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## Alito's Voice: Koontz and the end of Justice Steven's Private Private Property Regulation Policy

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**ALITO’S VOICE:  
KOONTZ AND THE END OF JUSTICE STEVENS’  
PRIVATE PROPERTY REGULATION POLICY**

COLIN W. MAGUIRE\*

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I. INTRODUCTION

We missed it. Like a slowly growing river as the snow melts in the hills, it grew from a trickle to a tide. Justice Alito was the author of the Opinion of the Court in *Koontz v. St. John River Water Management District*, 133 S. Ct. 2586, 2592, 186 L. Ed. 2d 697 (2013). Alito’s opinion represented a 5–4 split on the Supreme Court. This was interesting because the last two major water-related cases were unanimous—*Sackett v. EPA*, 132 S. Ct. 1367 (2012), and *Arkansas Game & Fish Commission v. U.S.*, 133 S. Ct. (2012). Then came the *Koontz* opinion. *Koontz* was decided on June 25, 2013. At the time, I was working on an article on *Sackett v. EPA*.<sup>1</sup> It was immediately apparent that *Koontz* was a significant decision. I also was immediately reminded of the concurrences that both Justices Ginsburg and Alito wrote in *Sackett*.

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<sup>1</sup> Colin W. Maguire, *Sackett v. EPA Six Months Out: A Wide-Ranging Effect with an Uncertain Significance*, 30 T.M. COOLEY L. REV. 59 (2013).

In *Sackett*, Justice Ginsburg emphasized judicial restraint in addressing the overzealous actions of a government agency.<sup>2</sup> Indeed, the Justices unanimously agreed that the EPA's actions amounted to nothing more than unreasonable "strong-arming" on behalf of the government.<sup>3</sup> Justice's Alito's concurrence did not exercise such restraint. He argued that 33 U.S.C. § 1367(a) of the Clean Water Act (CWA) allowed for such government behavior because "[t]he position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees."<sup>4</sup>

With those viewpoints in mind when it comes to water and wetland issues, two significant cases came before the Court shortly after *Sackett*. Justice Ginsburg authored the unanimous Opinion of the Court in a case brought on behalf of the State of Arkansas.<sup>5</sup> Arkansas claimed that temporary flooding of state lands by the federal government was a taking. Without determining whether a taking occurred or looking to Arkansas law, the Court limited its ruling to the proposition "that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."<sup>6</sup> Justice Ginsburg specifically looked to the case-by-case approach affirmed in *Tahoe-Sierra* and championed by Justice Stevens.<sup>7</sup>

This set the stage for *Koontz*. With Justice Alito writing the Opinion, the Court announced two holdings. First, government coercion in the form of conditional permits for filling wetlands does not "evade the limitations of *Nollan*<sup>8</sup> and *Dolan*<sup>9</sup>" and could equate to a taking.<sup>10</sup> Second, the monetary exactions required by government entities must meet the nexus and rough proportionality requirements of *Nollan* and *Dolan*.<sup>11</sup>

What does this case mean for takings law? How did the Court come to extend the breadth of takings? Is this another blow to wetlands protection—a troubled and questioned area of the law in recent times through decisions like *Sackett* and *Rapanos*?<sup>12</sup> The Opinion in *Koontz* has deep meaning, but it should not lessen the importance of water resource sustainability. This analysis will attempt to show that the environmental aspect of these cases is often incidental to the majority of the Court. This makes the impact no less real, but *Koontz* also may force us as a country to embrace environmental impact. This analysis will first focus on sustainable water

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<sup>2</sup> *Sackett v. EPA*, 132 S. Ct. 1367, 1374-75 (2012) (Ginsburg, J., concurring).

<sup>3</sup> *Id.* at 1374.

<sup>4</sup> *Id.* at 1375.

<sup>5</sup> *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

<sup>6</sup> *Id.* at 522.

<sup>7</sup> *Id.* (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342, 122 S. Ct. 1465 (2002)).

<sup>8</sup> *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>9</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

<sup>10</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595-96 (2013).

<sup>11</sup> *Id.* at 2599.

