978, when he became the owner in his individual capacity.”).

91. *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

92. *Id.* at 3–4.

93. *Id.* at 4 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992)).

94. *See* Memorandum in Opposition to Petition for Writ of Certiorari at 2, *Palazzolo*, 533 U.S. 606 (No. 99-2047).

95. *See id.* at 5–6.

96. *See id.* at 6.

97. *See id.* at 3.

98. *Palazzolo*, 533 U.S. at 614.

99. *See* Memorandum in Opposition to Petition for Writ of Certiorari at 6–8, *Palazzolo*, 533 U.S. 606 (No. 99-2047).

100. *See id.* at 1.

sign of mootness. Mr. Palazzolo repeatedly applied for identical permits, and he did not adjust his applications based on state responses that he could develop the uplands portions of his property.¹⁰¹ Instead, he argued for a damages award based on a development plan that was never presented to the state.¹⁰² Mr. Palazzolo did not even have an accurate map of his property to present to the court, and PLF at oral argument simply agreed with assertions of the state as to the characteristics of the land.¹⁰³ At oral argument, as the messy record and valuation issues became clear, Justice Scalia noted that the Court “might not have taken . . . the case” if the various record issues had been clearer to the Court.¹⁰⁴

PLF brought this case—and the U.S. Supreme Court ultimately granted certiorari—because, with enough factual spin, the petition presented a compelling categorical case. Unfortunately for the Takings Project, the presentation of a categorical case does not hold up under the spotlight. The narrative centered on an unsuspecting landowner denied the right to develop his property by an overzealous government that wanted to use loopholes to deny just compensation.¹⁰⁵ It also presented a new categorical rule for consideration: “Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant’s acquisition of the property.”¹⁰⁶ But the complicated facts of this case simply do not support PLF’s argument.¹⁰⁷

Perhaps as a result of the factual complications, the case has had little precedential value.¹⁰⁸ In fact, this case resulted in a baffling set of six conflicting

101. *See id.* at 6–8, 10–11.

102. *See id.* at 16–18.

103. Transcript of Oral Argument at 24–25, *Palazzolo*, 533 U.S. 606 (No. 99-2047) (“Are you telling me we have no exact map of the property in question?”).

104. *Id.* at 7 (depicting a frustrated exchange between Justice Scalia and counsel to the petitioner regarding the incomplete record).

105. *See* Petition for a Writ of Certiorari at 2–4, *Palazzolo*, 533 U.S. 606 (No. 99-2047).

106. *Id.* at i.

107. Memorandum in Opposition to Petition for Writ of Certiorari at 13, *Palazzolo*, 533 U.S. 606 (No. 99-2047) (“While the Petitioner posits a neat academic question, the question does not take into account the peculiar situation at hand.”).

108. *See, e.g.*, Mary Blatch, *Palazzolo v. Rhode Island: A Decision Worth Noticing?*, 52 CATH. U. L. REV. 481, 488 (2003) (“[*Palazzolo*] did not change the substantive law that determines when a taking has occurred” and “may do nothing more than increase the number of takings claims filed without increasing the number of cases in which a taking is actually found to have occurred.”); Jaime Dawes, *Palazzolo v. Rhode Island: Clarification and More Confusion on the Notice Issue*, 42 NAT. RES. J. 641, 641 (2002) (“*Palazzolo*, though providing some degree of guidance, will likely perpetuate confusion and inconsistency in state and lower federal courts confronted with notice issues.”); Gregory M. Stein, *The Modest Impact of Palazzolo v. Rhode Island*, 36 VT. L. REV. 675, 676–77, 726–30 (2012) (reviewing a large number of just compensation cases and concluding that “*Palazzolo v. Rhode Island* has had only a minimal impact on decisions by state and lower federal courts addressing the notice rule”).

opinions.¹⁰⁹ The Court did rule in favor of PLF, holding that regulations could be challenged by future landowners under the Just Compensation Clause, or as they put it: “Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.”¹¹⁰ However, it is difficult to say this was a true win for the Takings Project. While the Court prevented challenges to regulations from simply being excluded as a rule, it appears—arguably from the conflicting opinions—that such regulations should be considered as part of investment-backed expectations.¹¹¹ In either case, *Palazzolo* has had little impact in just compensation cases, demonstrating that the Takings Project’s techniques are not always as successful as they would wish.

D. *Rapanos v. United States*¹¹²

Rapanos is the Court’s most recent statement on the jurisdictional limits of the Clean Water Act. PLF again represented the landowner in this case, John Rapanos, teeing up a clean academic question on the CWA that would benefit developers to the detriment of federal authority to protect watersheds and wetlands.¹¹³ In its ultimately successful attempt to get this case before the U.S. Supreme Court, PLF again sanded away inconvenient or inconsistent facts.

In the petition for certiorari, PLF presented a landowner who faced the threat of *prison* for the simple desire to develop land he reasonably believed was not regulable wetland.¹¹⁴ Mr. Rapanos owned three parcels of land in Michigan, and “each site is separated from the nearest navigable water by intervening tributaries, as far as 20 miles.”¹¹⁵ Specifically, one of the sites had only “intermittent” surface water connections to navigable waterways “only by means of a manmade ditch, a nonnavigable creek and a river that ultimately flows into the Saginaw Bay.”¹¹⁶ In spite of this tenuous connection, the federal government sought to prevent Mr. Rapanos from developing his land by bringing criminal and civil charges against him in response to unpermitted filling of wetlands.¹¹⁷ Mr. Rapanos “now face[d] certain jail time in a federal penitentiary,” and he and his wife faced “fines and mitigation fees totaling several million dollars.”¹¹⁸

109. See generally *Palazzolo*, 533 U.S. at 606.

110. *Id.* at 627.

111. Compare *Palazzolo*, 533 U.S. at 632–36 (O’Connor, J., concurring) with *Palazzolo*, 533 U.S. at 636–37 (Scalia, J., concurring).

112. 547 U.S. 715 (2006).

113. See Felecity Barringer, *Michigan Landowner Who Filled Wetlands Faces Prison*, N.Y. TIMES (May 18, 2004), <https://perma.cc/J57K-HGYG>.

114. Petition for a Writ of Certiorari at 2–4, *Rapanos*, 547 U.S. 715 (No. 04-1034).

115. *Id.* at 4.

116. *Id.* at 6 (citations omitted).

117. See *id.* at 4–5.

118. *Id.* at 3–4.

This narrative painted the picture of an overzealous federal government encroaching on the property rights of Mr. Rapanos through regulation of isolated wetlands. In this way, PLF sought to present a clean question for consideration: whether CWA jurisdiction extends to “nonnavigable wetlands that do not even abut a navigable water.”¹¹⁹

Unfortunately, this presentation in many ways ignored the messy reality on the ground in Michigan. The petition for certiorari understated the complicated status of this case in two ways: it focused on only one of three properties at issue, ignoring the hydrological realities of the wetland, and it set aside Mr. Rapanos’ bad faith efforts to fill wetlands in spite of frequent notice of the law. PLF argued for a limited reading of the CWA that would only cover wetlands directly abutting regulable waterways or their tributaries.¹²⁰ While the petition certainly discloses there were three sites at issue, the petition focused its presentation on the Salzburg Site, with the nearest navigable water sitting “more than 20 miles away.”¹²¹ As a first matter, the Salzburg Site actually sits between eleven and twenty miles from navigable water.¹²² More importantly, there were also two other sites at issue: the Hines Road Site and Pine River Site. Each of the three sites have starkly different sets of hydrological characteristics. The Hines Road Site has a surface hydrological connection to Rose Drain—into navigable water.¹²³ The Pine River Site actually *does* abut a navigable water, the Pine River, which would qualify the site as regulable even under PLF’s theory of CWA jurisdiction.¹²⁴ Rather than directly address these different properties, the petition presented the set of three through the lens of the most isolated wetland of the bunch.

Turning next to Mr. Rapanos, the petition for certiorari described a property owner who “had to defend” himself against ambushing regulators and who now faced criminal charges for “land-clearing activities.”¹²⁵ But Mr. Rapanos was put on notice for potential violations multiple times and he actively ignored those notices to fill his lands. The Michigan Department of Natural Resources (“MDNR”) toured the Salzburg Site in 1989 and advised Mr. Rapanos he may have regulable wetlands on his property.¹²⁶ Mr. Rapanos then hired a consultant who confirmed that finding.¹²⁷ Mr. Rapanos directed the consultant to destroy the report and said that he would “destroy” the consultant if he refused to com-

119. *Id.* at i.

120. *See id.* at 9.

121. *See id.* at 6.

122. *See* Brief for the United States in Opposition at 6, *Rapanos*, 547 U.S. 715 (No. 04-1034).

123. *See id.* at 6–7.

124. *See id.* at 7.

125. Petition for a Writ of Certiorari at 4, *Rapanos*, 547 U.S. 715 (No. 04-1034).

126. *See* Brief for the United States in Opposition at 5, *Rapanos*, 547 U.S. 715 (No. 04-1034).

127. *Id.* at 5.

ply.¹²⁸ Mr. Rapanos then began construction to fill most of the wetlands from 1988 to 1997.¹²⁹ Mr. Rapanos also filled most of the wetlands at his other two properties.¹³⁰ This construction occurred in direct contradiction to his notice of potential regulable wetlands on his property, receipt of multiple MDNR cease-and-desist orders, and the issuance of multiple compliance orders from EPA.¹³¹ The threat of jail time and fine was no sudden surprise—rather, it was a direct result of a refusal to cooperate with or challenge enforcement notices.

