

Two Steps Forward for the “Poor Relation” of Constitutional Law: *Koontz*, *Arkansas Game & Fish*, and the Future of the Takings Clause

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Introduction

Despite occasional judicial protestations to the contrary, property rights protected by the Fifth Amendment’s Takings Clause have long been “relegated to the status of a poor relation” in Supreme Court jurisprudence.¹ Since the 1930s, federal courts have rarely given them the level of protection routinely accorded most other constitutional rights.² Over the last 25 to 30 years, however, Takings Clause issues have been more seriously contested in the Court than previously, and property rights have had a modest revival. During the 2012–2013 Supreme Court term, property rights advocates won three notable victories: *Arkansas Game & Fish Commission v. United States*,³ *Koontz v. St. Johns River Water Management District*,⁴ and *Horne v. Department of Agriculture*.⁵ These decisions stop well short of completely ending the

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¹Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

² See Ilya Somin, Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law, George Mason Law & Econ. Research Paper No. 08-53 (2008), available at <http://ssrn.com/abstract=1247854> (discussing this trend and the rationales offered to justify it); see also James W. Ely Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 125–42 (9th ed. 2008) (discussing the origins of this trend in the New Deal era).

³133 S. Ct. 511 (2012).

⁴133 S. Ct. 2586 (2013).

⁵133 S. Ct. 2053 (2013).

“poor relation” status of the Takings Clause, but they are noteworthy steps in the right direction.

This article considers the significance of *Arkansas Game & Fish* and *Koontz*, arguing that both cases are potentially important victories for property rights, and that the Court decided both correctly. But because both rulings also left some key issues unresolved, their full impact may not be evident for some time to come. Unlike the other two cases, *Horne* focuses primarily on procedural issues and is therefore covered in Joshua Hawley’s contribution to this volume.⁶

In Part I, I discuss *Arkansas Game & Fish*, the less controversial of the two cases. The Court’s unanimous decision makes clear that when the government repeatedly and deliberately floods property owners’ land, it is possible that the resulting damage qualifies as a taking for which “just compensation” must be paid under the Fifth Amendment. The Court’s unanimity is a rebuke to the extreme position taken by the federal government in the case. But it also leaves a number of crucial issues for later resolution by lower courts, and perhaps future Supreme Court decisions.

Part II considers *Koontz*, which ruled that there can potentially be a taking in a situation where a landowner was refused a permit to develop his land by a government agency, unless he agreed to, among other things, pay for off-site repair and maintenance work on other land in the area that he did not own.⁷ *Koontz* thereby limits the government’s ability to use permit processes and other land-use restrictions as leverage to force property owners to perform various services. The case could turn out to be the most important property rights victory in the Supreme Court in some time. In part for this reason, the Court was much more divided than in *Arkansas Game & Fish*, with the justices splitting 5–4 along ideological lines. Like the term’s other major Takings Clause case, *Koontz* leaves some crucial issues for later determination, including the question of what kinds

⁶ See Joshua Hawley, *The Beginning of the End? Horne v. Department of Agriculture and the Future of Williamson County*, 2012-2013 Cato Sup. Ct. Rev. 245 (2013). For my own thoughts on *Horne*, see Ilya Somin, *A Modest, But Potentially Significant Supreme Court Victory for Property Rights, Volokh Conspiracy*, Jun. 10, 2013, <http://www.volokh.com/2013/06/10/a-modest-but-potentially-significant-supreme-victory-for-property-rights>.

⁷ *Koontz*, 133 S. Ct. at 2591–93.

of remedies property owners are entitled to in cases where their Takings Clause rights are violated by permit denials.

Finally, the conclusion briefly discusses the implications of these decisions for the future of constitutional property rights. Although both cases represent incremental progress, there is still a long way to go before property rights cease to get second-class treatment from the Court. Moreover, the deep ideological division over *Koontz* reinforces the reality that judicial enforcement of Takings Clause property rights lacks the kind of cross-ideological support needed to firmly establish it in the long run. At the same time, these cases show that protection for property rights is making incremental gains.

I. *Arkansas Game & Fish Commission v. United States*

Arkansas Game & Fish addressed a case that arose from the U.S. Army Corps of Engineers’ repeated, deliberate flooding of forest land owned by an Arkansas state agency responsible for management of public wildlife habitats. Between 1993 and 2000, the Army Corps repeatedly engaged in deliberate flooding of the Dave Donaldson Black River Wildlife Management Area, owned by the Arkansas Game & Fish Commission; as a result, some 18 million board feet of timber were damaged or destroyed, and the area’s function as a habitat for migratory birds and other animals was significantly impaired.⁸

At the trial stage, the Court of Federal Claims ruled that this deliberate flooding qualified as a taking.⁹ But the U.S. Court of Appeals for the Federal Circuit reversed this ruling, concluding that because the floods created by the Corps of Engineers “were only temporary, they cannot constitute a taking.”¹⁰

A. The Court’s Holding and Its Limits

In a narrowly drawn opinion written by Justice Ruth Bader Ginsburg, the Supreme Court reversed the Federal Circuit decision but limited its holding to the proposition that “recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability.”¹¹ As the Court’s opinion emphasizes, “We

⁸ Ark. Game & Fish Comm’n, 133 S. Ct. at 515–18.

⁹ Ark. Game & Fish Comm’n v. United States, 87 Fed. Cl. 594 (2009).

¹⁰ Ark. Game & Fish Comm’n v. United States, 637 F.3d 1366, 1378 (Fed. Cir. 2011).

¹¹ Ark. Game & Fish Comm’n, 133 S. Ct. at 515.

rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.”¹²

The ruling leaves open a large number of other issues relevant to the determination of what kinds of government-induced flooding qualify as takings. Justice Ginsburg does note several factors that are relevant to such determinations, including the duration of the flooding, “the character of the land at issue and the owner’s ‘reasonable investment-backed expectations’ regarding the land’s use,” and “the degree to which the invasion is intended or is the foreseeable result of authorized government action.”¹³ But the Court does not tell us how long the flooding must continue before it is long enough to qualify as a taking, what degree of intent or foreseeability is required, in what ways “the character of the land” matters, how much in the way of “investment-backed expectations” the owner must have, or how these four factors should be weighed against each other in cases where they cut in opposite directions.

Brian Hodges of the Pacific Legal Foundation, a leading property rights public interest firm, argues that the Court’s brief citation of these four factors may confuse litigants and lower court judges because it “lists, without any differentiation, various tests that have been developed over the years to determine different types of takings in very different circumstances.”¹⁴ Hodges further suggests that *Arkansas Game & Fish* may perpetuate preexisting confusion in the lower courts over the distinction between temporary and permanent physical occupation takings cases.¹⁵

The Court also did not even clearly address the federal government’s extremely dubious argument that damage inflicted by flooding on downstream owners is categorically excluded from qualifying

¹² *Id.* at 522.

¹³ *Id.* at 522–23 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001)).