<sup>12</sup> *Rapanos v. United States*, 547 U.S. 715, 742 (2006).

resource policies—including the CWA—as a conduit for aggressive government action towards property owners. Indeed, the principal reason for disagreement among the “liberal” and “conservative” factions of the Court appears to focus on the motivations of government administrators—starting with *Rapanos*. Second, the Opinion of the Court in *Tahoe-Sierra*, as authored by then-Justice Stevens, created a strong divergence between takings inquiries based upon (1) government policies or (2) the land use of individual parcels—again, to create breathing room for government administrators in a case regarding water quality sustainability. Third, the analysis will examine a recent trend of bold government regulations imposed against property owners, and how resilient property owners have taken government administrators to the Supreme Court—with impressive results. Finally, this analysis will focus on how Justice Alito authored *Koontz* to set the tone on takings law in this era.

In the end, both Justice Alito and Justice Ginsburg had the foresight to understand the growing tension between property rights and government regulation of water resources in *Sackett*. Justice Ginsburg pled restraint, and exercised that restraint in *Arkansas Fish & Game* to address a policy creating a takings issue. Justice Alito took the next step and brought about a sort of backlash to *Tahoe-Sierra*. He was able to place individual parcel wetlands issues in the camp of *Nollan* and *Dolan*. It is no accident that the nexus standard in *Dolan* is so similar to the nexus standard in *Rapanos*, and now they are connected. In the cases leading up to *Koontz*, the Court surprisingly appeared to agree that government actors were exercising heavy-handed decisions in dealing with water and wetlands issues on property. This administrative attitude could have found some justification in Justice Stevens’ voice on takings issues in the preceding years. But Justice Ginsburg saw the problem with contemporary developments in water resource regulation and takings law. That problem created an opportunity which Justice Alito appears to have capitalized on.

## II. CLEAN WATER OFTEN LEADS TO AGGRESSIVE ACTIONS

Significant sections of land in, around, and near oceans, lakes, and rivers are subject to the federal Clean Water Act (CWA) under 33 U.S.C. § 1362(7); this section of law states that the CWA applies to “navigable waters” which means the waters of the United States.” The EPA and the U.S. Army Corps of Engineers have a substantial definition of what a wetland is based upon what the term “waters of the United States” means, especially in their own interpretation of the CWA.<sup>13</sup> But the breadth of this definition, as applied, was tackled head on by the Supreme Court of the United States in *Rapanos*, and added a layer of analysis to the government’s definition:

[F]irst, 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.<sup>14</sup>

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<sup>13</sup> 33 C.F.R. § 328.3 (2013).

<sup>14</sup> *Rapanos*, 547 U.S. at 742.

This means a government entity must show a “significant nexus” between the land and the “waters of the United States.”<sup>15</sup> This language was the hallmark of the *Rapanos* Opinion.

But the reasoning behind the *Rapanos* Opinion is couched in expansive administrative attitudes regarding jurisdiction on behalf of the EPA and Army Corps of Engineers. The Court noted that, unlike the jurisdiction under the CWA to protect against filling wetlands, the jurisdiction for directly polluting water extended to any source.<sup>16</sup> Therefore, the Court felt it was a stretch for the government to argue that pollutants such as effluents would pollute water if the jurisdiction under the CWA was limited because other legislation addressed this concern.<sup>17</sup>

The Court’s concern in *Rapanos* was caused by cases like *U.S. v. Deaton*—a 2003 Fourth Circuit decision which illustrates a common example of how a private developer may run afoul of the CWA.<sup>18</sup> In that case, a developer dug a drainage ditch in Maryland in order build a subdivision because an existing drainage ditch insufficiently drained the property.<sup>19</sup> That existing ditch drained into another ditch, and then a stream, and then a river, and then the Chesapeake Bay—a trip of 32 miles.<sup>20</sup> After dirt was placed near the ditch, the U.S. Army Corps of Engineers filed a civil suit against the property owner claiming that this was an unlawful discharge of pollutants into the existing ditch—a wetland—in violation of CWA 33 U.S.C. § 1344(a) and 33 C.F.R. § 328.3(a)(5).<sup>21</sup> Therefore, violators get fined twice as much—\$65,000.00 per day as opposed to \$32,500.00 per day for violating a law and a federal rule.<sup>22</sup> Prior to *Rapanos*, CWA jurisdiction required only a hydrologic connection between the wetlands and navigable waters.<sup>23</sup> This allowed for government action like that in *Deaton*.