In spite of the factual complications present in this case, PLF worked to present a clean academic question that would limit the jurisdictional reach of the CWA to only those wetlands directly abutting surface waters, ignoring hydrological interconnectedness of watersheds entirely. Mr. Rapanos almost certainly joined in this effort because of shared ideological motivations. For example, he said in an interview, “I don’t think you should just lie down for the federal government . . . [m]y father and mother would say, ‘Johnny, fight to the death for what’s right. Fight to the death against those bastards.’”¹³² Mr. Rapanos and PLF found a Court responsive to their desires—at least in part. The result was a strange set of opinions, in which Justice Scalia wrote for a plurality of four justices limiting CWA jurisdiction; Justice Kennedy stood alone with a concurrence spelling out a new “hydrological connection” test for CWA jurisdiction; and Justice Stevens wrote a dissent for four justices endorsing broad CWA jurisdiction.¹³³ *Rapanos* continues to confound the U.S. legal system and regulatory system alike.¹³⁴ It is still not entirely clear how to treat the jurisdiction of the CWA, so it is difficult to say that this case was a complete success for the Takings Project. For Mr. Rapanos, it seems clear this was an ultimate loss: on remand he settled the case, agreeing to pay a \$150,000 fine and construct 100 acres of wetlands.¹³⁵

128. *Id.*

129. *See id.* at 5–7.

130. *See id.*

131. *See id.*

132. Clark Hughes, *John A. Rapanos, Who Vowed ‘Fight to the Death’ Against EPA, Dies at 80*, MLIVE (Feb. 11, 2016), <https://perma.cc/EHP7-JWC8>.

133. *See generally Rapanos*, 547 U.S. 715.

134. *See, e.g., Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 748–49 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (Feb. 19, 2019) (No. 18-260); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054–56; Brief Amicus Curiae of Chantell and Michael Sackett and Duarte Nursery, Inc., in Support of Petitioner at 13–31, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155) (arguing—in an amicus brief drafted by PLF—that the Supreme Court should clarify the controlling opinion in *Rapanos*); *About Waters of the United States*, EPA, <https://perma.cc/AN7Z-Y929>.

135. *Midland Developer John Rapanos Agrees to Pay Fine in Wetlands Case*, MLIVE (Dec. 30, 2008), <https://perma.cc/8V2V-82JT>.

*E. Sackett v. EPA*¹³⁶

Chantell and Michael Sackett purchased a small lot in a residential subdivision near Priest Lake, Idaho, to build a house.¹³⁷ In their telling, they completed “due diligence inspections” and their research in no way “indicated any [Clean Water Act] permitting history or requirements for the property.”¹³⁸ The Sacketts claimed that they did not know, nor did they have reason to know, that their property was a wetland subject to restriction.¹³⁹ After the Sacketts “began some earthmoving work with all local building permits in hand,” EPA sent them a compliance order asserting their land was subject to CWA regulation as a wetland, requiring the Sacketts to stop construction and restore the wetlands.¹⁴⁰ The Sacketts responded by demanding a hearing at EPA to contest the determination that their land was a jurisdictional wetland.¹⁴¹ As they describe it, EPA ignored the request, and the Sacketts brought suit to contest the compliance order.¹⁴² The district court and Ninth Circuit each held that there was no judicial review for this kind of order, but the Supreme Court granted certiorari and ultimately reversed the decisions below on procedural grounds in a unanimous 9–0 decision.¹⁴³

This case presented a compelling story: a family wanted to build a “modest three-bedroom home” in an area already filled with homes,¹⁴⁴ but the government suddenly stepped in, halted construction, demanded the family start expensive restoration, and asserted that the family had no redress in the courts. Though the Court accepted this narrative, it was far from the whole truth. The Natural Resources Defense Council (“NRDC”), along with other environmental nonprofits, conducted further research into the background of the case and filed an amicus brief alleging that the Sacketts omitted “integral parts of [their] own prior account” of the dispute.¹⁴⁵ The Sacketts owned Sackett Contracting and Excavating, a construction company that operated in the lake area.¹⁴⁶ They employed a scientist to assess the land and determine if it was a potential protected wetland,¹⁴⁷ showing some familiarity with the process of assessing and

136. 566 U.S. 120 (2012).

137. Petition for a Writ of Certiorari at 4, *Sackett*, 566 U.S. 120 (No. 10-1062).

138. *Id.* at 5.

139. Petitioners’ Reply Brief at 1, *Sackett*, 566 U.S. 120 (No. 10-1062).

140. Petition for a Writ of Certiorari at 5, *Sackett*, 566 U.S. 120 (No. 10-1062).

141. *See id.* at 5–6.

142. *See id.* at 6.

143. *See Sackett*, 566 U.S. at 125, 131.

144. *Sackett v. EPA: Landowners Can Challenge EPA Compliance Orders in Court*, PLF, <https://perma.cc/LM3G-Y5MB>.

145. *See generally* Brief Amicus Curiae of Natural Resources Defense Council at 6, *Sackett*, 566 U.S. 120 (No. 10-1062).

146. *See id.* at 5.

147. *See id.* at 2.

filling wetlands. That scientist, EPA, and the U.S. Army Corps of Engineers each informed the Sacketts that their property may be a protected wetland; yet the Sacketts ignored those warnings, did not seek a fill permit, and began to fill the land until they received the compliance order.¹⁴⁸ The Sacketts were not ill-informed actors suddenly faced with arbitrary government punishment. The Sacketts were in the construction business and knew six months before EPA issued a compliance order that their land could contain wetlands.¹⁴⁹ After receiving the compliance order, they waited four months to follow up with EPA, demanded a costly formal adjudication in lieu of informal discussion, and waited until the last possible day to file the suit challenging the agency order.¹⁵⁰

These omissions from the record created a potent story that did not reflect reality. In representing the Sacketts, PLF constructed a case that presented a clear anti-government narrative and targeted contentious wetland regulation. The Sacketts became a popular cause in the conservative movement—even then-presidential-candidate Mitt Romney mentioned their case when advocating for a more conservative judiciary on the 2012 presidential campaign trail.¹⁵¹ Yet the Court's decision was quite limited: it only held that judicial review was available to the Sacketts while leaving the merits untouched.¹⁵² After a rehearing at the district court in 2016,¹⁵³ the Sacketts ultimately lost their case based on the more complete facts.¹⁵⁴

While *Sackett* had limited impact, it showed the Court's willingness to accommodate ideological fact obfuscation to support the Takings Project. The Court may have ruled narrowly in this case precisely because of the omitted facts revealed after certiorari was granted. On that reading, the Court issued a limited decision in order to stay silent on factual errors that would come up on the merits. Though the Sacketts lost on the rehearing below, the Takings Pro-

148. See *id.* at 2, 5–11.

149. See *id.* at 11.

150. See *id.* at 12.

151. See Molly Ball, *Mitt Romney, the Supreme Court's Best Friend?*, ATLANTIC (Apr. 13, 2012), <https://perma.cc/B4EF-28ZK>.

152. See Turner Smith & Margaret Holden, Case Comment, *Sackett v. EPA*, 37 HARV. ENVTL. L. REV. 301, 301 (2013) (“[W]hile the decision changes the face of Clean Water Act enforcement law, it does so without affecting other administrative or environmental laws and with virtually no practical effect on Clean Water Act enforcement programs.”).

153. See Robin Bravender, *Years After Win, Couple Still Battle EPA to Build Dream Home*, E&E NEWS (Mar. 29, 2016), <https://perma.cc/M28E-PFQX>.

154. See *Sackett v. EPA*, Case No. 2:08-cv-00185-EJL (D. Idaho, Mar. 31, 2019), <https://perma.cc/TBH7-K8TU>; Ariel Wittenberg, *Years After Supreme Court Win, Sacketts Lose Fight with EPA*, E&E NEWS (Apr. 3, 2019), <https://perma.cc/B565-S5AL>. The Sacketts have also had separate legal troubles, with Mr. Sackett serving jail time for a sex crime. See Robin Bravender, *Winner of Major SCOTUS Wetlands Case in Jail for Sex Crime*, E&E NEWS (Mar. 31, 2016), <https://perma.cc/365X-R5CP>; Kip Hill, *Sackett, Who Took on EPA, Gets Prison in Sex Case*, SPOKESMAN REV. (Aug. 29, 2015), <https://perma.cc/8EAR-PCUK>.

ject still won when the conservative majority accepted PLF's factual overreach. Instead of reprimanding litigants caught omitting crucial information, the conservative majority finessed a quiet win. *Sackett* shows the enduring strength of the Takings Project even after factual inconsistencies come to light.¹⁵⁵

F. *Koontz v. St. Johns River Water Management District*¹⁵⁶

Coy Koontz owned 14.2 acres of land in Florida, and he “sought to improve 3.7 acres” of the property that were “unfit for animal habitat.”¹⁵⁷ This improvement involved the dredging and filling of 3.25 acres of wetlands, and so he applied for a development permit.¹⁵⁸ The petition for certiorari notes that Mr. Koontz “agreed to dedicate the remainder of his property—almost 11 acres—to the State for conservation.”¹⁵⁹ The state rejected this offer, and instead “demanded that Koontz enhance 50 off-site acres of wetland,” an expensive offer that Mr. Koontz refused as an “out-and-out plan of extortion.”¹⁶⁰ The state ultimately denied the permit, and Mr. Koontz filed suit alleging that this permit denial constituted a taking.¹⁶¹ The Court’s opinions in *Nollan v. California Coastal Commission*¹⁶² and *Dolan v. City of Tigard*¹⁶³ together require any permit conditions to have a clear “nexus” to the permitted activity and to have “rough proportionality” to the harm caused.¹⁶⁴ PLF represented Mr. Koontz in this case to bring the Court the question whether the *Nollan* and *Dolan* nexus and rough proportionality requirements also apply to monetary exactions for permits.¹⁶⁵ But the full facts of the case complicate this simple academic question.