¹⁴ Brian T. Hodges, *Will Arkansas Game & Fish Commission v. United States Provide a Permanent Fix for Temporary Takings?*, Boston College Environmental Affairs L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262908, at 18. Hodges was also lead counsel on the joint PLF-Cato Institute-Atlantic Legal Foundation amicus brief in the case. Brief for Pacific Legal Foundation et al. as Amici Curiae in Support of Petitioner, *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012) (No. 11-597), available at <http://www.cato.org/publications/legal-briefs/arkansas-game-fish-commission-v-united-states-1>.

¹⁵ *Id.* at 19–23.

as a taking, even though the justices expressed great skepticism about this claim at the oral argument.¹⁶ It similarly remanded for further consideration the federal government’s argument that much of the flood damage inflicted on Arkansas’ property was not really caused by the Corps’ actions.¹⁷ These and other issues will have to be dealt with by the lower court on remand, and by other federal and state courts in future cases.

Quite possibly, the justices bought unity at the expense of clarity. This ruling could be an example of Chief Justice John Roberts’s much-discussed efforts to seek unanimity by limiting the scope of holdings. As Roberts explained in 2006, he believes that “[t]he more cautious approach, the approach that can get the most justices to sign onto it, is the preferred approach,” in part because it “contributes . . . to stability in the law.”¹⁸ But we probably will not have real “stability” in this area of law until the Court develops clearer standards for determining what kinds of flooding qualify as takings. In the meantime, it seems clear that *Arkansas Game & Fish* will result in further litigation in the lower courts, as property owners and government agencies advance competing interpretations of the Court’s vague criteria.

B. What the Court Got Right—Without Going Far Enough

As far as it goes, the Court’s decision is clearly correct. There is no good reason to hold that temporary flooding can never count as a taking. This is especially true if the flooding was deliberate and inflicted permanent damage on the property owner’s land. Other temporary physical invasions of property, such as overflights by aircraft,¹⁹ qualify as takings, and there is nothing special about flooding that should lead the Court to create a categorical exception for it.

¹⁶ See *Ark. Game & Fish Comm’n*, 133 S. Ct. at 521–22 (declining to reach this issue). For my analysis of the discussion of this claim in the oral argument, see Ilya Somin, *Today’s Oral Argument in Arkansas Game and Fish Commission v. United States, Volokh Conspiracy*, Oct. 3, 2012, <http://www.volokh.com/2012/10/03/todays-oral-argument-in-arkansas-game-and-fish-commission-v-united-states>.

¹⁷ *Id.* at 522–23.

¹⁸ Quoted in Mark Sherman, *Roberts Touts Unanimity on Court*, *Wash. Post*, Nov. 17, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/17/AR2006111700999.html>.

¹⁹ *United States v. Causby*, 328 U.S. 256 (1946).

To the contrary, allowing the government to temporarily flood private property without paying any compensation whatsoever would severely undermine the purpose of the just-compensation element of the Takings Clause, which, as a 1960 decision put it, is to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁰ If temporary flooding was completely exempted from Takings Clause scrutiny, the government would have free rein to flood and destroy property at will any time it furthered a policy objective or advanced the interests of politically influential interest groups, like the agricultural interests that benefited from the Corps’ actions in this case.²¹

But the Court should have gone further and recognized that what ultimately matters is not the duration of the flooding, but that of the damage inflicted. If the government deliberately damages and destroys private property by physically occupying it with water or anything else, it has no less “taken” it if the destruction occurs quickly than if it takes a longer time. Either way, the effect is permanent and private property has been taken and destroyed by the government in order to advance some policy objective. As the Supreme Court explained in the 1871 case of *Pumpelly v. Green Bay Co.*, interpreting Wisconsin’s state constitutional takings clause (the wording of which is nearly identical to the federal one):

It would be a very curious and unsatisfactory result if in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest

²⁰ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

²¹ See *Ark. Game & Fish Comm’n*, 87 Fed. Cl. at 599–605 (describing the role of different interest groups in influencing the Corps’ plans).

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sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.²²

For this reason, the Supreme Court ruled that the government was liable under Wisconsin’s takings clause when it deliberately flooded a property owner’s land by building a dam that directed water toward it.²³ The key factor, as Justice Samuel Miller recognized, was the infliction of “irreparable and permanent injury,” which can occur irrespective of the duration of the flooding.²⁴ The federal Takings Clause, of course, is “almost identical in language” to Wisconsin’s,²⁵ and has much the same purposes.

Arkansas Game & Fish could thus have made a stronger statement than simply concluding that “government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.”²⁶ It might instead have held that such deliberate flooding is always a taking if it inflicts significant permanent damage on the property in question.

Despite the very limited nature of the Court’s holding, some commentators worry that the Court went too far, rather than not far enough. For example, Jon Kusler of the Association of State Wetland Managers claims that the decision will result in large amounts of “time-consuming, expensive, and technical” litigation, because “[l]andowners subject to even limited amounts of temporary flooding caused or exacerbated by governments may now claim (whether successful [sic] or not) a temporary taking.”²⁷ Professor Timothy Mulvaney worries that, in rejecting arguments that the “sky is falling” if

²² *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177–78 (1871).

²³ *Id.* at 176–82.

²⁴ *Id.* at 177.

²⁵ *Id.* Compare U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”) with Wisc. Const. art. I, § 13 (“The property of no person shall be taken for public use without just compensation therefore.”).

²⁶ Ark. Game & Fish Comm’n, 133 S. Ct. at 522.

²⁷ John Kusler, Implications to Floodplain and Wetland Managers of *Arkansas Game & Fish Commission v. United States*, *Wetland News* (Dec. 2012), at 2–3.

courts allow takings claims in temporary flooding cases, “the Court significantly understated the impact of its takings jurisprudence on the efforts of government officials charged with protecting the public health, safety, and the environment through the regulation of land uses.”²⁸

As discussed above, *Arkansas Game & Fish* will indeed likely lead to additional litigation, in part because of the vagueness of the Court’s standards for determining what counts as a taking in temporary flooding cases. But there is no reason to believe that such cases will be inherently more difficult than takings cases in other contexts, or cases involving the adjudication of many other constitutional rights. For example, Fourth Amendment cases, free-speech cases, freedom-of-religion cases, and numerous others all often involve complex circumstances that vary from case to case and locality to locality.²⁹ If such difficulties should not lead us to abandon judicial review in these areas, then they should not deter courts from protecting Takings Clause property rights.³⁰

Moreover, the amount of litigation is likely to decline over time as courts establish clearer rules in the course of addressing new cases. Even initially, it is likely that only landowners whose property has suffered fairly extensive damage will file suit. Even if there is a reasonable probability of winning, few will want to litigate cases where the damages that might be obtained are outweighed by the substantial costs of litigation itself.

Finally, allowing liability in such cases does not prevent beneficial regulation, and may actually improve the quality of regulatory policy. After all, requiring compensation for takings caused by temporary flooding does not actually bar such flooding, but merely requires the government to compensate landowners whose property has been damaged as a result. If the government is sensitive to costs,

²⁸ Timothy Mulvaney, Takings Case Set for Oral Argument at the SCOTUS on January 15th, *Envtl. L. Prof Blog*, Jan. 13, 2013, http://lawprofessors.typepad.com/environmental_law/2013/01/takings-case-set-for-oral-argument-at-the-scotus-on-january-15th-.html. But see *Ark. Game & Fish Comm’n*, 133 S. Ct. at 521 (rejecting this kind of “slippery slope argument”).