As the conservative elements of the Court pointed out in *Rapanos*, government actors were focusing on the CWA and its language of wetlands “adjacent to navigable bodies of water and their tributaries,” and then taking the term “adjacent” and deciding that it “may be interpreted who-knows-how broadly.”<sup>24</sup> The Court then chastised the dissent—composed of the more liberal faction of the Court, stating:

It is not clear why roughly defined physical proximity should make such a difference—without actual abutment, it raises no boundary-drawing ambiguity, and it is undoubtedly a poor proxy for ecological significance. In fact, though the dissent is careful to restrict its discussion to wetlands

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 743.

<sup>17</sup> *Id.*

<sup>18</sup> *U.S. v. Deaton*, 332 F.3d 698 (4th Cir. 2003).

<sup>19</sup> *Id.* at 702.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 702–3.

<sup>22</sup> *Clean Water Act: Penalties*, EPA, <http://www.epa.gov/region6/6en/w/cwa.htm> (last visited Mar. 31, 2015).

<sup>23</sup> *Deaton*, 332 F.3d at 712.

<sup>24</sup> *Rapanos v. U.S.*, 547 U.S. 715, 748 (2006).

“adjacent” to tributaries, its reasons for including those wetlands are strictly ecological—such wetlands would be included because they “serve . . . important water quality roles” and “play important roles in the watershed . . . .” This reasoning would swiftly overwhelm SWANCC altogether; after all, the ponds at issue in SWANCC could, no less than the wetlands in these cases, “offer ‘nesting, spawning, rearing and resting sites for aquatic or land species,’” and “‘serve as valuable storage areas for storm and flood waters.’”<sup>25</sup>

Again, the liberal faction of the Court cautioned restraint in interpreting the actions of government actors encumbering land through water quality efforts.

The dissent looked to broad policy and a good faith belief that the government was doing the right thing in encumbering a private property owner. The majority of the Court did not share this thought-process at all, instead looking to the potential for government abuse of power:

The dissent’s exclusive focus on ecological factors, combined with its total deference to the Corps’ ecological judgments, would permit the Corps to regulate the entire country as “waters of the United States.”<sup>26</sup>

Interestingly, there are serious questions as to whether protecting wetlands the way wetlands are protected under the CWA is even effective. This imprecise regulation has caused many observers, and possibly even liberal Justices on the Supreme Court, to question the necessity of the government attitudes toward wetlands protection.<sup>27</sup>

In fact, there is significant evidence which suggests that the CWA is extremely inefficient in providing ecological benefit, especially compared to the Clean Air Act.<sup>28</sup> For instance, large parking lots are perceived as water run-off and pollution nightmares under the water sustainability principles; but they can also create a “park once” mentality in community members which leads to a reduction in overall carbon emissions.<sup>29</sup> Plus, stormwater run-off from parking areas is manageable through water diversion techniques like the use of bioswales and permeable water detention areas.<sup>30</sup>

But there is even criticism of the ecological value of wetlands mitigation—the policy used in *Koontz*—because many developed parcels have greater ecological value than the parcel substituted in mitigation.<sup>31</sup> Others, particularly property rights advocates, have argued that there is a more subjective purpose in what is over-

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<sup>25</sup> *Id.* at 748–49 (internal citations omitted).

<sup>26</sup> *Id.* at 749.

<sup>27</sup> Richard A. Epstein, *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 HARV. J.L. & PUB. POL’Y 23, 38 (2014).

<sup>28</sup> Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 33 (2001) (citing J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 101–35, 147–48 (1998)).

<sup>29</sup> DEAN M. FRIEDERS, FOUNDATIONS FOR SUSTAINABLE DEVELOPMENT: LAW, REGULATION, AND PLANNING 48–50 (ABA 2012).