Mr. Koontz was a more belligerent developer than portrayed in PLF’s petition for certiorari. As the petition reply described, while Mr. Koontz did offer some land for conservation, that offer was denied because, *as his own expert conceded*, it did not meet the preservation standard required under state law.¹⁶⁶ It was undisputed that Mr. Koontz would damage wetlands; the only question

155. Even after the NRDC brief revealed factual omissions, the trade press and mainstream press continued to use the narrative put forward by PLF. See, e.g., Bravender, *supra* note 153; Editorial, *The EPA is Earning a Reputation for Abuse*, WASH. POST (May 3, 2012), <https://perma.cc/GF98-VTY8>.

156. 570 U.S. 595 (2013).

157. Petition for a Writ of Certiorari at 3, *Koontz*, 570 U.S. 595 (No. 11-1447).

158. See *id.* at 3.

159. *Id.* at 3.

160. *Id.* at 4, 9.

161. See *id.* at 4.

162. 483 U.S. 825 (1987).

163. 512 U.S. 374 (1994).

164. See *Dolan*, 512 U.S. at 386, 391; *Nollan*, 483 U.S. at 837.

165. Petition for a Writ of Certiorari at i–ii, *Koontz*, 570 U.S. 595 (No. 11-1447).

166. Respondent’s Brief in Opposition at 5, *Koontz*, 570 U.S. 595 (No. 11-1447).

was whether the mitigation was sufficient.¹⁶⁷ The state proposed a few options for potential mitigation meant to begin a negotiation to select an acceptable mitigation tactic.¹⁶⁸ Instead of negotiating with the state or challenging the permit in an administrative forum, Mr. Koontz filed suit, alleging an unconstitutional taking.¹⁶⁹ This is a strange allegation because no property or money ever changed hands, a fact that should be dispositive.¹⁷⁰ Put simply, how could a regulatory taking occur if there was no taking?

Despite these issues, the Court granted certiorari and held that the *Nollan* and *Dolan* nexus and rough proportionality requirements also apply to monetary exactions for permits.¹⁷¹ This was a doctrinal win for PLF because it extended exactions to the monetary realm and created new hurdles for land use regulation. It again showed how the conservative majority on the Court is willing to overlook factual and procedural infirmities to support the Takings Project. However, the case provided a simple safety valve: local governments could avoid the takings issue entirely by denying permits so long as they do not provide their own offers of permit mitigation.¹⁷² The state in *Koontz* could have simply denied the offer and done so until enough mitigation was offered. As a result, the case has limited applicability if local governments are aware of the doctrine.

G. *Murr v. Wisconsin*¹⁷³

Murr involved two lots of riverfront property in Wisconsin along the scenic St. Croix River. The petitioner Murr family consisted of four siblings who inherited two connected lots of waterfront property on the St. Croix River in Wisconsin from their parents.¹⁷⁴ The Murr parents purchased “Lot F” in 1960 and transferred title to their plumbing company, William Murr Plumbing.¹⁷⁵ The parents then built a cabin on the lot and “began a family legacy of enjoying many summers, long weekend holidays, birthdays, and 4th of July celebrations at the lake.”¹⁷⁶ In 1963, the Murr parents purchased the adjoining

167. *See id.* at 2–3.

168. *Id.* at 4.

169. *Id.* at i, 4–5.

170. *See Koontz*, 570 U.S. at 621 (Kagan, J., dissenting) (“[N]o property changed hands; as just noted, Koontz therefore cannot claim just compensation under the Fifth Amendment.”).

171. *See id.* at 612.

172. Sean F. Nolan, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 211–19 (2015) (describing strategies for local governments to avoid *Koontz* when dealing with permits).

173. 137 S. Ct. 1933 (2017).

174. Petition for a Writ of Certiorari at 3, *Murr*, 137 S. Ct. 1933 (No. 15-214).

175. *See id.*

176. *Id.*

parcel, “Lot E,” and kept it in their own name.¹⁷⁷ In 1994 and 1995, the parents transferred Lots F and E, respectively, to the children as gifts.¹⁷⁸

According to the petition, the Murr children hoped to sell Lot E and use the proceeds to upgrade the cabin on Lot F, but they discovered “from government officials that they could no longer separately develop and sell Lot E.”¹⁷⁹ The county would only allow the Murrs to build on their combined “substandard” plots, but they could not sell or develop the plots individually.¹⁸⁰ The zoning ordinance included a grandfather clause that allowed owners of “substandard” plots to develop their land, but two plots owned in common by the same people could not be separated to qualify for the grandfather clause.¹⁸¹ As PLF wrote, “Lot E would still be allowed to be developed if it was owned by *anyone other than the Murr siblings*.”¹⁸² PLF framed this case with a compelling narrative: a hard working family had invested in property, and the government would destroy their “family legacy.”¹⁸³ This narrative teed up a clean academic question for the Court: whether takings analysis applied to each individual parcel of land at issue or to a combined, contiguous set of parcels as a whole.

Before the Supreme Court heard oral arguments, the United States as amici and new counsel for the county discovered a number of factual inconsistencies in the Murr family’s representations. The entire lawsuit was built on an omission: in fact, these were not legally distinct properties subject to a variance. Public records show that the parents initially purchased both Lots E and F as a unified parcel, but the seller had already conveyed Lot E to a third party.¹⁸⁴ The parents transferred the full contiguous parcel to their plumbing company, but upon realizing the deed error, purchased Lot E in a subsequent transaction three years later and continued to hold that lot in their own possession.¹⁸⁵ The Murr family claimed that Lot F was then conveyed directly from the plumbing company to the Murr children, but they omitted a crucial link: the plumbing company conveyed Lot F to the Murr parents in 1982, meaning the two lots were held in common ownership starting that year.¹⁸⁶ Further, the Murr children treated the two lots as functionally combined: they built a volleyball court

177. *See id.* at 4.

178. *See id.*

179. *Id.*

180. *See id.* at 4–6.

181. *See id.*

182. *Id.* (emphasis in original).

183. *Id.* at 3.

184. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 6 n.1, *Murr*, 137 S. Ct. 1933 (No. 15-214).

185. *See id.* at 5–6.

186. Brief for Respondent St. Croix County at 11 n.5, *Murr*, 137 S. Ct. 1933 (No. 15-214) (“In its briefing before this Court, petitioners continue to perpetuate that error by claiming that ‘in 1994, the Murr parents transferred title to Lot F (the cabin parcel) from the plumbing company to their six children,’ and by making legal arguments based on that factual asser-

on the non-cabin parcel¹⁸⁷ and even inquired with the county about an expansion of their cabin that functionally treated the two plots as a single lot.¹⁸⁸

Together, these discrepancies muddle the academic question posed by PLF in its representation of the Murr family. Justice Kennedy noted these factual discrepancies in his majority opinion—but rather than address them, he left the facts as they had been “assumed” below for purposes of the opinion.¹⁸⁹ Even with these discrepancies, the Takings Project was resoundingly defeated in *Murr*. PLF’s proposed parcel-by-parcel categorical takings analysis would have allowed a developer to unilaterally carve up its property into smaller parcels to manufacture a complete taking of a newly isolated parcel of property.¹⁹⁰ Instead, the Court endorsed fact-specific, case-by-case analysis of the contiguous parcel in its decision. Considering the disputed status of the land at issue in *Murr*, it seems reasonable that the Court may not have granted certiorari if the full facts had been known beforehand. The county was unable to adequately search records to dispute the Murrs’ statements because it lacked resources compared to the Takings Project. This case shows an important lesson of the Takings Project: even with its success in getting cases in front of the Supreme Court through spin, the Court may still reject its arguments on legal grounds alone.

H. *Knick v. Township of Scott, Pennsylvania*¹⁹¹

According to her petition for certiorari, Rose Mary Knick lived alone in “rural, western Pennsylvania” on property her family owned for nearly fifty years.¹⁹² For unexplained reasons, the local government enacted a “first-of-its-kind law dealing with private cemeteries” in order to create a “right-of-way into private land from the nearest public road” during daylight hours to provide access to any “cemetery” on private land.¹⁹³ For reasons again unexplained, “the Township’s Code Enforcement Officer” entered Ms. Knick’s land and discovered “stones located on her property” that they then unilaterally declared “con-

tion.” (internal citations and alterations omitted) (quoting Brief for Petitioner at 4, *Murr*, 137 S. Ct. 1933 (No. 15-214)).

187. See Brief for the United States as Amicus Curiae Supporting Respondents at 7, *Murr*, 137 S. Ct. 1933 (No. 15-214).

188. See Brief for Respondent St. Croix County at 13, *Murr*, 137 S. Ct. 1933 (No. 15-214).

189. *Murr*, 137 S. Ct. at 1941 (“There are certain ambiguities in the record concerning whether the lots had merged earlier, but the parties and the courts below appear to have assumed the merger occurred upon transfer to petitioners.”).

190. For example, a landowner could cut property into new plots that would isolate known wetlands into a single property line, then allege a complete taking of that plot of wetlands when permits for development are denied.