²⁹ See Ilya Somin, *Federalism and Property Rights*, 2011 *U. Chi. Legal Forum* 53, 80–84 (discussing these complexities and comparing them to those in takings cases).

³⁰ *Id.* at 80–87 (discussing why there should not be a double standard cutting against property rights in this field).

this will strengthen its incentives to resort to flooding only when the benefits outweigh the costs. If it does not have to pay compensation, the government has incentives to ignore the damage caused by its regulations, except perhaps in cases where the victims are politically powerful. As Professor Jonathan Adler has explained, requiring the government to pay takings compensation can actually improve environmental policy by incentivizing officials to focus regulatory efforts on initiatives that are likely to create the greatest benefits at the least total cost to society, including property owners.³¹

Such benefits will not materialize in situations where government agencies are indifferent to the fiscal costs of their actions, of course. But where that is the case, it is also unlikely that requiring compensation will deter officials from engaging in beneficial flooding.

Ultimately, the slippery-slope objections against *Arkansas Game & Fish* fail, because they could just as easily be made against enforcement of the Takings Clause in other contexts. As Justice Ginsburg writes in her opinion:

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. 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* [allowed takings liability for plane overflights] and today's modest decision augurs no deluge of takings liability.³²

There is a strong case that the Court should have gone further than it did in protecting property rights in *Arkansas Game & Fish*. But it is hard to argue that it went too far, without simultaneously rejecting judicial enforcement of a wide range of other constitutional rights.

³¹ Jonathan Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Regulatory Takings*, 49 B.C. L. Rev. 301 (2008); see also James W. Ely Jr., *Property Rights and Environmental Regulation: The Case for Compensation*, 28 Harv. J. L. & Pub. Pol'y 51 (2004) (making a similar argument).

³² Ark. Game & Fish Comm'n, 133 S. Ct. at 521.

A final argument that the Court went too far is based on claims that it should not have gone against the rule outlined in the 1924 case of *Sanguinetti v. United States*,³³ the main precedent relied on by the United States. *Sanguinetti* states that an “overflow” must “constitute an actual, permanent invasion of the land” in order to be considered a taking.³⁴ However, that case primarily turned on the fact that there was “no permanent impairment of value” to the owner’s land, and that any injury he suffered was “indirect and consequential.”³⁵ As Justice Ginsburg notes, “[N]o distinction between permanent and temporary flooding was material to the result in *Sanguinetti*.”³⁶ It is not clear that the 1924 Court would have reached the same decision if the landowner’s property had suffered permanent damage as a result of temporary government-created flooding.

In addition, as Ginsburg emphasizes, the *Sanguinetti* Court did not assume that temporary flooding cases should be treated any differently from other cases where the government damages private property by means of a deliberate but temporary physical invasion of land. In sum, the *Arkansas Game & Fish* Court was justified in going against this passage in *Sanguinetti*, even if one assumes that it had a strong obligation to defer to precedent. The passage in question was not essential to the outcome of the 1924 case.

Furthermore, the relevant statement was not supported by any detailed textual, historical, or logical reasoning. The only authorities the Court cited to support this statement in *Sanguinetti* were two earlier cases that actually cut the other way, even if not conclusively.³⁷ One of them held that “where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment.”³⁸ This suggests that the crucial factor is the destruction of value rather than the duration of the flooding that caused it. The second case concluded that “[t]here is no

³³ 264 U.S. 146 (1924).

³⁴ *Id.* at 149.

³⁵ *Id.* at 149–50.

³⁶ Ark. Game & Fish Comm., 133 S.Ct. at 520.

³⁷ See *Sanguinetti*, 264 U.S. at 149 (citing *United States v. Lynah*, 188 U. S. 445 (1903) and *United States v. Cress*, 243 U. S. 316 (1917)).

³⁸ *Lynah*, 188 U.S. at 470.

difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows."³⁹ While this statement does not cover intermittent flooding that is *not* "inevitably recurring," the same logic surely applies: The difference between "inevitably recurring overflows" and recurring overflows whose future continuation is not inevitable is also one of degree rather than kind.

C. Using the Takings Clause to Protect Public Property as Well as Private

One interesting anomaly in *Arkansas Game & Fish* that has not gotten much attention is the fact that the flooded land was owned by the state of Arkansas, rather than a private owner. The text of the Fifth Amendment protects only "private property" against takings without "just compensation." However, the Supreme Court has long treated federal takings of state property the same way as takings of private property,⁴⁰ and the United States did not challenge these longstanding precedents in this case. The relevant precedents are not very persuasive in explaining the reasons why a Takings Clause that only refers to "private property" should be used to protect public property as well. For example, a 1946 Supreme Court decision suggests that public property is protected because the Takings Clause is merely "a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."⁴¹ But even if the power to take private property for public use is "preexisting,"⁴²

³⁹ *Cress*, 243 U.S. at 328.

⁴⁰ See, e.g., *United States v. Carmack*, 329 U.S. 230, 241–42 (1946) ("The Fifth Amendment . . . imposes on the Federal Government the obligation to pay just compensation when it takes another's property for public use in accordance with the federal sovereign power to appropriate it. Accordingly, when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it."); *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 101 (1893) (holding that the Takings Clause bars uncompensated federal takings of "property whose ownership and control is in the state [because] it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state").

⁴¹ *Carmack*, 329 U.S. at 241.

⁴² For a recent critique of the conventional wisdom that the federal government has broad, inherent authority to condemn property within states, see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 *Yale L. J.* 1738 (2013).

the constraint on that power imposed by the requirement of just compensation comes from the Fifth Amendment—and that amendment seems to apply it only to takings of private property.

Longstanding as it is, the Supreme Court's position that the Takings Clause protects government as well as private property is an obvious deviation from the text of the Fifth Amendment. It should perhaps be revisited in an appropriate future case. Be that as it may, the Court was probably justified in not considering this issue in *Arkansas Game & Fish* given that neither party sought to overturn longstanding precedent on the subject.

II. *Koontz v. St. Johns River Water Management District*

The *Koontz* case arose from a situation where Coy Koontz Sr., a Florida property owner, was refused a permit to develop his land by a government agency unless he agreed to, among other things, perform off-site repair and maintenance work on other properties he did not own, which were miles away from his land.⁴³ When Koontz sought to get a permit to develop his 14.9 acre property, the St. Johns River Water Management District asked him to either cede it a conservation easement over more than 90 percent of the land or “hire contractors to make improvements to District-owned land several miles away.”⁴⁴ Koontz argued that these demands violated his rights under the Takings Clause. During the course of the prolonged litigation on the subject, Coy Koontz Sr. passed away, and the claims of his estate continued to be asserted by his son, Coy Koontz Jr.⁴⁵

In *Nollan v. California Coastal Commission* (1987)⁴⁶ and *Dolan v. City of Tigard* (1994),⁴⁷ the Supreme Court ruled that, under the Takings Clause, there must be a connection between the purpose behind a government-imposed physical invasion of property and the objectives of any permit scheme where development permits are conditioned on allowing the invasion. In *Nollan*, the Court held that a

⁴³ *Koontz*, 133 S. Ct. at 2591–93.

