

# Eleven Years of the Roberts Court on Private Property Rights

- **Presented by James Burling**
- **Pacific Legal Foundation**

# The Before -- The Resurgence of Property Rights at the Beginning of the Rehnquist Court

- ***First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987)**
  - Compensation for temporary takings
- ***Nollan v. California Coastal Commission* (1987)**
  - Requirement of a “nexus” for permit exactions
- ***Lucas v. South Carolina Coastal Council* (1992)**
  - Per se regulatory take when all use or value destroyed
- ***Dolan v. City of Tigard* (1994)**
  - Permit exactions must be “roughly proportional”



The Before -  
The End of Property Rights  
at the End of the Rehnquist Court

- ***Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency***
- ***Lingle v. Chevron U.S.A. Inc.,***
- ***San Remo Hotel, L.P. v. City and County of San Francisco***
- ***Kelo v. City of New London, Conn***

# Before the before

- *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)
- A balancing of three factors:
  - **Economic impact of the regulation**
  - **The owner's (distinct or reasonable) investment backed expectations**
  - **The character of the government regulation**

# The Before - Property Rights and Rehnquist Court



# *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*

- **Roughly 700 property owners subject to a series of rolling moratoria at Lake Tahoe**
- **They sued for a regulatory taking**
- **Justice Stevens took his First English dissent – (that there could be a temporary taking only if use denied for a “significant percentage of the property’s useful life”) and made it into a majority opinion**
- **No temporal slicing of property**

# *Lingle v. Chevron U.S.A. Inc.* (2005)

- In 1980 in *Agins v. Tiburon* Court held there's a take when:
  - A regulation fails to substantially advance a legitimate governmental purpose
  - Or, when economically viable use is destroyed
- *Lingle* involved a challenge to an ill-conceived rent control scheme on Hawaiian gas station leases – designed to keep gas prices low

# *Lingle v. Chevron U.S.A. Inc.*

- **Chevron lawyers proved there was no way the scheme could work – it failed to substantially advance a legitimate government interest: a taking**
- **On appeal, the Court tossed the 25 year old test finding it was a mere and deferential Due Process standard**
  - **Which are notoriously difficult to win ...**

# *San Remo Hotel, L.P. v. City and County of San Francisco (2005)*

- ***Williamson County* (1985): state takings remedies must be pursued prior to bringing a federal claim**
- **Hotel owner told to pay \$567,000 before he could rent rooms to tourists. He sued for a taking in state court – reserving any federal claims.**
  - **Lost in state court, then filed in federal court**
- **Held: because he could have filed federal claims in state court, may not later sue in federal court**

# *Kelo v. City of New London, CT* (2005)

- **Condemnation of working-class neighborhood for an undefined (private) use for the benefit of Pfizer**
- **The logical and extreme end of the “public purpose” trail blazed by *Berman* and *Midkiff***
- **“The beneficiaries are likely to be those citizens with disproportionate influence and power . . . . As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.”**

The *Kelo* redevelopment has been a roaring success!

**\$78 million direct costs A net loss of 1400 jobs**



# Roberts appointed to Court

- **Upon the retirement of Justice Sandra Day O'Connor, President George W. Bush nominated John Roberts to replace her spot.**
- **Upon the death of William Rehnquist on September 3, 2005, the President withdrew that nomination and nominated John Roberts for the position of Chief Justice two days later.**
- **He was sworn in twenty-six days later**

# Harvard Law Review note

- “[there] may often be perfectly good reasons to impose even substantial losses on individual property holders where such losses are outweighed by the gains achieved in social utility . . . . As a result, the criterion of justice which underlies **takings doctrine has been unduly informed by concerns for individual property holders and insufficiently attuned to the imperatives of social policy.**”

# *Marvin Brandt Revocable Trust v. United States*

Are railroad easements easements?

- 1. Railroads aren't what they used to be and we have many thousands miles of abandoned railroad tracks throughout the country.**
- 2. Everybody loves hiking trails.**
- 3. Nobody wants to pay for things, like hiking trails, if they can take them for free.**
- 4. People who own things, like abandoned railroad right-of-ways, don't like to give them away for free.**

# *Brandt v. United States*

- **The government has been regularly losing “rails to trails” cases, where it asserts that an “abandoned” railroad right-of-way doesn’t revert to the fee owner but is “railbanked” for interim trail use**
- **So here it tried something new; asserted that a railroad easement originally on top of federal land, is a sort of a fee interest with an implied reversionary interest in favor of the government**
- **Under this theory, the government filed a quiet title action against 31 Wyoming landowners, all of whom settled or defaulted except for Marvin Brandt**

# *Brandt v. United States*

- **The Tenth Circuit held that the homesteader has no reversionary interest in the right-of-way**
- **The Supreme Court took the case and reversed in an 8 to 1 decision authored by Chief Justice Roberts.**
- **In addition to the black-letter law of easements,**
- **the Court was most persuaded by the fact that in 1942, the United States persuasively argued that railroads had only an easement for the operation of a railroad, and not some kind of “limited fee.”**
- **A win for property rights**