191. 139 S. Ct. 2162 (2019).

192. Petition for a Writ of Certiorari at 5–6, *Knick*, 139 S. Ct. 2162 (No. 17-647).

193. *Id.* at 6.

stituted a ‘cemetery’” under the code.¹⁹⁴ The Township “commanded Ms. Knick to ‘make access to the cemetery available to the public.’”¹⁹⁵ The petition went on to describe how Ms. Knick was then denied access to the courts “through a Kafkaesque litigation process”¹⁹⁶ rooted in Supreme Court precedent that required an aggrieved property owner to seek compensation in state court before suing for just compensation in a federal venue.¹⁹⁷ PLF represented Ms. Knick because, they argued, the requirement treated “property rights as ‘second-class’ rights” and federal courts should “allow property owners to defend their constitutional rights in federal court—just like every other constitutional right.”¹⁹⁸

The petition demanded the Court to reconsider its precedent and asserted that this case was “a clean vehicle for doing so,”¹⁹⁹ but a closer examination of the record shows that Ms. Knick’s narrative was not as “clean” as PLF suggested. First, the alleged cemetery on Ms. Knick’s property sat across a two-lane road from Ms. Knick’s residence.²⁰⁰ The proposed right-of-way from the nearest road would be nowhere near her home, dispelling the narrative of a property owner fearful of a stranger’s intrusion or a privacy invasion.

Second, what the petition described as a mere set of stones was actually “multiple grave markers/tombstones” clearly marking burials by her neighbor’s family.²⁰¹ While not in the record, people involved in the case described *nearly forty* grave markers at the site.²⁰² To bolster its narrative muddying whether the site was clearly a cemetery, PLF released a photo of Ms. Knick sitting on one of the stones, which does not look like a traditional grave marker.²⁰³ Further, Knick grazed her animals throughout her property,²⁰⁴ and it is unlikely that she did not notice the grave markers when doing so. Finally, people involved in the case indicated that it was *Ms. Knick* herself who alerted the Township to the existence of the gravestones after the law was passed,²⁰⁵ explaining how the Township learned of the cemetery in the first place.

PLF constructed a narrative of selectively emphasized facts, partial truths, and misrepresentation. Despite these factual differences raised in the response

194. *Id.* at 7–8.

195. *Id.* at 6–8.

196. *Id.* at 33.

197. *Id.* at 2–3 (citing *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–96 (1985)).

198. *Knick v. Scott Township of Pennsylvania: Supreme Court Considers Second-Class Treatment of Property Rights*, PLF, <https://perma.cc/2QNL-JZYF>.

199. Petition for a Writ of Certiorari at 4, *Knick*, 139 S. Ct. 2162 (No. 17-647).

200. Brief for Respondents at 13–14, *Knick*, 139 S. Ct. 2162 (No. 17-647).

201. *Id.* at 14.

202. Interviews on file with author.

203. Photo of Ms. Knick, *supra* note 30.

204. Brief for Respondents at 13, *Knick*, 139 S. Ct. 2162 (No. 17-647).

205. Interviews on file with author.

to the petition for certiorari, as well as the thumb on the scale of stare decisis, the Court overturned its precedent, opening federal courts to just compensation challenges, even if state venues are available.²⁰⁶ This was a clear victory for the Takings Project.

I. *United States v. Robertson*²⁰⁷

The Takings Project has continued its march through the judicial system even during the writing of this Note. In an attempt to clarify what it describes as the “confusing legacy” of *Rapanos* and to even argue for the unconstitutionality of the CWA generally,²⁰⁸ PLF recently took up the case of Joe Robertson. The case centers on what PLF described as an “unnamed channel, a foot or so wide and a foot or so deep, running through a clearing in the woods in Montana . . . carrying two or three garden hoses worth of flow.”²⁰⁹ Mr. Robertson, “an elderly Navy veteran” who ran a “fire fighting support truck business,” was concerned about the threat of fire on his land, and “dug a series of small water supply ponds” to capture water from that channel without approval from the Forest Service or Army Corps of Engineers.²¹⁰ In response to this action, the federal government “indicted [Mr.] Robertson charging him with two counts of violating the Clean Water Act . . . and one count alleging willful destruction of government property.”²¹¹ Mr. Robertson was convicted and sentenced to eighteen months in prison for each of the three counts, one year of supervised release for the CWA counts, and three years of supervised release for the third count. He was also ordered to pay \$129,933.50 in restitution to the government.²¹² On appeal, the Ninth Circuit upheld his conviction, ruling that Justice Kennedy’s *Rapanos* concurrence controlled.²¹³ PLF petitioned for certiorari so that the Court could reconsider *Rapanos*—or, alternatively, find that the term “navigable waters” in the CWA was unconstitutionally vague, dooming the law altogether.²¹⁴

While PLF framed its case on the plight of a veteran firefighter and an extremely isolated stream, the details reveal that PLF’s case is dubious. For example, diverting the stream was no small undertaking: Mr. Robertson used

206. *Knick*, 139 S. Ct. at 2178 (overturning *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985)).

207. 875 F.3d 1281 (9th Cir. 2017), *cert. granted and judgment vacated and case remanded*, 139 S. Ct. 1543 (2019).

208. Petition for a Writ of Certiorari at 14–21, *Robertson*, 139 S. Ct. 1543 (No. 18-609).

209. *Id.* at 8.

210. *Id.* at 9–10.

211. *Id.* at 10.

212. *Id.* at 12.

213. *United States v. Robertson*, 875 F.3d 1281, 1288 (9th Cir. 2017).

214. Petition for a Writ of Certiorari at 14–21, *Robertson*, 139 S. Ct. 1543 (No. 18-609).

an excavator to remove earth from the wetlands around the stream, placed that earth and other rocks into the stream to completely block the flow of the water, and ultimately disrupted 400 feet of stream and 1.5 acres of wetland.²¹⁵

He constructed ponds not only on his own property, but also on designated national forest lands.²¹⁶ When an EPA agent saw early construction of these ponds, the agent let Mr. Robertson know he should contact the Army Corps of Engineers because he “very likely” needed a permit—and Mr. Robertson ignored that advice.²¹⁷ Further, this was not Mr. Robertson’s first interaction with federal authorities: he had received and consistently ignored citations for nearly ten years for unauthorized activities on national forest lands.²¹⁸ At sentencing, the trial court noted that Mr. Robertson had “repeatedly demonstrated that he has no respect for the law.”²¹⁹ The defendant was far from sympathetic, and he had disobeyed federal agent demands that he not disrupt a stream that had a consistent, direct, surface connection to navigable waters.²²⁰ PLF overstated its case.

While the Takings Project saw this case as an opportunity to torpedo *Rapanos* and the CWA, the Court dealt the Project a defeat in the form of delay. Mr. Robertson passed away while the petition was pending, and though his wife petitioned to replace him in the case, the Court vacated and remanded for a decision on whether the case was moot.²²¹ It is debatable whether this case was the best vehicle to challenge *Rapanos*—but the Takings Project will need to wait for a new case to bring the issue before the Court.²²² And if the legal arguments in this case are any indication, its ambition is growing bolder in scope.

II. HOW DOES THE TAKINGS PROJECT OPERATE?

The above cases highlight an alarming trend in the legal system. The Takings Project is still actively pursuing its radical anti-environmental and anti-regulatory effort across a variety of legal fronts. The Project has become more active and more successful in bringing cases to the U.S. Supreme Court over

215. See Brief for the United States in Opposition at 6, *Robertson*, 139 S. Ct. 1543 (No. 18-609).

216. See *id.* at 6.

217. See *id.*

218. See *id.* at 8.

219. *Id.*

220. See *id.* at 6 (“An unnamed tributary runs through those lands to Cataract Creek, which in turn runs into the Boulder River and then the Jefferson River, a traditional navigable water.”).

221. See *Robertson*, 139 S. Ct. 1543.

222. Interestingly, PLF still considers the result a success on its website. See *Robertson v. United States: Montana Man Unjustly Convicted of Violating Clean Water Act*, PLF, <https://perma.cc/FN9C-YLGB> (“Case Status: Won: Unjust conviction and fines thrown out by Ninth Circuit Court of Appeals”).

time. This growing threat prompts a series of questions: How is the Takings Project so successful at reaching the Court? What gaps or errors in the adversarial system does the Takings Project highlight?

Kendall and Lord rooted their explanation for the Takings Project in moneyed, powerful, ideological interests promoting deregulation in academia, the “public interest” advocacy community, and the judiciary.²²³ Their description is still helpful, but it ignores other systemic explanations. This Part identifies and describes five major drivers for this trend: (1) involvement of a web of ideological actors including litigants, advocacy groups, and judges; (2) limitations of appellate procedure; (3) lawyering below; (4) messy property history; and (5) misunderstandings about land and ecology in the law.

A. Ideological Actors

Just as Kendall and Lord identified in their original article, the involvement of ideologically motivated actors is one of the most potent explanations for the Takings Project. After all, the Project is rooted in a conservative theory of limited regulation and government intervention in the use of personal property.²²⁴ The purpose of the Project is to promote that theory through strategic litigation.²²⁵ In order to support the development of this project, three ideologically motivated parties promote and reinforce the Project: legally focused interest groups, individual litigants, and members of the judiciary. These groups act as a kind of triangle, each individually playing a role that propels the goals of the Takings Project forward.