⁴⁴ *Koontz* himself had previously offered to forego development on 11 acres of the land. But the district's offer of barring it on 13.9 acres would still have banned him from developing over 70 percent of the area he sought to build on. *Id.* at 2592–93.

⁴⁵ *Id.* at 2591.

⁴⁶ 483 U.S. 825 (1987).

⁴⁷ 512 U.S. 374 (1994).

requirement that beachfront property owners allow the public to pass through their property lacked an “essential nexus” to their building-permit application.⁴⁸ In *Dolan*, the Court extended the logic of *Nollan* by ruling that there must be “rough proportionality” between the degree of the imposition and the government’s objectives.⁴⁹ Under the *Nollan-Dolan* framework, if either an “essential nexus” or “rough proportionality” is lacking, then a taking has occurred, and the Takings Clause requires that the property owner get just compensation.

These rules are essential to enforcement of the Takings Clause. Without them, the government could essentially wipe out owners’ rights to control their property simply by refusing them the right to develop their land in any way unless they do whatever the state demands. Absent the essential-nexus requirement or something like it, the government could use permit schemes as leverage to force owners to give up their property rights for virtually any purpose. Absent rough proportionality, the government could do the same thing in any instance where the landowner’s property has even a slight connection to the legitimate purposes of a permit scheme.

Koontz addresses two major issues that previous Supreme Court cases had not covered: (1) Whether the requirements of *Nollan* and *Dolan* apply when the government denies a permit, as opposed to approving it with attached conditions; and (2) whether those requirements apply to cases where the burden imposed by the government is a financial obligation—in this case, paying for improvements on other government-owned land—as opposed to requiring the property owner to allow a physical invasion of his own property. *Koontz* had prevailed on both issues in a Florida trial court and intermediate appellate court, but lost in the state supreme court.⁵⁰

In an opinion written by Justice Samuel Alito, the Supreme Court answered “yes” to both questions, though it did not determine whether the conditions demanded of *Koontz* actually violated the requirements of *Nollan* and *Dolan*.⁵¹ The Court was unanimous in rejecting the idea that the *Nollan-Dolan* framework does not apply

⁴⁸ *Nollan*, 483 U.S. at 837–38.

⁴⁹ *Dolan*, 512 U.S. at 391.

⁵⁰ *Koontz v. St Johns Water Mgmt. Dist.*, 5 So.3d 8 (Fla. Dist. Ct. App. 2009), rev’d 77 So.3d 1220 (Fla. 2011).

⁵¹ This latter issue will have to be determined by the Florida courts on remand. *Koontz*, 133 S. Ct. at 2603.

to permit denials, but split 5-4 on the issue of whether it applies to financial exactions. In addition, the Court ruled that permit denials that violate the *Nollan-Dolan* framework qualify as per se takings, as opposed to regulatory-takings cases where the *Penn Central* three-factor balancing test must be applied.⁵² This was a crucial conclusion, since the *Penn Central* test is usually applied in ways that are highly favorable to the government, making it difficult for property owners to vindicate their rights.⁵³

A. Permit Denials vs. Permit Approvals

Rejection of the federal government's argument that permit denials should be exempt from the Takings Clause scrutiny given to approvals was the one important question in *Koontz* on which all nine justices agreed.⁵⁴ Justice Alito's opinion for the Court puts forward several strong arguments for subjecting permit denials to *Nollan-Dolan* Takings Clause scrutiny. As he points out, this distinction has been rejected when applied to constitutional rights other than the Takings Clause.⁵⁵ These include freedom of speech and the right to travel, among others.⁵⁶ If the St. Johns River Water Management District refused to issue *Koontz* a permit unless he refused to stop criticizing its land use regulations, few would deny that his First Amendment rights were violated. The same logic applies to situa-

⁵² *Id.* at 2600 (citing *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

⁵³ A 2003 study found that property owners prevail in fewer than 10 percent of cases where the *Penn Central* test is applied (including 13.4 percent of cases that reached the merits stage). See F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 *Duke Env. L. & Pol'y F.* 121, 141-42 (2003). The authors claim that the 13.4 percent success rate is not especially low when one considers that all but one of the cases where property owners lost were ones where low litigation costs or high potential rewards justified pursuing a case with a low probability of success. *Id.* However, the fact that nearly all of the *Penn Central* cases in the authors' sample involved instances where plaintiffs had incentives to go forward with even a low probability of success merely underscores the reality that the test is tilted against owners.

⁵⁴ See *Koontz*, 133 S. Ct. at 2594-97 (majority's rejection of the approval-denial distinction); *id.* at 2603 (Kagan, J., dissenting) (stating that "I think the Court gets the first question it addresses right").

⁵⁵ *Koontz*, 133 S. Ct. at 2594-95.

⁵⁶ See *id.* (citing *Perry v. Sindermann*, 408 U.S. 593 (1972) (freedom of speech) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (right to travel)).

tions where the government denies permits to property owners who refuse to surrender their constitutional right to compensation for the taking of their property by the state. As Alito puts it:

We have said in a variety of contexts that “the government may not deny a benefit to a person because he exercises a constitutional right” Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.⁵⁷

Justice Alito also correctly points out that “[a] contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.”⁵⁸ If the federal government had prevailed on this issue, “a government order stating that a permit is ‘approved if’ the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words ‘denied until’ would not.”⁵⁹ It should be emphasized that virtually any other constitutional right could be undermined in the same way. For example, a government seeking to use permit systems to restrict freedom of speech or religion could simply draft orders stating that land-use permits (or any other type of permit) are “denied until” the applicant stops criticizing the government or practicing a particular religion.

Despite the Court’s unanimity on this issue, its rejection of the approval-denial distinction has drawn a certain amount of criticism. University of Vermont law professor John Echeverria, a leading critic of judicial enforcement of restrictions on land-use regulation and eminent domain, worries that this part of the decision “will very likely encourage local government officials to avoid any discussion with developers related to permit conditions that, in the end, might have let both sides find common ground on building projects that are good for the community and environmentally sound. Rather than risk a lawsuit through an attempt at compromise, many

⁵⁷ *Id.* at 2594 (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983)).

⁵⁸ *Id.* at 2596.

⁵⁹ *Id.*

municipalities will simply reject development applications outright—or, worse, accept development plans they shouldn't.”⁶⁰

This criticism can, of course, be applied to judicial enforcement of *any* restrictions on government's ability to use permit denials as leverage to extract concessions from landowners, or private individuals seeking other kinds of permits. If the government is not allowed to demand restrictions on freedom of speech, religion, Fourth Amendment rights, or any other constitutional rights when it negotiates with private parties, there is a chance that it will instead refuse to negotiate and simply deny permits—or, alternatively, issue them unwisely.