# The Roberts Court and Wetlands I

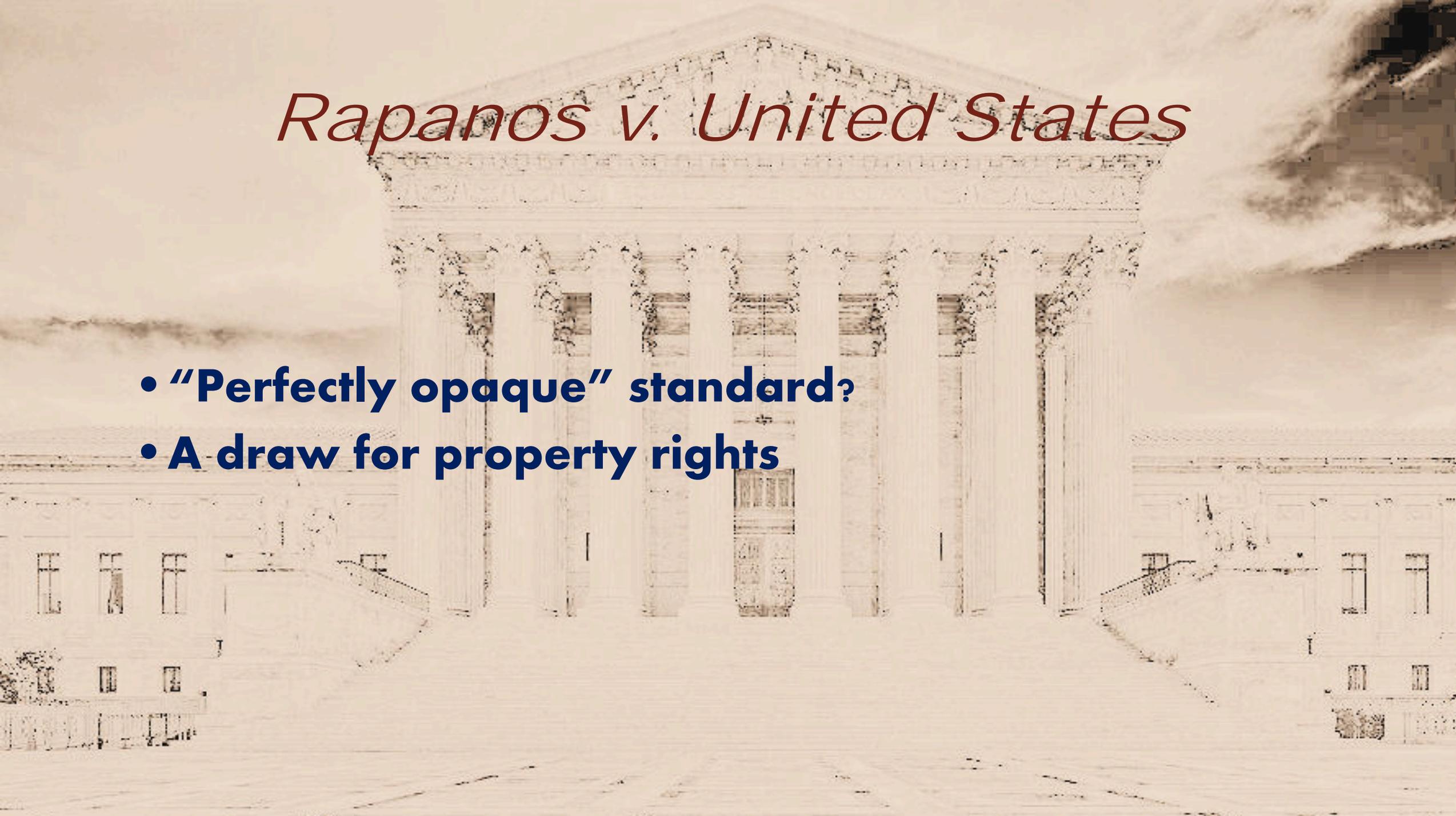
## *Rapanos v. United States* (2006)

- **Wetlands under U.S. jurisdiction are notoriously difficult to identify**
- **John Rapanos owned 54 acres of farmland that he backfilled. It had some saturated spots which could qualify as wetlands. And it was some 11 to 20 miles from the nearest navigable waterway.**
- **The Corps asserted jurisdiction**
- **The Court split 4:1:4**



# *Rapanos v. United States*

- **Justice Scalia:** first, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins
- **Justice Kennedy:** “if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered [navigable] waters



# *Rapanos v. United States*

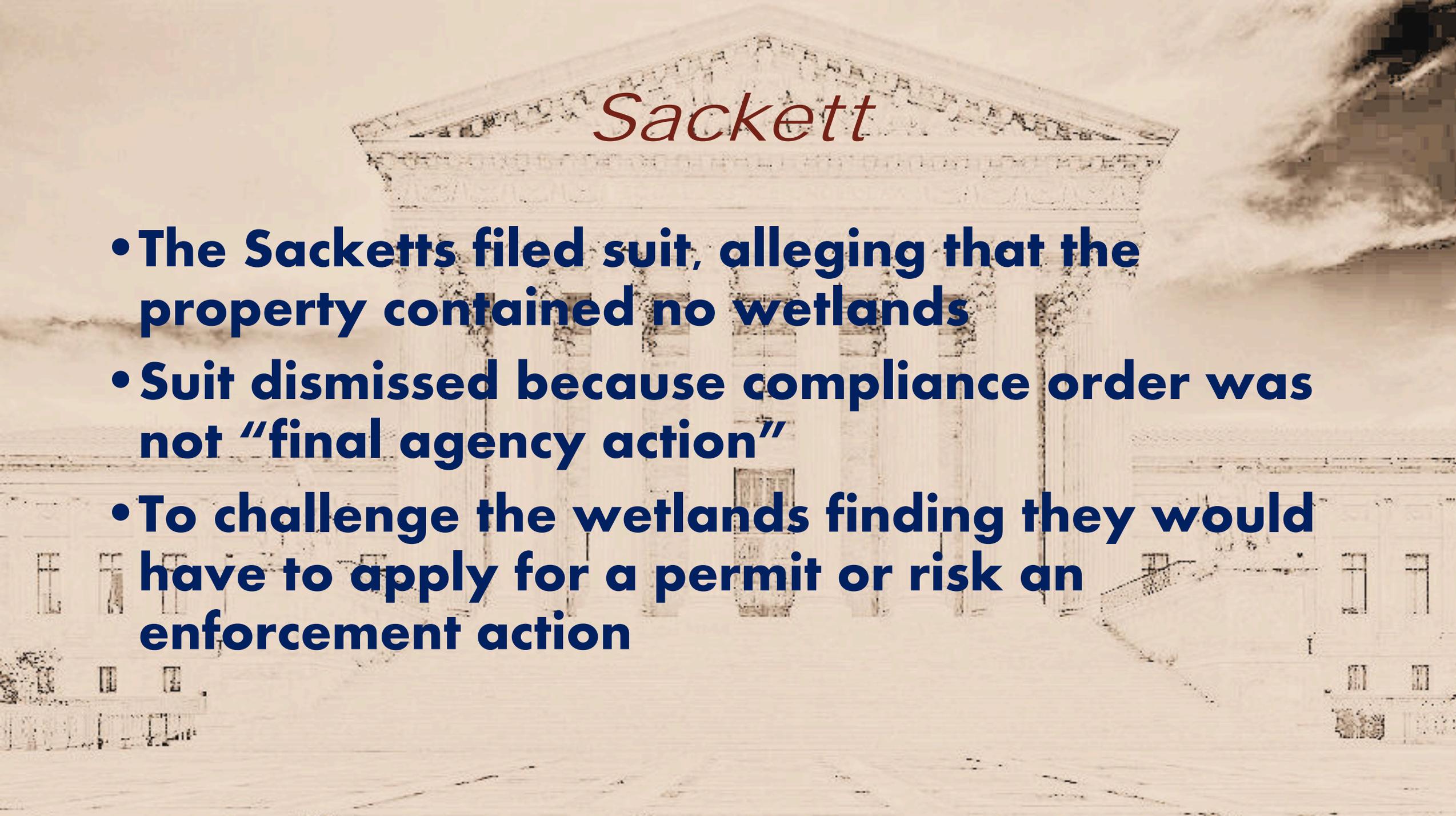
- **“Perfectly opaque” standard?**
- **A draw for property rights**