At the center of the Takings Project are a series of legally focused “public interest” and trade association groups that actively litigate or promote Takings Project cases. These groups have long been the beating heart of the Project: Kendall and Lord pointed to PLF “and a dozen other ‘public interest’ legal foundations located around the country [who] represent developers free-of-charge in takings cases. . . . Large and powerful lobbies such as the National Association of Home Builders similarly devote significant resources . . . to litigating takings cases.”²²⁶ These organizations continue to litigate cases as well as participate as active amici. As shown in the Appendix, the same set of ideological organizations tend to cluster around Takings Project cases. This quality can help others identify Takings Project cases.

These repeat litigants have an important set of incentives that contribute to their success. Not only do they have an ideological agenda to promote—they also have an agenda that attracts fundraising based on profile benchmarks. Organizations like PLF thrive not only because they have a set of beliefs, but also

223. Kendall & Lord, *supra* note 1, at 510–14.

224. See *infra* Part III.

225. See *id.*

226. Kendall & Lord, *supra* note 1, at 511.

because they get cases in front of the U.S. Supreme Court. Their entire fundraising model is premised on this fact. This is clear from their marketing that highlights “12 victories and counting” at the Court,²²⁷ as well as from their website redesign meant to emphasize Supreme Court cases in a way that spurred a large increase in donations.²²⁸ This can lead to skewed incentives, where getting in front of the Court becomes the end in and of itself. This set of incentives, as well as the sheer caseload of the Takings Project when you count active litigation and amici for any individual organization, could help explain the factual discrepancies described in the many cases above. Rather than pure ideological motivation or malice, a combination of fundraising incentives and sloppiness that comes from overwork may be the cause.

In addition to the legal organizations described above, ideological litigants and judges each contribute to the Takings Project through their actions. As described above, litigants like Mr. Rapanos, the Sacketts, and Mr. Lucas often have an ideological and development interest in the outcome of these cases.²²⁹ These individual litigants are motivated by a desire to fight regulation and have personal financial interest in the ability to develop their land even if it means a loss for public health and the environment. Judges also play a role in the perpetuation of the Takings Project by accepting a surprising number of appeals from Takings Project litigants. Ideological members of the judiciary like Justice Antonin Scalia have handed the Project many of its key victories.

The actors in this project are interdependent: individual litigants want to fight regulation to promote their ideological and financial interest; interest groups represent the individuals for free and have a fundraising interest in successful high-profile appeals; and judges have an interest in using these cases to promote their judicial philosophy. Looking at the comprehensive collection of cases above shows the internal fail points in this cycle: litigants can be bad actors, interest groups can fail to disclose key facts or conduct adequate due diligence, and judges may fail to build the coalition needed to attract a majority. But when it succeeds, this cycle is crucial to the Takings Project. The Project promotes its agenda through high-profile appeals, and advances in anti-regulatory doctrine pave the way for new litigants who can push the doctrine yet further. This is a core feature of the Takings Project and its success.

B. Appellate Procedure

Procedural constraints have contributed to the ongoing success of the Takings Project. In particular, the Supreme Court does not ask for updates to facts

227. Updated during the writing of this Note from “11 victories and counting” with the addition of *Knick*. See *About Pacific Legal Foundation*, PLF, <https://perma.cc/W548-TFYH>.

228. See Emergent Order, *Work: PacificLegal.org* (describing the Pacific Legal Foundation website redesign) (document on file with author).

229. See *supra* Part I.

when it grants certiorari, allowing the Takings Project to sneak in cases containing several procedural or factual issues. Many issues do not come to light until after certiorari has been granted, or even until argument itself. This is advantageous for the Takings Project because, once it is through the door, the Court has two choices: either remand on procedural grounds—like in *Sackett*, which can look like a win for the Project—or accept the facts as granted and rule on those facts—like *Lucas*, which can also look like a win for the Project.²³⁰ Thus, the Takings Project can use the constraints of appellate procedure to manufacture the perfect case at the moment it is most high-profile, without answering to the consequences of its misrepresentations. Their success in building a narrative also relies on the construction of a useful record below, which is addressed in the next sections.

C. *Lawyering Below*

Many Takings Project cases begin with Project efforts at the trial court level. The Project generates two strategic advantages when it gets involved early in a case: resource asymmetry, and broad case cultivation. To the first point, the municipality, state agency, or federal agency adverse to the Project is often at a resource disadvantage of time, money, people power, and attention. While a city government attorney may see an individual Takings Project case as one of many on their docket, the Project is able to focus significant resources and energy into the case. As a result, the targeted entity may not be able to conduct the due diligence or commit the resources necessary to construct an accurate record that could combat the Project's allegations. This can lead to limited, stipulated, or altogether strange facts in the record that can help the Project on appeal.²³¹ On the second point, the Takings Project can get involved with several cases focused on similar goals at the trial court level, effectively playing a numbers game. It seeds many cases at the trial level and then focuses on cultivating the appeals of the most advantageous cases. This is one of the advantages of ideological movement lawyering with significant resources.

D. *Messy Property History*

Another key to the Takings Project's success originates in the mundane realm of property records. Property is messy. Record-keeping can be shoddy at the municipal level, records are often hard to find, records may misstate the physical realities on the ground, family history is difficult to prove, and property transfers may not be recorded. This confusion can help the Takings Project

230. See *id.* (discussing *Sackett v. EPA*, 566 U.S. 120 (2012), and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

231. See, e.g., *supra* Section I.B (discussing *Lucas* and the strange factual findings relating to the value of the beachfront property at issue).

build the record when it gets involved in a case at an early stage. It can use incomplete records to cultivate more advantageous timelines,²³² describe property in more desirable ways,²³³ or set up strange claims about value.²³⁴ The Takings Project can use messy property history to construct a more advantageous record, isolate a discrete academic question for the Court, and cultivate a narrative centered on bad government stomping on private individual rights—all to promote the ideological project of limiting government regulation.

This kind of fictional construction to tee up a clean academic question is not new in property litigation at the U.S. Supreme Court. The tradition goes back to foundational Court jurisprudence like *Johnson v. M'Intosh*.²³⁵ This foundational property law case centered on conflicting land claims in Illinois.²³⁶ Chief Justice John Marshall wrote a now famous opinion centered on discovery and conquest, ruling that the federal government would not recognize private purchases of Indian lands.²³⁷ *Johnson v. M'Intosh* has had a lasting impact in federal Indian law—but it was based on a falsity. Records show that the two disputed plots of land were nowhere near one another.²³⁸ It appears that the legal dispute in *Johnson v. M'Intosh* was entirely fictional, and meant to clean up property disputes across the expanding United States.²³⁹ The Takings Project similarly uses manufactured facts to construct clean academic questions with broader implications beyond the dispute at issue.

E. Misunderstandings About Land, Water, and Ecology

Finally, part of the success of the Takings Project lies in the way the law misunderstands the Project's targets: land, water, and ecology. This insight is not unique; it is one of the great challenges inherent in environmental law as a

232. See *supra* Section I.G (discussing *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017)); *supra* Section I.E (discussing *Sackett*, 566 U.S. 120).

233. See *supra* Section I.H (discussing *Knick v. Twp. of Scott*, Pennsylvania, 139 S. Ct. 2162 (2019)).

234. See *supra* Section I.C (discussing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Lucas*, 505 U.S. 1003).

235. 21 U.S. (8 Wheat.) 543 (1823).

236. The plaintiff claimed ownership through a deed obtained directly from a group of native people in Illinois while the defendant claimed ownership through a United States land patent. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 L. & HIST. REV. 67, 67–69 (2001).

237. See *id.* at 69.

238. See *id.* at 99–100 (“As the map shows, none of McIntosh’s tracts come within fifty miles of the Wabash Company’s claims . . . [indicating that] the parties either feigned their dispute or that the defendant and the courts declined to take even the simplest steps to verify the existence of a true controversy.”).

239. See *id.* at 67–69.

subject.²⁴⁰ The legal system fails to recognize a dynamic vision of the environment that would better encompass the property and environmental disputes it faces.

The legal system's failure to accommodate new scientific understanding is clear at every level of the law. The U.S. Constitution was built on old visions of limited government and Lockean property. The common law subjects of property, tort, and contract are predicated in many ways on a vision of permanent and fixed property. Even statutes like the CWA hold within them concepts rooted in old understandings of sovereignty and hydraulic permanence.²⁴¹ Three examples put this fundamental misunderstanding of the law into relief: wildlife, land, and water.

The first example of an ecological misunderstanding in the law lies with wildlife. The ESA is a frequent target of anti-regulatory criticism. It creates affirmative burdens on developers to study property and the impact of development on species living on or around that property—which can stop development in its tracks.²⁴² The law has been a resounding success, saving numerous species from the brink of extinction.²⁴³ Critics have argued that the law may be unconstitutional on the theory that Congress may only enact laws that regulate interstate commerce, and the regulation of endangered species is not the regulation of commerce.²⁴⁴ Such a narrow reading of the bounds of the Commerce Clause can leave Congress powerless to protect people and wildlife from new economic, public health, and environmental problems that cannot be solved at the local level. The science is still developing as to how species confined to a

240. RICHARD LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 5–28 (2004).

241. *See, e.g.*, *PPL Montana v. Montana*, 565 U.S. 576 (2012) (rooting the concept of “navigable waters” in Roman civil law and English common law on public navigation); *Rapanos v. United States*, 547 U.S. 715, 732–35 (2006) (Scalia, J., plurality) (describing terms in the CWA that “connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely, ‘streams,’ connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as ‘rivers,’ ‘lakes,’ and ‘oceans.’ None of these terms encompasses transitory puddles or ephemeral flows of water.”); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001) (limiting the jurisdictional reach of the CWA based on understandings of navigable waters).