In practice, however, governments can deal with the danger of lawsuits by restricting the demands they impose on landowners to those that are unlikely to violate the Takings Clause—just as they currently try to avoid making demands that would force landowners to give up other constitutional rights. Even demands that would otherwise implicate the Takings Clause would be constitutionally permissible under *Koontz*, so long as they were coupled with an offer of adequate compensation. In this respect, the enforcement of Takings Clause just-compensation rights actually imposes *fewer* constraints on permit processes than enforcement of most other constitutional rights. The government cannot remedy violations of free-speech rights or freedom of religion by offering financial rewards to people who are willing to give up those rights in exchange for permits. In the case of the Takings Clause's just compensation element, however, such a strategy is perfectly permissible, because the payment

⁶⁰ John D. Echeverria, *A Legal Blow to Sustainable Development*, N.Y. Times, June 27, 2013, available at <http://www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html>. Echeverria attributes this concern to Justice Elena Kagan's dissent, but, as discussed below, the dissent actually endorses this part of the majority's decision. Kagan does, however, raise a similar concern about the majority's resolution of the second issue. *Koontz*, 133 S. Ct. at 2610 (Kagan, J., dissenting). Cf. Timothy Mulvaney, *Koontz: 5-4 Supreme Court Sides with Landowner in Takings Case*, Env. L. Prof. Blog, June 25, 2013, http://lawprofessors.typepad.com/environmental_law/2013/06/koontz-5-4-supreme-court-sides-with-landowner-in-takings-case.html (*Koontz* “is nearly certain to place a significant chilling effect on regulator-landowner coordination. Governmental officials may be forced into uncommunicative rejections or unconditioned approvals of development applications when a more amenable compromise may have been available”); see also Mark Fenster, *Failed Exactions*, 36 Vt. L. Rev. 623, 643–44 (2012) (arguing that imposing *Nollan-Dolan* scrutiny on government demands that are rejected would unduly impede negotiations).

of compensation for restrictions on property rights is precisely the right at issue.

B. Extending the Nollan-Dolan Framework to Cover Financial Exactions

Although the Court's rejection of the approval-denial distinction was not completely uncontroversial, far more criticism has been leveled at its holding that the *Nollan-Dolan* framework applies to financial exactions imposed on property owners, not just direct physical invasions of their land.

1. A Flood of Litigation?

In a forceful dissenting opinion written on behalf of the four liberal justices, Justice Elena Kagan warns that "the majority's approach . . . threatens significant practical harm" because it would lead to Takings Clause litigation over the "many kinds of permitting fees" that state and local governments "impose every day," including those that mitigate pollution, pay for public services such as sewage, and "limit the number of landowners who engage in a certain activity."⁶¹ New York University law professor Roderick Hills similarly fears that *Koontz* will lead to a "quagmire" by "enlist[ing] federal courts to duplicate the work of state courts in policing conditions on literally hundreds of thousands of land-use permits."⁶² For his part, John Echeverria warns that the ruling is a "revolutionary and destructive step" that undermines the "traditional court approach of according deference to elected officials and technical experts on issues of regulatory policy" and "will result in a huge number of costly legal challenges to local regulations."⁶³

A key problem with this sort of criticism of *Koontz* is that it can just as readily apply to federal judicial protection of a wide range of other constitutional rights that might be infringed by state and local government action. To adapt Professor Hills's terminology, federal courts "duplicate the work of state courts" in enforcing Fourth Amendment

⁶¹ *Koontz*, 133 S. Ct. at 2606–07 (Kagan, J., dissenting).

⁶² Roderick Hills, *Koontz's Unintelligible Takings Rule: Can Remedial Equivocation Save the Court from a Doctrinal Quagmire?*, *Prawfsblawg*, June 25, 2013, <http://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takings-rule-can-remedial-equivocation-make-up-for-an-incoherent-substantive-.html>.

⁶³ Echeverria, *supra* note 60.

restrictions on searches and seizures despite the fact that local law enforcement agencies conduct “literally hundreds of thousands” of raids and searches every year. By the early 2000s, there were an estimated 40,000 SWAT team raids alone every year, to say nothing of the much larger number of ordinary searches.⁶⁴ Similarly, as Justice Kagan might put it, federal courts enforce First Amendment rights against state and local officials, despite the fact that “many kinds of permitting” schemes—including those regulating the use of streets, parks, movie theaters, and lecture halls—impinge on free-speech rights to varying degrees.⁶⁵

Obviously, judicial enforcement of Fourth Amendment rights, speech rights, and numerous other constitutional protections necessarily involves nondeferential judicial scrutiny of what Echeverria describes as “elected officials and technical experts’ [decisions] on issues of regulatory policy.”⁶⁶ In many cases, these decisions are just as dependent on technical expertise and knowledge of varying local conditions as land-use decisions are.⁶⁷ If such concerns are not a sufficient reason to abandon judicial oversight of other constitutional rights, they also should not stand in the way of judicial enforcement of the Takings Clause.

Obviously, judicial protection of any constitutional right necessarily involves greater litigation than would exist if the courts simply let government officials do as they please. This situation is particularly true when the courts first begin to intervene in an area, and the application of doctrine to particular cases is often still unclear. Thus, it would not be surprising if *Koontz*, like other decisions expanding protection for constitutional rights of various kinds, led to an initial increase in litigation. Such an increase is, however, as much a feature as a bug. It can help clarify applicable legal standards and deter officials from future rights violations.

Moreover, it is far from clear that *Koontz* really will result in as great a flood of litigation as feared by Kagan, Hills, and Echeverria. As Justice Alito points out in his majority opinion, no such deluge

⁶⁴Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America* 11 (2006).

⁶⁵See, e.g., Timothy Zick, *Speech out of Doors: Preserving the First Amendment Liberties in Public Places* (2009) (discussing federal judicial review of numerous types of permit policies restricting outdoor speech).

⁶⁶Echeverria, *supra* note 60.

⁶⁷For details, see Somin, *Federalism and Property Rights*, *supra* note 29, at 80–84.

has occurred in the many states whose supreme courts adopted rules similar to *Koontz* in interpreting their state constitutions.⁶⁸ Indeed, at least seven state supreme courts have made similar decisions since 1991, including those of highly populated states such as California, Illinois, Ohio, and Texas.⁶⁹ UCLA law professor Jonathan Zasloff points out that California’s experience, in particular, undercuts the notion that *Koontz* is likely to lead to a flood of litigation that blocks beneficial regulation.⁷⁰

Professor Hills worries that reliance on state-level experience is misleading, because federal courts, unlike state courts, lack the “decentralized flexibility” and expertise needed to make appropriate adjustments to local conditions.⁷¹ But that has generally not been the case with federal court enforcement of other constitutional rights that involve complex local policy decisions. Moreover, there is little reason to believe that the average state judge is significantly more knowledgeable about local land-use policy and property law than the average federal judge. Federal district judges usually come from the states where they hear cases, and many have prior experience as state judges, state officials, or practitioners.⁷² Few federal judges are property-law experts. But the same is true of most state judges. On average, there is little reason to believe that state judges are likely to do a systematically better job of handling takings cases than federal

⁶⁸ *Koontz*, 133 S. Ct. at 2602–03.