# The Roberts Court and Wetlands II

## *Sackett v. United States* (2012)

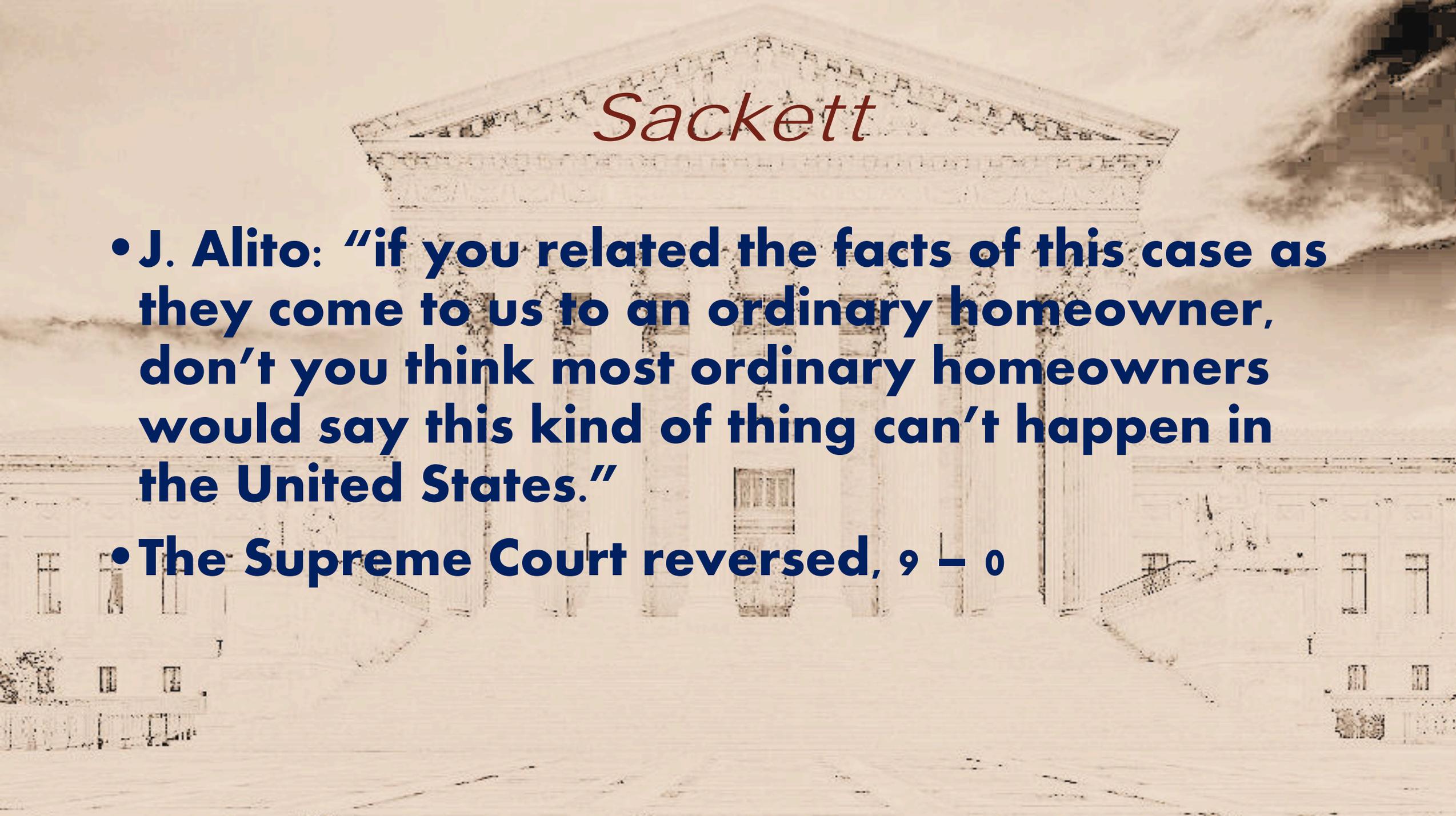
- In 2007 **Mike & Chantell Sackett** began the process of preparing a small lot for their family home
- They received a compliance order ordering them to:
  - Remove all fill
  - Plant wetlands vegetation
  - Fence off their property
  - Wait three years
  - Then apply for an after-the-fact permit
- Failure to obey would result in fines of \$75,000 / day





# *Sackett*

- **The Sacketts filed suit, alleging that the property contained no wetlands**
- **Suit dismissed because compliance order was not “final agency action”**
- **To challenge the wetlands finding they would have to apply for a permit or risk an enforcement action**



# *Sackett*

- **J. Alito: “if you related the facts of this case as they come to us to an ordinary homeowner, don’t you think most ordinary homeowners would say this kind of thing can’t happen in the United States.”**
- **The Supreme Court reversed, 9 – 0**

# *Sackett*

- **“The APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into “voluntary compliance” without the opportunity for judicial review – even judicial review of the question whether the regulated party is within the EPA’s jurisdiction”**
- **A win for property rights**

# The Roberts Court and Wetlands - III

## *United States v. Hawkes* (2016)

- **The Hawkes company owns peat property in Minnesota 120 miles from the nearest navigable waterway**
- **Before the owners sought to expand its operation, the Corps performed a “jurisdictional determination” and found jurisdictional wetlands**
- **An administrative hearing officer disagreed, but the district engineer declined to change the determination leaving Hawkes with three choices:**

# *United States v. Hawkes*

Three choices:

**1. Abandon the property**

**2. Apply for a permit at a cost of years and hundreds of thousands of dollars**

- (An employee was advised by a Corps bureaucrat to find a new job because the permit would take years and likely not be granted)

**3. Use the property anyway, risking enormous fines and incarceration**

- **Hawkes sued the Corps, but the case was dismissed for want of a final agency decision under the APA**

# *United States v. Hawkes*

- **The Eighth Circuit reversed,**
- **“The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a **transparently obvious litigation strategy**: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test ... its expansive assertion of jurisdiction**”