242. *See, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978) (blocking construction of dam to protect endangered snail darter); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (blocking construction of a real estate development to protect endangered arroyo toad); *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (blocking construction of hospital complex to protect endangered Delhi Sands flower-loving fly).

243. *See* KIERAN SUCKLING, NOAH GREENWALD & TIERRA CURRY, *CTR. FOR BIOLOGICAL DIVERSITY*, *On Time, On Target: How the Endangered Species Act Is Saving America’s Wildlife* 2–6 (2012), <https://perma.cc/6FHJ-D49U>.

244. *See Rancho Viejo*, 323 F.3d at 1066–79 (citing *United States v. Lopez*, 514 U.S. 549 (1995)) (rejecting arguments that the ESA does not properly regulate activity that is economic in nature).

small area of a single state can contribute to broader interstate ecology and provide economic benefits through crucial ecosystem services. The Commerce Clause can and should be read more broadly to encompass activities such as habitat destruction or development that threatens the existence of species.

Turning to land, a fundamental misunderstanding embedded in the common law of property attempts to treat land as a fixed and certain commodity, which is one reason that so many cases struggle with the facts on the ground, particularly where land and water meet. Property law is premised on a notion of fixed, mapped, and well understood reality. Unfortunately for courts, land is difficult to accurately map, frequently shifts and changes based on the season, and where land and water interact factors like erosion, tides, and precipitation can alter property boundaries and what may constitute a wetland, a public beach, or a stream.²⁴⁵ Old notions of property can struggle to accommodate cyclical changes in property, let alone permanent changes over time. As a consequence, the law struggles to accommodate contemporary harms to ecosystems that take time to experience and result from the invisible circulation of air, water, and pollutants that ignore property lines.

A final example of the ecological flaws in the law lies in the legal understanding of water. Water exists in an interconnected hydrological system, in which harms to remote snowpack can affect humans and sea creatures alike. Unfortunately, rather than recognize this interconnectedness, the CWA relies at least in part on the regulation of “navigable waters,” an old concept originating in the sovereign’s power over waters used for commerce.²⁴⁶ Some, like Justice Scalia in *Rapanos*, argue that water protection should be linked to and limited by this concept of sovereignty to only allow the protection of waters that are consistently flowing and above-ground.²⁴⁷ Such a reading would prevent regulators from treating water as the interconnected system that science

245. See, e.g., Alyson C. Flournoy, *Beach Law Cleanup: How Sea-Level Rise Has Eroded the Regulatory Boundaries Legal Framework*, 42 VT. L. REV. 89, 101–05 (2017) (describing the interface of three zones—submerged lands, the foreshore, and the dry sand beach—and how shifting boundaries from erosion and climate change have put stress on property law doctrines); Phillip Wm. Lear, *Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problem*, 11 J. ENERGY NAT. RES. & ENVTL L. 265, 275–82 (1991) (describing the doctrines associated with the movement of water and their subsequent effects on shoreline titles); Joseph L. Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights*, 11 VT. J. ENVTL. L. 641, 645 (2010) (explaining how the doctrines developed to accommodate erosion could be interpreted as unreasonable in the face of climate change and increased erosion issues).

246. *PPL Montana*, 565 U.S. at 603–04 (rooting the concept of “navigable waters” in Roman civil law and English common law on public navigation); see also J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 46 ECOLOGY L.Q. (forthcoming 2020) (examining the Roman Law roots of the public trust doctrine, which is integral to the navigable waters concept).

247. *Rapanos v. United States*, 547 U.S. 715, 732–35 (Scalia, J., plurality).

tells us it is. Adequate protection of water requires regulation across an entire watershed, and throughout the entire water cycle.

Put simply, law and science do not develop in parallel. Rather, the law adjusts to science in fits and spurts, occasionally accommodating new knowledge, and too frequently ignoring scientific progress to prevent government regulation. The Takings Project has successfully capitalized on the slow-moving nature of the law in order to dampen the potential impact of science in jurisprudence. Until the legal system is able to accept a dynamic vision of land, water, and ecology, the courts will continue to misunderstand property and environmental disputes. This misunderstanding may itself be an aim of the Project. At a time of such great importance, environmentalists cannot continue to ignore this reality.

III. ASSESSING THE TAKINGS PROJECT

The Takings Project has litigated a number of issues over the last decades, but the question remains: how successful has the Project been in its aims? In 1998, Kendall and Lord delivered a lukewarm assessment of the Project to that point. To measure its success, the authors pointed to the radical individual property-rights framework proposed by Professor Richard A. Epstein as the guide.²⁴⁸ Professor Epstein argued that government has a limited right to interfere with an individual's "natural right" to property, rooted in the philosophy of John Locke.²⁴⁹ He further elaborated that the natural right to property consists of a bundle of rights including possession, use, and disposition.²⁵⁰ In a departure from mainstream legal scholarship, Professor Epstein argued that *any government interference with these individual bundled rights* constitutes a taking requiring just compensation, "no matter how small the alteration and no matter how general its application."²⁵¹ Based on that theory, the Just Compensation Clause would render unconstitutional or constitutionally suspect "many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, [and] progressive taxation."²⁵²

Kendall and Lord traced a variety of connections between Epstein's argument and the Takings Project, and argued that the ultimate aim of the project was to enact this extreme view of property to "achieve an anti-regulatory, anti-environmental agenda."²⁵³ Based on that standard, Kendall and Lord argued at the time that the Supreme Court had "handed Project advocates important, but narrow, victories, containing both the foundation for a more dramatic expan-

248. Kendall & Lord, *supra* note 1, at 519 (citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)).

249. See EPSTEIN, *supra* note 248, at 7-18.

250. See *id.* at 57-62.

251. *Id.* at 57.

252. *Id.* at x.

253. Kendall & Lord, *supra* note 1, at 510.

sion of takings law, and, potentially, the seeds of the Project's defeat."²⁵⁴ More than twenty years later, we have a better idea of how the Takings Project has developed since its inception.

This Part argues that the pattern of narrow victories identified by Kendall and Lord has continued to this day. As described in the cases above, the Takings Project has won on a variety of fronts, but the victories are generally narrow in scope; hampered by factual errors and jurisdictional idiosyncrasies; and concentrated in certain issue areas, particularly the CWA. As a consequence, this Note will divide analysis in this Part according to two issues of focus to the Takings Project: just compensation cases and CWA cases.²⁵⁵

A. *Just Compensation Cases*

In just compensation cases, the Takings Project has continued to achieve "important, but narrow, victories."²⁵⁶ While the ideologically-motivated plaintiffs in these cases consistently win,²⁵⁷ they tend to win in one of two ways: (1) a victory on narrow grounds that limits the effect of the holding in future cases; or (2) a procedural victory that turns into a loss on remand.

There are many more examples of the first category of narrow victories. In *Lucas v. South Carolina Coastal Council*,²⁵⁸ the Court created a new per se just compensation rule for complete economic wipeout.²⁵⁹ While bright line rules are certainly a goal of the Takings Project because they provide clear guidance for how to show just compensation is required in lower courts, this rule relies on a strange factual finding that would be difficult to generate.²⁶⁰ As a result, the holding in *Lucas* has limited applicability beyond its own context. In *Koontz v. St. Johns River Water Management District*,²⁶¹ the Court held that the *Nollan* and *Dolan* nexus and rough proportionality requirements also apply to monetary exactions for permits.²⁶² While this holding raises a new hurdle for land use

254. *Id.* at 513.

255. Unfortunately, other subjects are beyond the limited scope of this Note. Other topics for study in future examinations of the Takings Project should include the ESA because of the its limitations on development rights.

256. Kendall & Lord, *supra* note 1, at 513.

257. *But see* *Murr v. Wisconsin*, 137 S. Ct. 1933, 1939 (2017).

258. 505 U.S. 1003 (1992).

259. *See id.* at 1019.

260. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (citing *Lucas*, 505 U.S. at 1019) ("A regulation permitting a landowner to build a substantial residence on an eighteen-acre parcel does not leave the property 'economically idle.'"); Amanda Reilly, *supra* note 24 ("A lot of people will tell you that *Lucas* is not that big a deal because there has never been another *Lucas* case in the Supreme Court.").

261. 570 U.S. 595 (2013).

262. *See id.* at 612.

regulation, local governments can avoid the issue entirely.²⁶³ *Koontz* has limited applicability as long as local governments are aware of the requirements.

*Palazzolo v. Rhode Island*²⁶⁴ exemplifies the second category of narrow victories. In *Palazzolo*, the Court gave new property owners the right to challenge regulations even if they purchased that property after the regulation was enacted.²⁶⁵ While the property owners in *Palazzolo* obtained a new method of redress, they lost on remand after years in state court.²⁶⁶ This kind of loss may have broader implications for the Takings Project because it creates a new avenue to challenge regulations. *Knick v. Township of Scott, Pennsylvania*²⁶⁷ may provide a similarly mixed victory. While the Takings Project has now achieved the ability to select venue between the state and federal courts in just compensation cases, Ms. Knick is still awaiting judgment on remand.

While the Takings Project has only achieved narrow successes until this point, each of these cases still represents small changes from the status quo. Even with continued narrow success, the traditionally broad regulatory power of state and local government is at risk of death by a thousand cuts.