⁶⁹ See *Ehrlich v. Culver City*, 911 P.2d 429 (Cal. 1996); *Home Builders Ass’n v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991); *N. Illinois Homebuilders Ass’n, Inc. v. Cnty. of du Page*, 649 N.E.2d 384 (Ill. 1995); *Smith v. Price Dev. Co.*, 125 P.3d 945 (Utah 2005); *Town of Flower Mound v. Stafford Estates Ltd P’ship*, 135 S.W.3d 620 (Tex. 2004); *Trimen Dev. Co. v. King Cnty.*, 877 P.2d 187 (Wash. 1994). For a detailed discussion of some of these cases and their relationship to *Koontz*, see Brief of Owners Counsel of America as Amicus Curiae in Support of Petitioner, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), at 9–11.

⁷⁰ See Jonathan Zasloff, *Koontz and Exactions: Don’t Worry, Be Happy*, Legal Planet: Env. L. & Pol’y Blog, June 27, 2013, at <http://legalplanet.wordpress.com/2013/06/27/koontz-and-exactions-dont-worry-be-happy>.

⁷¹ See Hills, *supra* note 62.

⁷² For a discussion of various reasons why federal judges are not likely to be significantly worse than state judges at addressing property rights issues, see Somin, *Federalism and Property Rights*, *supra* note 29 at 84–86; see also Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol’y 91, 101–03 (2011) (symposium on judicial takings)

judges in the same region. On the other hand, in some instances state judges may be systematically *worse*, if they have been put into their positions by the same interest groups that also promote harmful government policies at the state level. Especially in states where judges are elected, state judges sometimes have close ties to the local political establishment, which in turn may be susceptible to interest-group lobbying.⁷³

2. Will Koontz Impede Beneficial Regulation?

Closely related to the “flood of litigation” critique of *Koontz* are claims that it will impede beneficial regulation by convincing officials to desist from beneficial regulation that might now lead to takings lawsuits.⁷⁴ If some demands that regulatory agencies could previously impose without paying any costs might now be compensable takings, it is certainly possible that the frequency of such demands will be reduced. There is no way to definitively prove that such risk aversion will never lead to the abandonment of potentially beneficial regulatory policies.

But, as discussed above in addressing similar criticisms of *Arkansas Game & Fish*, this constraint is likely to lead to better, rather than worse, regulatory policies. Forcing governments to internalize the costs that their regulations impose on landowners, will strengthen incentives to adopt only those regulations whose benefits are likely to exceed their costs. Whereas these officials previously did not need to consider costs imposed on landowners in their calculus—unless the landowners could force them to do so through political lobbying—compensation requirements will impose tighter discipline and incentivize officials to concentrate regulatory expenditures in areas where they are likely to do the most good.

Interestingly, a 2001 analysis of a survey of land-use planners in California suggests that they perceive the impact of *Nollan-Dolan* restrictions on land-use policy in roughly this way.⁷⁵ Some 74 percent of California city planners and 81 percent of county planners agreed

⁷³ See Somin, *Stop the Beach Renourishment* and the Problem of Judicial Takings, *supra* note 72 at 99–100 (discussing this problem in more detail).

⁷⁴ See Echeverria, *supra* note 60; Mulvaney, *supra* note 60.

⁷⁵ See Ann E. Carlson & Daniel Pollak, Takings on the Ground: How the Supreme Court’s Takings Jurisprudence Affects Local Land Use Decisions, 35 U.C. Davis L. Rev. 103 (2001).

with the statement that “[t]he nexus and rough proportionality standards established by the *Nollan* and *Dolan* decisions, when followed carefully, simply amount to good land use planning practice.”⁷⁶ The planning officials endorsed the decisions despite the fact that a majority of them reported that concern about takings issues had led them to reevaluate their fee and exaction standards over the previous decade.⁷⁷ The authors of the study suggest that this positive response to the decisions may be because planners support their “tendency to favor a comprehensive, long-range approach to planning that avoids ad hoc decision-making.”⁷⁸ This beneficial effect occurred despite the fact that many lower court decisions have interpreted *Nollan* and *Dolan* relatively narrowly, exempting some types of exactions from the essential-nexus and rough-proportionality requirements.⁷⁹ Stronger enforcement of these rulings might yield greater efficiency benefits, by increasing government planners’ incentives to take account of the costs their policies impose.

Like *Arkansas Game & Fish*, *Koontz* does not actually forbid regulatory measures, but merely requires the government, in some cases, to pay compensation to landowners whose property rights have been impaired. As will be discussed below, regulatory agencies may not have to pay compensation in cases where they ultimately choose not to impose a particular condition, perhaps even if they also ultimately deny the permit in question. But in cases where the relevant demand fails the requirements of *Nollan* and *Dolan*, they will have to offer compensation if they hope to make the condition stick. A *Koontz*-like rule thus sometimes increases the efficiency of regulation in ways that even planning officials welcome.

In addition, *Koontz* largely gives the government free rein in cases where monetary exactions are used to prevent landowners from engaging in activities that harm the property of others, including that

⁷⁶ *Id.* at 142.

⁷⁷ *Id.* at 143.

⁷⁸ *Id.*

⁷⁹ See, e.g. J. David Breemer, *The Evolution of the Essential Nexus: How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 374–75 (2002) (describing this trend); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567–75 (1999) (same).

of the state. Justice Alito’s majority opinion emphasizes that “[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.”⁸⁰

3. *Doctrinal Criticisms of the Koontz Majority*

As we have seen, much of the criticism aimed at *Koontz* in Justice Kagan’s dissent and by academic commentators focuses on policy considerations. But Kagan’s most powerful attacks on the majority are primarily doctrinal in nature. She suggests that “the *Nollan-Dolan* test applies only when the property the government demands during the permitting process is the kind it otherwise would have to pay for—or, put differently, when the appropriation of that property, outside the permitting process, would constitute a taking.”⁸¹ Kagan notes that a demand that a citizen spend money for public purposes, outside the permitting process, would not in itself constitute a taking, and therefore the Water Management District’s demand that Koontz spend money on refurbishing public lands cannot be a taking.⁸²

This is an important point. But it runs afoul of the reality that the monetary payment was demanded as the price for allowing Koontz to avoid having to cede a conservation easement covering more than 90 percent of his property, and for allowing him to develop at least some substantial part of the property. Forcing a property owner to allow an easement surely would be a taking even outside the permitting process; *Nollan* and *Dolan* themselves both involved government demands for easements.⁸³ As the *Dolan* Court noted, an easement differs from a mere regulatory restriction on the use of property because it constitutes “a requirement that [the owner] deed portions of the property to the city.”⁸⁴

⁸⁰ *Koontz*, 133 S. Ct. at 2595.