*United States v. Hawkes*

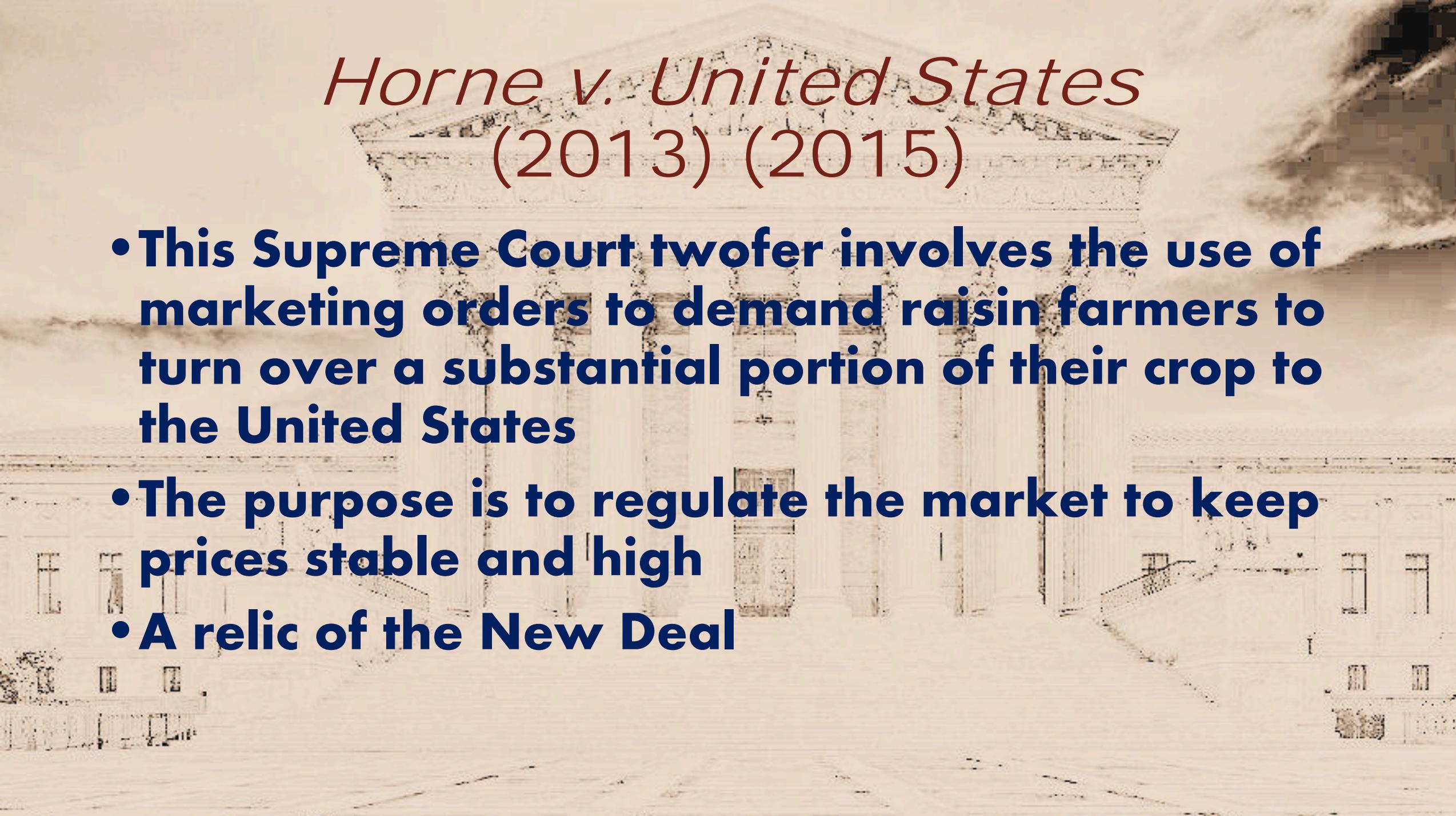
- **The Court granted cert in December, 2015**

# *United States v. Hawkes*

- **8-0 for the landowner**
- **JD is a “final agency action” with “legal consequences” landowners have a right to judicial review according to the Administrative Procedures Act.**
- **Permitting process is “arduous, expensive and long” with a laundry list of information demands – and therefore not a viable option**

# *Hawkes v. United States*

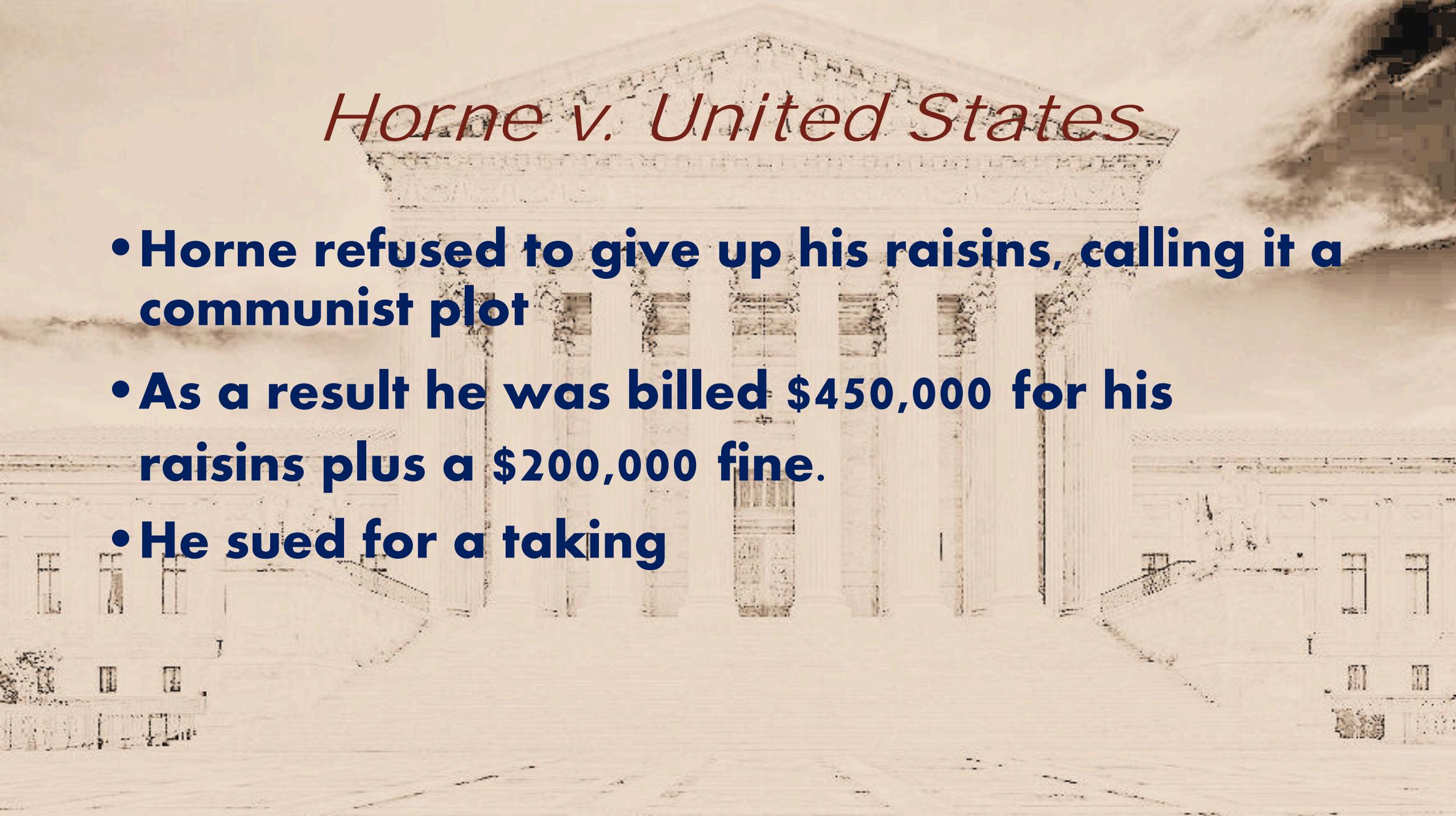
- **Justice Kennedy:**
- **Clean water act “Unconstitutionally vague?”**
- **“The Act, especially without the JD procedure were the Government permitted to foreclose it, continues to raise troubling questions regarding the Governments’ power to cast doubt on the full use and enjoyment of private property throughout the Nation.”**