B. Clean Water Act Cases

The Takings Project has experienced its greatest success in the CWA context, where the Court appears more prepared to accept ideologically skewed views of water, land, and the connection between water systems. Such a view would exempt a broad array of properties, including wetlands, groundwater, and other non-traditional water conveyances, from regulation. The CWA is a powerful mechanism to protect the environment because it requires permits to discharge pollutants in regulated waters²⁶⁸ and to fill wetlands.²⁶⁹ This requirement can be a major point of leverage to mitigate or control development on high-value water-adjacent property, so it is a priority target for the Takings Project.

As described in the previous Part, the Court divided 4–1–4 in *Rapanos v. United States*²⁷⁰ on whether the CWA regulates wetlands that at least occasionally empty into a tributary of a traditionally navigable water. In his lone concur-

263. Nolan, *supra* note 172, at 211–19 (describing strategies for local governments to avoid *Koontz*).

264. 533 U.S. 606 (2001).

265. *Id.* at 632.

266. See *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at *15 (R.I. Super. July 5, 2005) (“In sum, Plaintiff has failed to prove by a preponderance of the evidence that there has been a regulatory taking of his property.”).

267. 139 S. Ct. 2162 (2019).

268. See 33 U.S.C. § 1342 (2018).

269. See *id.* § 1344.

270. 547 U.S. 715 (2006).

rence, Justice Kennedy focused his analysis of the CWA on the need to establish a case-specific “nexus” between the particular wetland and a traditional navigable water.²⁷¹ While Kennedy’s concurrence is generally understood as the law,²⁷² Justice Scalia’s plurality retains significant authority. Scalia focused on the idea that the CWA only regulates “relatively permanent, standing or continuously flowing bodies of water” connected to navigable rivers, and connected wetlands.²⁷³ This rule would drastically reduce the amount of property regulated by the CWA and would be an unambiguous win for the Takings Project. It was a single vote away from becoming the law of the land, and arguably could become the law of the land after recent rulemakings by the Trump Administration.²⁷⁴

The resilience of the conservative view is due in part to the historical origins of the CWA’s text, which makes it more amenable to a conservative reading. The CWA regulates “navigable waters” defined as “waters of the United States.”²⁷⁵ The term “navigable waters” has its roots in traditional notions of sovereignty and those above-ground waters used to conduct commerce.²⁷⁶ However, Congress further defined the term in the CWA, resulting in significant debate and controversy.²⁷⁷ In spite of this departure in the statutory text, the traditional definition of water bodies persists to this day. This formulation presents water as only those above-ground bodies like lakes and rivers that can be seen, continuously flow, and are navigable by boat. This vision places an extreme limit on waters Congress sought to regulate through the CWA, and

271. *See id.* at 759 (Kennedy, J., concurring in the judgment) (“[T]o constitute ‘navigable waters’ under the Act, a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”).

272. *See* *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (determining jurisdiction based on the Kennedy test); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (same); *United States v. Robison*, 521 F.3d 1319 (11th Cir. 2008) (same); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (determining jurisdiction based on either the Kennedy or Scalia test); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (same); *see also* Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (defining “waters of the United States” using Justice Kennedy’s nexus test from *Rapanos*). *But see* Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (Feb. 14, 2019) (revising the previous definition of “waters of the United States” using Justice Scalia’s test instead).

273. *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality).

274. *See* Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4,154.

275. 33 U.S.C. § 1362(7) (2018).

276. *See* *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589–93, 603 (2012) (describing the origins of “navigable waters” in Roman civil law and English common law); *Shively v. Bowlby*, 152 U.S. 1, 13 (1894) (same).

277. *See, e.g.*, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 163 (2001) (quoting Clean Water Act definition of “navigable waters” provided in 33 U.S.C. § 1362(7)).

seemingly ignores the most basic understanding of the water cycle and hydrology.

In *Sackett v. EPA*,²⁷⁸ the Court gave property owners the right to challenge CWA compliance orders under the APA rather than wait for EPA to file an enforcement action.²⁷⁹ While this procedural holding has minimal practical effect,²⁸⁰ it provides a new avenue to challenge the CWA, and shows the willingness of the Court to accommodate the Takings Project in CWA cases.

While opponents of the Takings Project can breathe a sigh of relief about the outcome of *United States v. Robertson*,²⁸¹ the Project's defeat was premised on strange circumstances,²⁸² and there will certainly be other opportunities for the Court to revisit *Rapanos* in the near future. The Court appears poised to place new limits on the CWA. On the near horizon, the Takings Project may experience a major victory in the upcoming case *County of Maui v. Hawaii Wildlife Fund*.²⁸³ In that case, the Court seems prepared to strike down CWA jurisdiction over pollutants discharged into navigable waters through groundwater.²⁸⁴

Overall, the Takings Project has experienced its greatest success in the CWA context. Should the Project continue its progress, the Court may completely gut CWA jurisdiction in key areas of wetland, stream, and groundwater regulation. Should that occur, Congress must step in with a restatement of support for a broad and powerful CWA.

IV. SOLUTIONS

Environmentalists and progressives must stop the Takings Project before further damage is done. While the Project has achieved quiet but mixed success over the last few decades, two challenges demand attention: ideological changes in the judiciary, and the growing threat of climate change.

Recent changes to the judiciary and the Court's composition may create an opening for the Takings Project. When Kendall and Lord published their arti-

278. 566 U.S. 120 (2012).

279. *See id.* at 131.

280. *See* Smith & Holden, *supra* note 152, at 308–12 (describing limited practical significance of narrow holding).

281. 875 F.3d 1281 (9th Cir. 2017), *cert. granted and judgment vacated and case remanded*, 139 S. Ct. 1543 (2019).

282. *See* Ellen M. Gilmer, *Justices Send Clean Water Act Conviction Fight to 9th Circuit*, E&E NEWS (Apr. 15, 2019), <https://perma.cc/Q2HD-9JCK> (noting Robertson's recent death).

283. 886 F.3d 737 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (2019).

284. *See* Lisa Heinzerling, *Argument Analysis: Context Trumps Text as Justices Debate Reach of Clean Water Act*, SCOTUSBLOG (Nov. 7, 2019), <https://perma.cc/3ZUT-ARDW> (analyzing oral argument in the case); Colleen Uechi, *Maui Case Gets Day in High Court*, MAUI NEWS (Nov. 7, 2019), <https://perma.cc/7NS4-399M> (describing the case); *see also* Transcript of Oral Argument, *Cty. of Maui* (No. 18-260), <https://perma.cc/765P-49QK>.

cle, there were four “solid and consistent votes” for the Project’s aims.²⁸⁵ In cases like *Rapanos v. United States*²⁸⁶ and *Murr v. Wisconsin*,²⁸⁷ Justice Kennedy stood as a swing vote open to potentially upholding regulatory action, but the Court has changed. Since that time, the ideological balance of the Court has shifted further to the right, and the conservative Chief Justice John Roberts now represents the Court’s swing vote.²⁸⁸ In addition, the Trump Administration has appointed a historic number of conservative judges to the federal judiciary,²⁸⁹ which could prompt a distinct turning point for judicial acceptance of conservative notions of property rights in the coming years.

Meanwhile, the world is running out of time to address and mitigate the damage of climate change. The planet can only withstand so much climate change,²⁹⁰ and the window for action is closing.²⁹¹ Takings Project cases like *Lucas* prevent states from regulating the lands that are at risk of damage from climate change.²⁹² While critics may respond that cases like those described in Part I have limited application because the facts are so specific, this kind of jurisprudence can have a chilling effect on regulation for under-resourced cities, states, and Native nations.²⁹³ The increasingly conservative judiciary could limit our ability to deal with climate change at the exact moment when our need is greatest.

In Kendall and Lord’s article, the authors argued that the Takings Project was indefensible at its core. They aimed to provide a centralized warning about the Project, because “the more attention the media, policymakers and the public pays to the Project, the less likely it will succeed.”²⁹⁴ Unfortunately, attention was not enough to discredit the Project. While awareness is a crucial element to ending the Takings Project, we need solutions beyond sunlight.

285. See Kendall & Lord, *supra* note 1, at 583–84 (“[The] solid and consistent votes [are] Chief Justice Rehnquist, and Justices Scalia, Thomas and O’Connor. . . . The fate of the Project thus depends in large part on the jurisprudence of Justice Kennedy and the ideology of the next several justices appointed to the Court.”).

286. 547 U.S. 715 (2006).

287. 137 S. Ct. 1933 (2017).

288. Adam Liptak, *John Roberts, Leader of Supreme Court’s Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), <https://perma.cc/HQK8-76RK> (“[Chief Justice Roberts] has taken Justice Kennedy’s place as the swing vote at the court’s ideological center, making him the most powerful chief justice in 80 years.”).

289. Ann E. Marimow, *Two Years in, Trump’s Appeals Court Confirmations at a Historic High Point*, WASH. POST (Feb. 4, 2019), <https://perma.cc/N2QS-M28P>.

290. See generally sources cited *supra* note 22.

291. See generally sources cited *supra* note 23.

292. See *supra* note 24.

293. See *id.* (quoting Michael Wolf, “A lot of people will tell you that *Lucas* is not that big a deal because there has never been another *Lucas* case in the Supreme Court But I think it’s a big deal because it’s a threat: Local governments are afraid of gigantic lawsuits and judgments, probably in that order.”).