⁸¹ *Koontz*, 133 S. Ct. at 2605 (Kagan, J., dissenting).

⁸² *Id.* at 2605–06.

⁸³ *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 385–86.

⁸⁴ *Dolan*, 512 U.S. at 385. But see *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1217–21 (N.Y. 2004) (holding that the *Nollan-Dolan* framework does not apply to a permanent “conservation restriction” imposed as a condition of a development permit because it is not an “exaction” that involves the “dedication of ‘property’” to public use). In my view, *Smith* is a serious misinterpretation of *Nollan* and *Dolan* because the permanent assignment of conservation rights to the government pretty clearly does involve

To be sure, there is a potential distinction between easements allowing public access, as in *Nollan* and *Dolan*, and the conservation easement demanded of Koontz. However, in both scenarios the government’s demands would have largely eliminated the landowner’s ability to determine the uses of his own property, and forced him to devote it to serving the government’s purposes. Indeed, by barring virtually any development on the land it covers, a conservation easement actually exerts greater control over the landowner’s property than merely giving the public the right to pass through a beachfront area, as in *Nollan*.⁸⁵ The same applies to a categorical permanent ban on development, at least if it destroys virtually all of the economic value of the land.⁸⁶

In addition, as Justice Alito emphasizes, exempting demands for monetary payments from *Nollan-Dolan* scrutiny would make it “very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough-proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement’s value.”⁸⁷

I should add that the same kind of argument can easily be used to undermine other constitutional rights. If demands for monetary payments can be used to circumvent the Takings Clause, they can also be used to get around the First Amendment, the Fourth Amendment, and most other individual rights. For example, the government could circumvent protection for freedom of speech by demanding that speakers either refrain from criticizing political leaders or pay a

the seizure of an important property right—often a more significant element of the owner’s “bundle of sticks” than that at stake in *Nollan* and *Dolan* themselves. Cf. *id.* at 1219 (unpersuasively claiming that the right at stake in a permanent conservation restriction “is trifling compared to the rights to exclude or alienate”). As Judge Read explained in his dissenting opinion in *Smith*, “A conservation easement is a nonpossessory ‘interest in real property’ . . . which imposes use restrictions on the landowner for purposes generally of ‘conserving, preserving and protecting’ the State’s ‘environmental assets and natural and man-made resources’ for the benefit of the public.” *Id.* at 1225 (Read, J., dissenting) (citations omitted).

⁸⁵ *Nollan*, 483 U.S. at 828.

⁸⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

⁸⁷ *Koontz*, 133 S. Ct. at 2599.

fine for doing so. It could use the threat of fines to force homeowners to allow searches that would otherwise violate the Fourth Amendment. And so on. As with many of the other criticisms of *Koontz*, the claim that the use of financial exactions as leverage against landowners cannot violate the Takings Clause is one that few would accept if applied to other constitutional rights.

Alito also seeks to distinguish the water district's demands from taxes, user fees, and other typical financial exactions imposed by the government, by emphasizing that this "monetary obligation burdened petitioner's ownership of a specific parcel of land."⁸⁸ Here, Justice Kagan makes a good point where she notes that property taxes and some types of fees for public services also burden ownership of a specific parcel of land.⁸⁹ Thus, the majority's attempt to exclude such taxes and user fees from *Nollan-Dolan* scrutiny seems arbitrary. Justice Alito's claim that "teasing out the difference between taxes and takings is more difficult in theory than in practice" is far from fully reassuring.⁹⁰ Both property owners and local governments could benefit from clearer judicial guidance than this.

One possible answer is to take up Professor Richard Epstein's suggestion to bite the bullet, admit that taxes can be takings, and apply the *Nollan-Dolan* framework to them.⁹¹ This approach would not lead to the wholesale invalidation of all property taxes and user fees. Many such exactions could easily pass the essential-nexus and rough-proportionality tests, since there is surely both (1) an essential nexus between property ownership and financing for basic

⁸⁸ *Id.* This is also Alito's reason for distinguishing the Court's earlier decision in *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998), where five justices on a badly splintered Court concluded that the Takings Clause does not apply to situations where the government imposes monetary exactions that "d[o] not operate upon or alter an identified property interest." *Id.* at 540 (Kennedy, J., concurring); see also *id.* at 554–56 (Breyer, J., dissenting) (agreeing with Kennedy on this point on behalf of the four dissenting justices).

⁸⁹ *Id.* at 2607–08 (Kagan, J. dissenting).

⁹⁰ *Id.* at 2601.

⁹¹ See Richard Epstein, *Koontz v. St. Johns River Water Management District: Of Issues Resolved—and Shoved Under the Table*, PointofLaw.Com, Jun. 26, 2013, <http://www.pointoflaw.com/archives/2013/06/koontz-v-st-johns-river-water-management-district-of-issues-resolved--and-shoved-under-the-table.php>. See also Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 283–305 (1985) (arguing that taxes qualify as takings).

functions of local government that benefit the owners and (2) a rough proportionality between the amounts charged and the services provided. This dynamic is even more true for user fees calibrated to the amount of services the property owner consumes.

But courts need not take such a radical step to address the problem raised by Justice Kagan. Although it may not be possible to draw an absolutely precise line between takings and taxes, some guidance is provided by the purpose of the Takings Clause’s just-compensation requirement, which is to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁹² This creates an important distinction between broad-based property taxes or user fees that apply to all property owners, or to all users of a particular public service, and narrowly targeted exactions that single out individual landowners or small groups.⁹³ Although the precise line between the two may be elusive, most real-world cases are likely to fall clearly on one side or the other of this continuum.

Ultimately, Justice Alito was right to point out that the problem of distinguishing taxes from takings is not unique to this case, but “is inherent in this Court’s long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.”⁹⁴ Although there is a genuine difficulty here, the only way to completely avoid it is either to abandon judicial enforcement of the Takings Clause in all cases where the government uses monetary exactions to coerce property owners, or to embrace Richard Epstein’s position that taxes qualify as takings.

Finally, Justice Kagan argues that the water district did not really demand a monetary payment from Koontz.⁹⁵ If her understanding of the facts is correct, it is possible that the district did not run afoul of the *Nollan-Dolan* framework. But the majority was likely correct

⁹² *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁹³ Cf., Epstein, PointofLaw.com, *supra* note 91 (criticizing Kagan’s dissent and pointing out that “[a] general real estate tax is imposed on all parcels of land based on value in order to fund common improvements from which the community at large benefits. This particular exaction is imposed on a single parcel of land at the time of its possible development and thus singles out one owner for excessive burdens from which it gets no special return benefits.”).

⁹⁴ *Koontz*, 133 S. Ct. at 2601.