The background of the slide is a sepia-toned photograph of the United States Supreme Court building. The building's iconic portico with its six massive columns is the central focus, receding into the distance. The sky is overcast, and the overall tone is historical and formal.

# *Horne v. United States*

## (2013) (2015)

- **This Supreme Court twofer involves the use of marketing orders to demand raisin farmers to turn over a substantial portion of their crop to the United States**
- **The purpose is to regulate the market to keep prices stable and high**
- **A relic of the New Deal**



## *Horne v. United States*

- **Horne refused to give up his raisins, calling it a communist plot**
- **As a result he was billed \$450,000 for his raisins plus a \$200,000 fine.**
- **He sued for a taking**

# *Horne v. United States*

- **On his first trip to the Supreme Court the Court held that the case was properly before the district court in California, rather than the Court of Federal Claims**
- **On his second trip to the Court, the Court held that the raisins had indeed been taken via a per se physical invasion**

# *Horne v. United States*

- **In both cases, the Court seemed impatient with government arguments**
- **Refusing, for example, to remand the case for an assessment of damages, finding instead that the value of the take was the government's assessment of value of the raisins**

4th California Raisins



*Arkansas Game & Fish Comm'n v.  
United States (2012)*

Takings Compensation after the deluge

- **For seven years, the Corps of Engineers deliberately flooded state hardwood forest land below a dam**
- **Finally, after destroying millions of dollars worth of timber, it stopped**
- **Because it stopped, it said the take was only temporary and it did not have to pay, see e.g. *Tahoe-Sierra***



Being in government means  
never having to say you're sorry.

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# *Arkansas Game & Fish*

- a 9-0 decision by Justice Ginsburg:
- “We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.”

# Arkansas Game & Fish

- **“Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government’s ability to act in the public interest. . . . We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment’s instruction.**

# Arkansas Game & Fish

- “While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. **The sky did not fall after *Causby*, and today’s modest decision augurs no deluge of takings liability.**”
- Another win for property owners
- And some post *Tahoe-Sierra* life for temporary takings

# *Koontz v. St. Johns River Water Management District (2013)*

## *Money & Exactions*

- **Coy Koontz was told that if he wanted a permit to develop his property, he would have to pay the water management district up to \$150,000 to improve district-owned land**
- **The Florida Supreme Court held that since Koontz never accepted the permit, he could not challenge the condition**
- **And, in any event, the doctrine of Nollan and Dolan did not apply to monetary exactions.**

# *Koontz*

- **First, the Court held that just because Koontz had not accepted the permit he was not precluded from challenging the condition imposed by the District**
- **Second, the Court held that monetary exactions, just like exactions of land, must meet the nexus and rough proportionality standards of *Nollan* and *Dolan***
- **Another win for property owners**

# Stop the Beach Renourishment v. Florida DEP (2010)

- Judicial Takings?
  - **Chicago Burlington (1897)**
  - **Hughes v. State of Washington, Stewart concurrence (1967)**
  - **“to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate”**