294. Kendall & Lord, *supra* note 1, at 513.

This Part briefly proposes a set of solutions to prevent a new wave of Takings Project litigation before it is too late to save environmental regulation and other regulatory authorities more generally. These six solutions are not meant to be comprehensive but rather a place to begin the conversation. These solutions are drawn from analyzing Takings Project cases where potential successes became mixed successes. This Note contends, as Kendall and Lord argued, that the success of the Takings Project also contains “the seeds of the Project’s defeat.”²⁹⁵

As a first solution, appellate courts could demand more fact development before accepting a just compensation, CWA, or other fact-specific property-related case. As described in Part I, the Takings Project frequently capitalizes on conflicting reports on ownership and the status of property in order to obtain review and set regulation-chilling precedent. Examples include: *Lucas* and the strange fact pattern of worthless beachfront property; *Murr* and its property transfer factual discrepancies; *Palazzolo*, where the landowner did not provide the Court with a map of the property or a valuation of potential development options for the land; and *Sackett*, where the property owners did not disclose that they had consulted with wetland scientists who had indicated there were wetlands on the property.²⁹⁶

This new factual development requirement could be implemented by demanding a set of documents upon filing, much like required declarations of the court’s jurisdiction. This checklist could include adequate documentation of the history of ownership, clarification on state law ownership and public trust issues on the property, an accurate map of the property, a hydrological chart of the area, agreed upon assessments of property value based on different development proposals, and other basic facts required for adequate judicial consideration. This kind of requirement would force advocates to conduct crucial due diligence before pursuing cases.

Second, interested environmental and progressive non-profits, professors, as well as private pro bono practices should get involved in Takings Project cases, particularly before they reach the U.S. Supreme Court. As described previously, ideologically conservative non-profits like PLF take advantage of resource asymmetries to identify and cultivate cases against under-resourced government agencies that are not able to cultivate the record needed to adequately fight anti-regulatory efforts. These government entities may not see the forest from the trees—a random, seemingly small case can actually represent a crucial step in the broader mission of the Takings Project. Just compensation, CWA, and other Takings Project cases tend to become high-profile cases. Interested law firms or non-profits may want to get involved with these cases at the circuit level as an opportunity to increase their profiles. They may have trouble identifying these cases, which ties to this Note’s next suggestion.

295. *Id.*

296. *See supra* Part I.

Third, interested environmental and progressive groups should coordinate to track cases at the trial and appellate level that appear to be gaining traction in the conservative legal world. For example, groups can track cases where PLF and other Takings Project organizations are representing litigants or have clustered as amici, to identify cases before they become high-profile battles. This tracking can help organizations and interested litigators get involved in cases and influence early development of facts, narratives, and other record issues before the Takings Project sands away factual inconsistencies.

Fourth, the press has a responsibility to interrogate case narratives proposed by Takings Project litigants. Unfortunately, there are countless cases of news reports parroting the Takings Project narrative of a case without checking the background facts of the case at issue.²⁹⁷ Organizations like PLF create compelling narratives around their cases to frame their efforts as civil rights work. These stories are far more interesting than complicated property history or hydrological analysis; for example, the resident fearful of intruders in *Knick*, the overreaching government designating dry land a wetland in *Sackett*, the family denied their dream home in *Murr*. Popular and trade press alike have a responsibility to conduct due diligence and research the underlying facts before publication—or at least read briefs from both sides.

Fifth, it is time for the Supreme Court bar to look critically at the actions of Takings Project litigators. As the above cases show, Takings Project attorneys at organizations like PLF have omitted or distorted facts in cases to tee up clean, academic questions for the court. Despite this consistent pattern, over the last few decades the Court repeatedly has accepted PLF cases for review, and the group remains a litigant in good standing. There is evidence that the Court relies on the stature of briefing attorneys to filter which cases it should consider when granting certiorari.²⁹⁸ It is perhaps time for the Supreme Court bar to reflect on the kind of advocacy it allows within the halls of the Court, and which advocates are deserving of deference.

Sixth, and finally, there is a role for academia to shift the window on property law and regulatory theory. As described in Part III, the early roots of Takings Project took hold through a radical individual property rights framework proposed by Professor Richard Epstein.²⁹⁹ Academics can help discredit this theory when promoted in the courts and present new justifications for the regulatory state. This work should develop a litigation framework to protect and build up environmental law in the decades to come.

297. See, e.g., Adam Liptak, *In Property Rights Case, Justices Sharply Debate Power of Precedent*, N.Y. TIMES (June 21, 2019), <https://perma.cc/9LNU-8WMN>; Robin Brevander, *Years After Win, Couple Still Battle EPA to Build Dream Home*, E&E NEWS (Mar. 26, 2016), <https://perma.cc/83Y5-9JE4>.

298. See generally Richard J. Lazarus, *Advocacy Matters Before and Within the U.S. Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

299. See Kendall & Lord, *supra* note 1, at 519–20 (citing EPSTEIN, *supra* note 248).

While the above set of solutions is a place to start, it is by no means comprehensive. It also probably focuses too much attention on the U.S. Supreme Court. This Note invites scholars and practitioners alike to engage with the Takings Project directly in theory and practice. There is significant work to be done if we are to stop the Takings Project from continuing its march through the courts.

CONCLUSION

More than twenty years ago, Kendall and Lord wrote their piece “to bring attention to the Project and, thereby, to help stop it before it goes much further.”³⁰⁰ Unfortunately, we have not heeded that warning. Kendall and Lord’s attempt to reveal and stop this movement failed, and the Takings Project has continued without challenge. In fact, this ideological movement has only grown in scope since the turn of the century, and its emphasis on unbounded development now threatens the jurisprudence regarding the Just Compensation Clause, CWA, ESA, and other important statutes.

Kendall and Lord argued that the Project sat at an “important juncture.”³⁰¹ The Project stands at yet another juncture—and the potential risk has only become more severe. We stand at a crossroads in our ability to address and mitigate the damage of climate change and at a moment of extraordinary growth of conservative energy in the judiciary. Attention and solutions are crucial, particularly at this moment. The first step is sunlight: we need to expose actors like PLF that seek to dismantle critical environmental and public health regulations. This Note is intended to start a conversation among environmentalists, progressives, and the Supreme Court bar about what ethical advocacy should look like and what sorts of cases should be granted certiorari. Beyond conversation, we need advocates who are ready to conduct due diligence and combat the Takings Project directly, and we may need to reform the way litigation is conducted.

We have now seen decades of the Takings Project in action. Unheeded, the organizations and individuals that make up the Takings Project will continue their impact litigation to expand and protect development rights, all at the expense of regulations that protect public health, safety, and the environment. There are many contemporary threats to the environment worthy of attention. The sophisticated efforts of the Takings Project should be on the list of threats for discussion and action. Environmentalists, progressives, and advocates for the rule of law have a responsibility to stop the Takings Project “before it goes much further.”³⁰²

300. *See id.* at 513.

301. *See id.*

302. *Id.*

APPENDIX

AMICUS TRACKER³⁰³

Case Name	Counsel	Selected Listed Ideological Amici
Nollan v. California Coastal Commission	Pacific Legal Foundation	California Association of Realtors; National Association of Home Builders; California Building Industry Association; Legal Foundation of America
Lucas v. South Carolina Coastal Council	Lewis, Babcock & Hawkins	Pacific Legal Foundation; Nemours Foundation, Inc.
Palazzolo v. Rhode Island	Pacific Legal Foundation	National Association of Home Builders; California Coastal Property Owners Association; Defenders of Property Rights; Washington Legal Foundation and Allied Educational Foundation; Institute for Justice; American Farm Bureau Federation
Rapanos v. United States	Pacific Legal Foundation	New England Legal Foundation; Mountain States Legal Foundation; National Association of Home Builders; Washington Legal Foundation; Allied Educational Foundation
Sackett v. EPA	Pacific Legal Foundation	Center for Constitutional Jurisprudence; National Federation of Independent Business Small Business Legal Center; American Civil Rights Union; National Association of Home Builders; American Farm Bureau Federation
Koontz v. St. Johns River Water Management District	Pacific Legal Foundation	Pacific Legal Foundation; National Association of Home Builders; Institute for Justice; Cato Institute; Owner's Counsel of America; American Civil Rights Union; Real Estate Roundtable; National Mining Association; Atlantic Legal Foundation; Center for Constitutional Jurisprudence; Reason Foundation; Land Use Institute; National Federation of Independent Business

303. This list of selected amici provides a window into the web of interrelated ideological and moneyed interests involved in the Takings Project. Even this haphazard list displays a growth in the use of amici in the Takings Project. A more comprehensive study should be conducted to provide a greater understanding of these organizations, their coordination, and their activities. One could use this kind of analysis to identify cases in the future for study as a part of the Takings Project.

Case Name	Counsel	Selected Listed Ideological Amici
Murr v. Wisconsin	Pacific Legal Foundation	Chamber of Commerce of the United States; Southeastern Legal Foundation; Beacon Center; Cato Institute; Owner's Counsel of America; Mountain States Legal Foundation; Center for Constitutional Jurisprudence; National Association of Home Builders; National Association of Realtors; Real Estate Roundtable; National Association of Real Estate Investment Trusts; International Council of Shopping Centers; National Apartment Association; Building Owners and Managers Association; National Multifamily Housing Council; Leading Builders of America; California Cattlemen's Association; American Farm Bureau Federation; National Federation of Independent Business Small Business Legal Center; New England Legal Foundation; Reason Foundation
Knick v. Township of Scott, Pennsylvania	Pacific Legal Foundation	National Association of Home Builders; Institute for Justice
Robertson v. United States	Pacific Legal Foundation	Judicial Watch, Inc. and Allied Educational Foundation; Cato Institute; National Federation of Independent Business Small Business Legal Center; Center for Constitutional Jurisprudence; National Association of Home Builders