I. LUCAS, PALAZZOLO, MURR

Who won, supported by which justices?

1. Lucas v. South Carolina Coastal Council (1992): (5–1–3) Scalia for the court, Rehnquist, Thomas, O'Connor and White; Kennedy in separate concurrence; Blackmun and Stevens in dissent, Souter with a separate statement.
2. Palazzolo v. Rhode Island (2001): (5–4) Kennedy for the majority, joined by Rhenquist, Thomas, Scalia, O'Connor, concurrences by Scalia and O'Connor, dissents by Stevens [mostly, he agreed on the ripeness issue], Ginsburg, Souter, Breyer, who also noted his agreement with O'Connor on the acquisition-timing question)
3. Murr v. Wisconsin (2017): (5–3) Kennedy for the court with Ginsburg, Breyer, Sotomayor and Kagan. Roberts in dissent with Thomas and Alito. Thomas in a separate dissent. Gorsuch not participating.

II. LUCAS

For a vew of the area in question in *Lucas* click here.

For what one of Lucas's lots looks like now, click here.

1. *Lucas* (1992): (5–1–3) Scalia for the court, Rehnquist, Thomas, O'Connor and White; Kennedy in separate concurrence; Blackmun and Stevens in dissent, Souter with a separate statement.
    a. Where landowner is totally deprived of value s/he must be compensated unless the regulation deals with a nuisance.
    b. Was this landowner totally deprived of value? If not, can we make sense of the scope of the "nuisance exception"? That's basically Souter's argument.
    c. Where does the idea of "total deprivation of value" come from?
        i. 1789–91?
        ii. 1868?
        iii. 1897? *Chicago, Burlington & Quincy*
        iv. 1922? *Mahon*
    d. Where does the "nuisance exception" come from?
        i. 1789–91?
        ii. 1868?
        iii. 1897? *Chicago, Burlington & Quincy*
        iv. 1922? *Mahon*
    e. The opinion is notable for its frank recognition that the distinction between harm-producing and benefit-conferring is so malleable as to be meaningless. Coase has arrived at the Supreme Court.
    f. It is also notable for its frank recognition, at least in a footnote, that total deprivation of value is dependant on the denominator of the fraction, and that the concept therefore must be controversial.
    g. Kennedy: Wants to make clear that the nuisance exception extends beyond common-law nuisance.
    h. Blackmun: Is furious: "Today the Court launches a missile to kill a mouse." To which Scalia replies: "After accusing us of 'launch[ing] a missile to kill a

mouse' … , JUSTICE BLACKMUN expends a good deal of throw-weight of his own upon a noncombatant."

i. Case not ripe

ii. What's so great about common-law nuisance?

iii. Background principles must take into account the colonial and early US experience (Mill Acts)

i. Stevens:

i. Arbitrary nature of the total deprivation rule

ii. Basically same point about nuisance (*Mugler v Kansas* a particularly good case for his position)

j. Souter: We are faced with an unreviewable and highly questionable finding that there has been a total deprivation of value. Since we really do not know that there has been a total deprivation of value, we cannot meaningfully define what the nuisance-exception means.

2. Suppose in *Mugler v. Kansas* the property in question was subject to a private restriction that it could only be used for a brewery. Would Mugler have a claim of total deprivation value?

3. How much practical effect will this have?

4. What happened next? According to Fishel (p. 61), the state settled on remand by purchasing the land. A neighbor offered $315,000 for one of the lots to protect his view, with a promise to keep it unbuilt. The state preferred to sell both lots to a developer for $785,000. (I.e., $392,500 per lot or $77,500 more than the neighbor was willing to pay for it.)

III. PALAZZOLO

1. Palazzolo v. Rhode Island (2001) (5–4, Kennedy for the majority, joined by Rhenquist, Thomas, Scalia, O'Connor, concurrences by Scalia and O'Connor, dissents by Stevens [mostly, he agreed on the ripeness issue], Ginsburg, Souter, Breyer, who also noted his agreement with O'Connor on the acquisition-timing question)

For a map of the area in Pallazzolo click here.

a. Holdings:

i. case is ripe. The ground of this is basically that two applications for a special exception and a categorical regulation are enough.

ii. Post regulation acquisition did not bar a takings claim

iii. Because the petitioner has 18 acres on which he can build one residence, he's not been totally deprived of value. Case is remanded for *Penn Central* determination.

b. O'Connor vs. Scalia: When one bought is one factor to be taken into account vs. it's never a factor.

c. Ginsburg (with Souter and Breyer) dissented on the ripeness grounds. The argument was basically that P.'s failure to apply for development permission on the 18-acres rendered his *Lucas* argument untenable.

d. Breyer also made clear that he agreed with O'Connor.

e. Stevens dissents on the timing question. Only the victim of the taking can sue for it. Is his analogy to the action for mesne profits (the taking of fruit by a

trespasser) correct? "A new owner may maintain an ejectment action against a trespasser who has lodged himself in the owner's orchard but surely could not recover damages for fruit a trespasser spirited from the orchard before he acquired the property."

f. Palazzolo v. State, 2005 WL 1645974, No. WM 88-0297 (R.I. Super., July 5, 2005), on remand holds that P. has no *Penn Central* claim and that his proposed development would be a public nuisance (with at least mutterings about the doctrine of the public trust being part of the background law).

IV. MURR

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

For an aerial view of the property click here.

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