# Stop the Beach

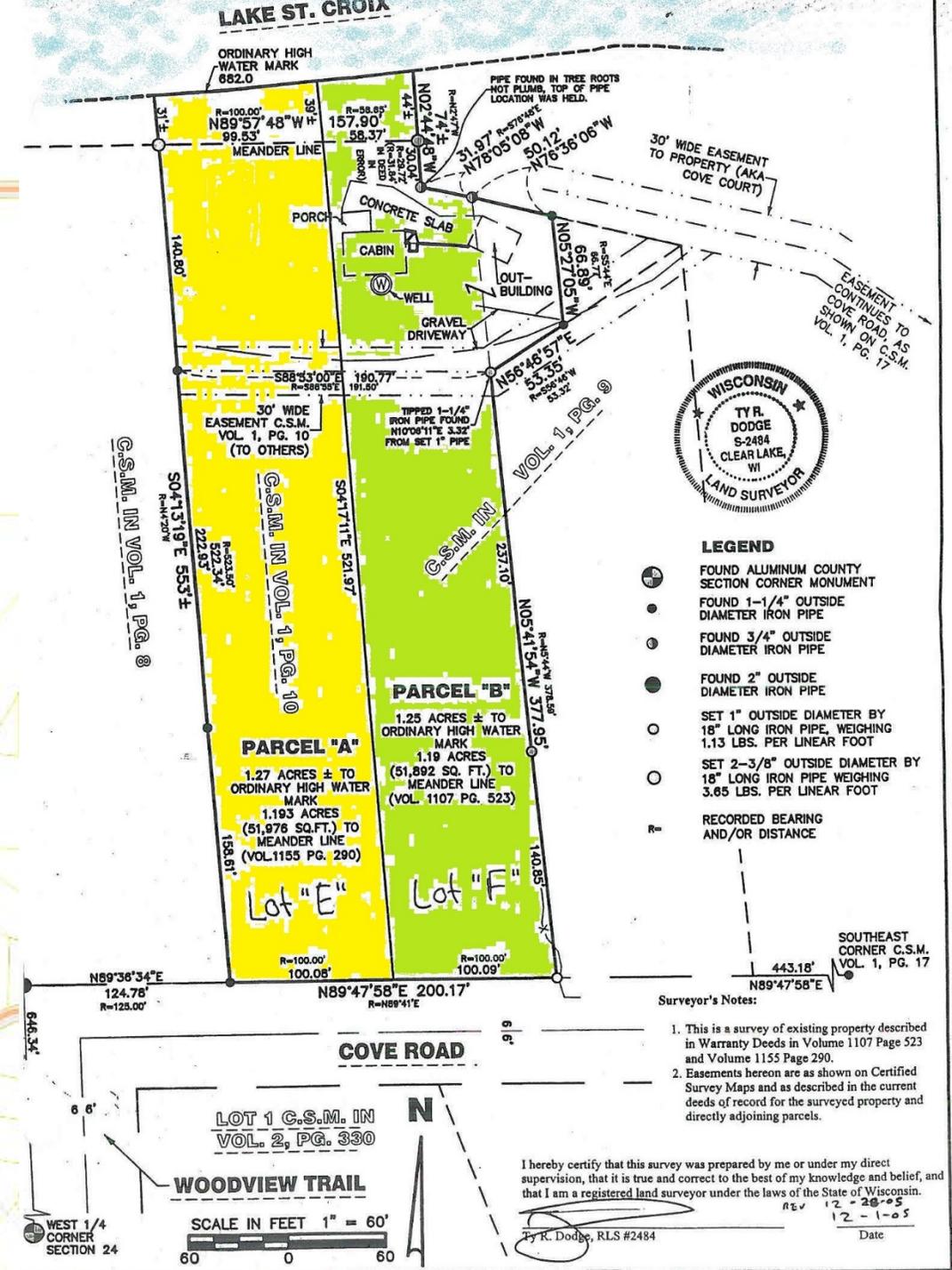
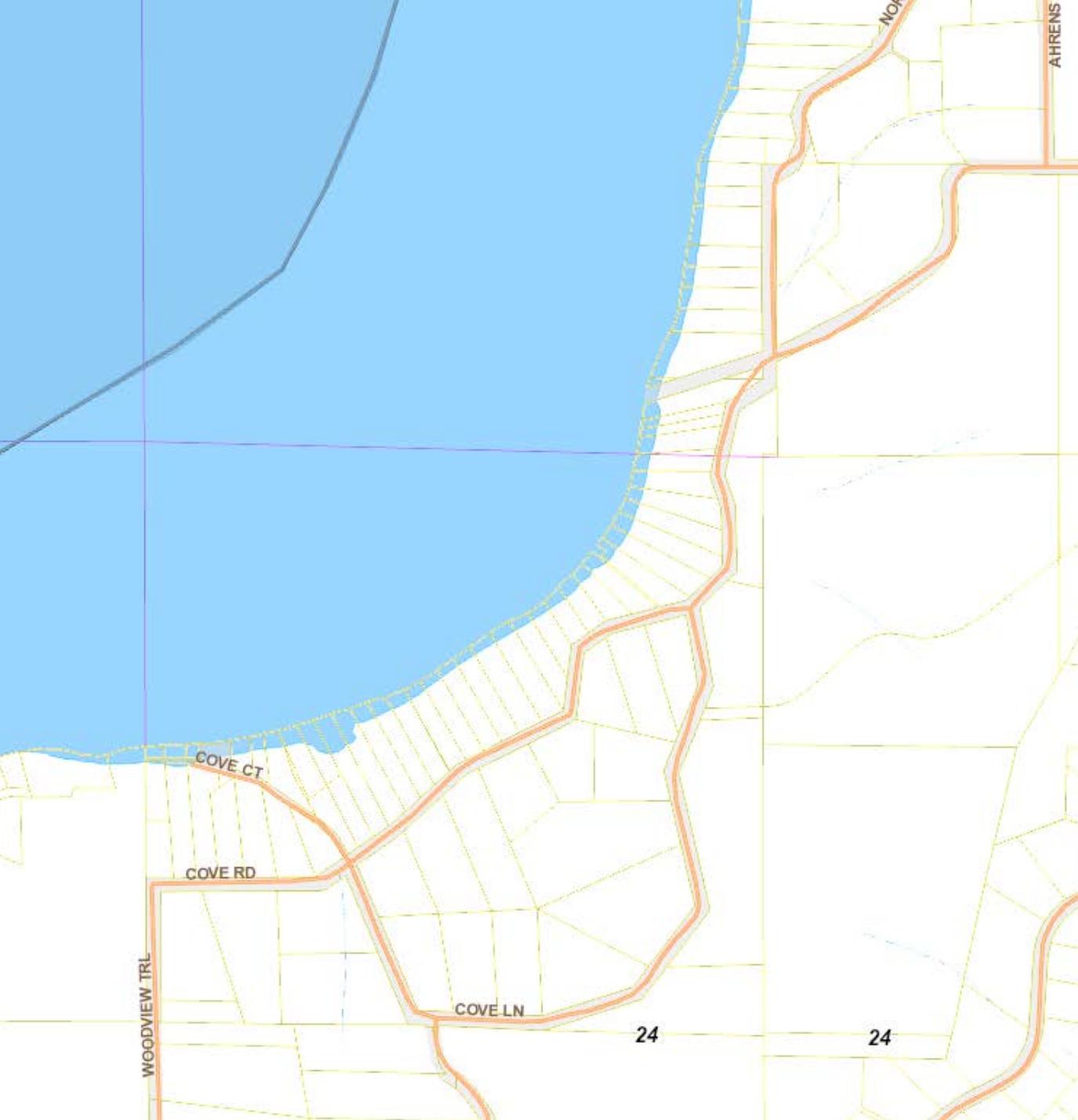
- Held: Dumping sand not a judicial taking
- Scalia plurality: Can have a judicial taking (but not well described)
- Kennedy concurrence: at most a due process violation
- Partial dissent: issue not justiciable here
- A loss and a partial sort of win 4 Prop rights