⁹⁵ *Id.* at 2609–11 (Kagan, J., dissenting).

in ruling that this sort of factual dispute should be settled by lower courts.⁹⁶

C. *The Problem of Remedy*

A key point left unaddressed in *Koontz* is the question of what sort of remedy is available to landowners who successfully challenge conditions linked to permit denials. The usual remedy for a Takings Clause violation is the payment of fair-market-value compensation.⁹⁷ In *Koontz* and similar permit-denial cases, however, “there is an excessive demand but no taking” and the possible constitutional problem is “an unconstitutional conditions violation.”⁹⁸ The issue is not that the government has directly violated the Takings Clause, but that it has undermined it indirectly by trying to force property owners to surrender their Takings Clause rights as a condition of getting a permit. For this reason, the Court did not address the issue of what kind of remedy *Koontz* may be entitled to. If the lower court concludes that the requirements demanded of *Koontz* violated the standards of *Nollan* and *Dolan*, Florida courts will have to determine the appropriate remedy.

Professor Hills, a leading critic of *Koontz*, believes that, if the federal courts leave the remedy issue up to state courts, and the latter “continue to define the *Nollan-Dolan* remedy as invalidation of the illegal condition and denial of the zoning permission, then *Koontz* will be a practical dead letter.”⁹⁹ Hills believes this possibility is “a good thing,” since he would prefer that federal courts abandon the exercise of judicial review over Takings Clause violations created by permit systems.¹⁰⁰

This analysis is either unduly pessimistic (from my point of view) or unduly optimistic (from Hills’s). It is not clear that restoration of the pre-permitting status quo is the remedy lower courts and the Supreme Court will ultimately settle on. For example, Richard Epstein

⁹⁶ *Id.* at 2598.

⁹⁷ See, e.g., *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984) (noting that this is the remedy “in most cases”).

⁹⁸ *Koontz*, 133 S. Ct. at 2597.

⁹⁹ Hills, *supra* note 62; see also Fenster, *supra* note 60, at 642–43 (making a similar argument).

¹⁰⁰ *Id.*

suggests that courts could instead award property owners “damages for economic losses attributable to what is temporary taking of land given that no development could take place.”¹⁰¹

Even if invalidation of the permit condition does turn out to be the sole remedy, that approach is far from completely toothless. It disincentivizes states and localities from adopting land-use restrictions whose main purpose is precisely to be used as leverage in forcing landowners to accept extortionate conditions in exchange for lifting them. It should also incentivize localities to offer compensation in cases where they wish to impose permit conditions that would otherwise violate the rules of *Nollan* and *Dolan*. Just as *Nollan* and *Dolan* previously incentivized California land-use planners to revamp their approval policies, so *Koontz* may incentivize them to either moderate their demands or offer compensation in cases where the *Nollan-Dolan* standard would otherwise be violated.

Conclusion

Both *Arkansas Game & Fish* and *Koontz* are significant victories for property rights advocates. The former ruling prevents the government from “temporarily” flooding property owners’ land virtually at will, without paying compensation. The latter restricts the power of government agencies to use permit processes to impose “[e]xtortionate demands” on landowners.¹⁰²

To some extent, these cases are part of a recent trend of property rights victories in the Supreme Court. *Arkansas Game & Fish* was the second of three unanimous Supreme Court defeats for the federal government in property rights cases within a 15-month period, following *Sackett v. EPA*,¹⁰³ and preceding *Horne v. Department of Agriculture*.¹⁰⁴

At the same time, both rulings have significant limitations. We are still far short of achieving the goal of enforcing property rights on the same terms as those accorded most other constitutional rights. The Obama administration’s three unanimous defeats were in part a result of the extreme nature of the positions adopted by the federal

¹⁰¹ Richard Epstein, PointofLaw.com, *supra* note 91.

¹⁰² *Koontz*, 133 S. Ct. at 2595.

¹⁰³ 132 S. Ct. 1367 (2012).

¹⁰⁴ 133 S. Ct. 2053 (2013).

government in these cases.¹⁰⁵ This intransigence is likely what led liberal justices normally inclined to be skeptical of property rights claims to vote against the government in these three instances. In addition, *Horne* and *Sackett* were both decided on statutory rather than constitutional grounds, and both merely involved property owners' rights of access to judicial review of their takings claims, rather than a substantive decision on the merits.

As previously discussed, *Arkansas Game & Fish* and *Koontz* do not address crucial issues the resolution of which is likely to be a major factor in determining their ultimate real-world impact. *Arkansas Game & Fish* is vague on the standards that determine which types of temporary government-induced flooding qualify as takings, and which do not. *Koontz* did not address the issue of remedy and side-stepped the question of "how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*."¹⁰⁶ If, as Justice Kagan suggests, the "demand must be unequivocal,"¹⁰⁷ government officials could potentially evade *Koontz* by cloaking their demands in euphemisms.

Another troubling aspect of *Koontz* is that it was a close decision, with all four liberal justices not only dissenting but being willing to exempt nearly all demands for monetary exactions from Takings Clause scrutiny under *Nollan* and *Dolan*. In reaching this conclusion, they—and prominent academic commentators—advanced a range of arguments that few would credit outside the property rights context. The widespread acceptance of such claims is a sign of the continuing second-class status of property rights in much of our constitutional discourse.

The ideological division evident in the debate over *Koontz* is a further sign that most liberal jurists are unwilling to support anything more than extremely limited judicial enforcement of constitutional property rights—a standard of protection far below that extended to

¹⁰⁵For a brief discussion of this aspect of these cases, see Ilya Somin, Supreme Court Shutouts Reveal Reckless Decisions, USA Today, July 23, 2013, at 8A; see also Ilya Shapiro, Why Obama Keeps Losing at the Supreme Court, Bloomberg View, Jun. 6, 2013, <http://www.bloomberg.com/news/2013-06-06/why-obama-keeps-losing-at-the-supreme-court.html> (describing administration's unanimous losses in several areas, including property rights).

¹⁰⁶*Koontz*, 133 S. Ct. at 2598.

¹⁰⁷*Id.* at 2610 (Kagan, J., dissenting).

most other enumerated constitutional rights.¹⁰⁸ As long as this ideological division persists, the status of constitutional property rights will remain tenuous: In the long run, no constitutional right is likely to get robust judicial protection unless there is at least some substantial bipartisan and cross-ideological consensus in favor of it.

At the same time, it is also clear that property rights advocates have won some important victories over the last 25 years. The 2012–2013 Supreme Court term is a continuation of that trend. Even painful defeats such as *Kelo v. City of New London*¹⁰⁹ have often been much closer and more controversial than similar decisions would have been a generation ago.¹¹⁰ Property rights are still the “poor relations” of constitutional law. But the case for bringing them back into the family fold is now being taken more seriously.

¹⁰⁸ For a more detailed discussion of this aspect of modern liberal jurisprudence, see Somin, *Taking Property Rights Seriously?*, *supra* note 2.

¹⁰⁹ 545 U.S. 469 (2005).

¹¹⁰ On the massive controversy generated by *Kelo*, a close 5–4 decision, see, e.g., Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *Minn. L. Rev.* 2100 (2009) (documenting the political and legislative response to the decision); and Somin, *The Judicial Reaction to Kelo*, 4 *Albany Gov’t L. Rev.* 1, 7–10 (2011) (symposium on eminent domain) (documenting skeptical reaction by several state supreme courts).