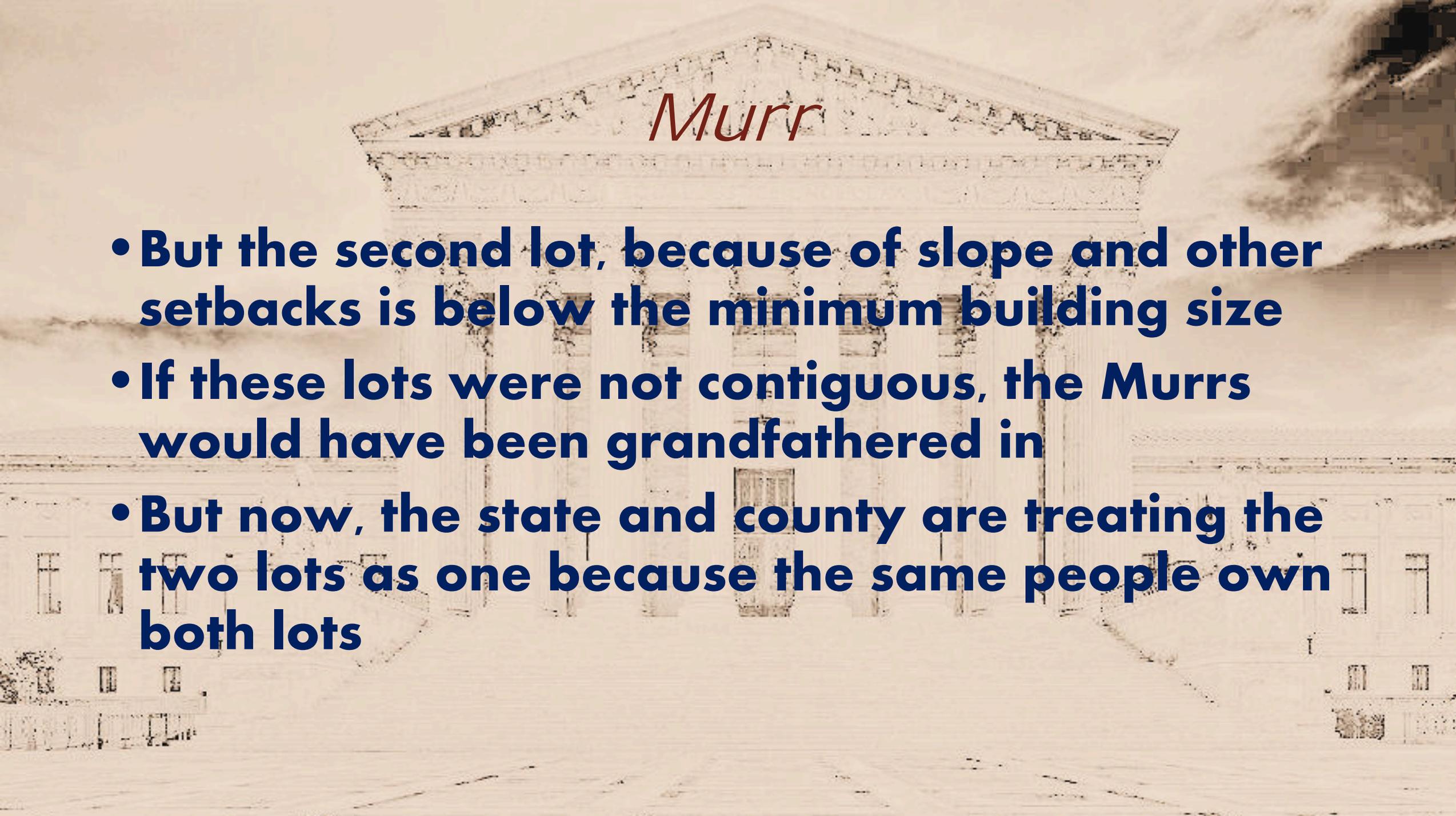
# *Murr v. Wisconsin (2016)*

## Parcel as a whole

- **The Murrs bought a one and one-quarter acre lot in 1960 along the Lake St. Croix, a wide spot in the St. Croix River**
- **They built a 950 square foot cabin for family outings**
- **In 1963 they bought a second contiguous lot**
- **In time their children came to own the lots**
- **After being flooded five times, they decided they needed to raise the cabin**
- **To pay for this, they decided to sell the second lot**





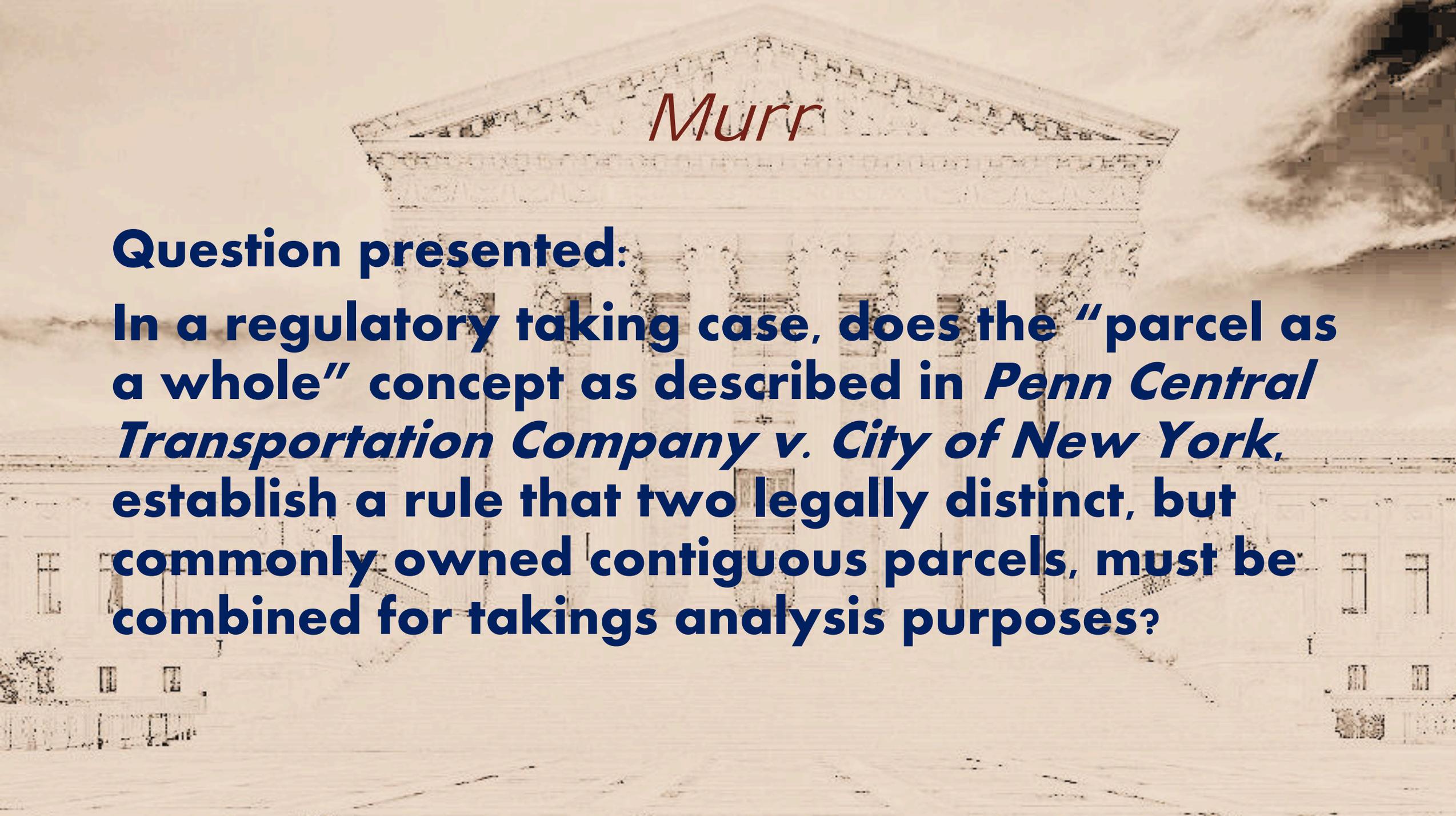


## *Murr*

- **But the second lot, because of slope and other setbacks is below the minimum building size**
- **If these lots were not contiguous, the Murrs would have been grandfathered in**
- **But now, the state and county are treating the two lots as one because the same people own both lots**

# *Murr*

- **And because the Murrs own the first developed lot, the Wisconsin Supreme Court said they have no viable takings claim**
- **This is the “parcel-as-a-whole” or “relevant parcel” problem**
- **Or the “more someone owns, the more government can steal” doctrine**



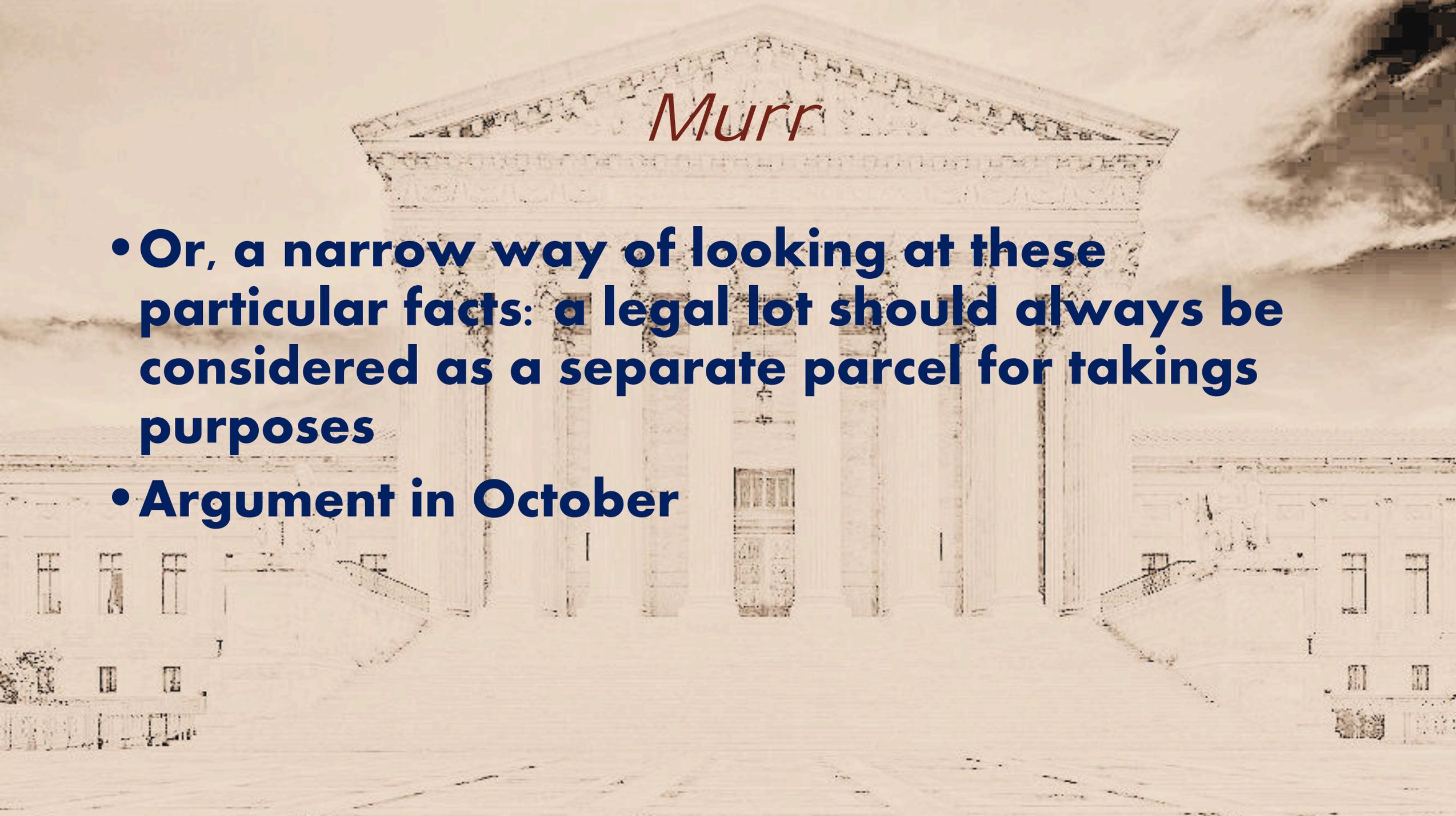
## *Murr*

**Question presented:**

**In a regulatory taking case, does the “parcel as a whole” concept as described in *Penn Central Transportation Company v. City of New York*, establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?**

# Murr

- **This issue was touched on, but never decided, in *Lucas*, *Palazzolo*, and *Tahoe-Sierra*.**
- **One proposed test is: “Any identifiable segment of land is a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments.” (Prof. John Fee)**



# *Murr*

- **Or, a narrow way of looking at these particular facts: a legal lot should always be considered as a separate parcel for takings purposes**
- **Argument in October**