<sup>30</sup> *Id.* at 79.

<sup>31</sup> Stewart, *supra* note 28, at 76.

regulation masquerading as water resources protection. Indeed, the presence of a wetland and government interest can “bring chills to developers’ spines.”<sup>32</sup> In this sense, it is not surprising that the most significant takings case of the 2000–2010 decade involved the protection of water resources from private development.

III. *TAHOE-SIERRA* CREATED A CLEAR DIVERGENCE OF TAKINGS LAW IN THE HOPE THAT WATER RESOURCE REGULATION WAS TRENDING IN THE RIGHT DIRECTION

Justice Stevens wrote the Opinion of the Court in *Tahoe-Sierra*. Justice Stevens wrote the *Tahoe-Sierra* Opinion not many years after writing the infamous *Kelo* decision. What is critical to note is that, prior to Justice Alito’s arrival, Justice Stevens held the ear of the Court (particularly Justice Kennedy) on land use issues. This is not surprising given his background. Justice Stevens’ family was part of the prominent Chicago landowning and business elite in the early part of the 20<sup>th</sup> Century.<sup>33</sup> Justice Stevens’ education on the campus of the University of Chicago ultimately made him a brilliant, constant experimenter with norms and judicial policy.<sup>34</sup> But he also saw his family’s amassing of property wealth, followed by the Great Depression and the government taking his family’s businesses and properties into receivership.<sup>35</sup> How this life experience impacted his decisions is unclear, but he certainly wrote *Kelo* and *Tahoe Sierra*—two takings cases with very different factual basis—from a unique perspective: a liberal jurist and the son of a staunch Republican businessman who lost everything to the government when times were hard.

*Tahoe-Sierra* involved a series of moratoria on any development along scenic Lake Tahoe. Were these moratoria takings, and was that really the issue the Court looked at?<sup>36</sup> The initial focus of Justice Stevens’ analysis was on the unique beauty and ecological character of Lake Tahoe.<sup>37</sup> The water of Lake Tahoe was among the clearest in the world.<sup>38</sup> It was undisputed that, in this particular case, significant development around Lake Tahoe over 40 years negatively impacted the quality of the water.<sup>39</sup> However, it was also undisputed that the property value of the undeveloped land around Lake Tahoe was significantly impacted due to the government moratoria on development.<sup>40</sup>

Of critical importance to the Court, was the fact that the landowners banded together in a single entity to challenge the nature of the government moratorium

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<sup>32</sup> FRIEDERS, *supra* note 29, at 112.

<sup>33</sup> BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 21–25 (2010).

<sup>34</sup> *Id.* at 27.

<sup>35</sup> *Id.* at 31.

<sup>36</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 306–07 (2002).

<sup>37</sup> *Id.* at 307.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 308.

<sup>40</sup> *Id.* at 309.

policy—arguing that the policy created a categorical temporary taking.<sup>41</sup> Because it was agreed that the total economic loss of the singular parcels had occurred for a period of time, the landowners wanted the Court to apply the rule in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). The rule in *Lucas*, which is tied to *Nollan*,<sup>42</sup> states that an owner of a particular parcel suffers a taking when all of the owner's economic use is idle.<sup>43</sup>

Combining this rule with the possibility of a temporary taking was possible through the Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). While Justice Stevens agreed that *First English* was significant, the Court opined that *First English* was about policy and not about whether a taking actually occurred.<sup>44</sup> Justice Stevens announced two completely distinct tracks for a takings analysis.

Justice Stevens agreed that all takings cases originate from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Penn Coal*, Justice Holmes announced the rule that “if a regulation goes too far it will be recognized as a taking.”<sup>45</sup> Justice Stevens also recognized the long-standing “whole parcel theory” from Justice Brandeis' dissent.<sup>46</sup> Justice Stevens reasoned that this meant that regulatory takings and physical invasions of property were distinct takings categories. Regulatory takings address the actions of a government in creating a policy which leads to a taking or series of takings. Physical invasions of property address a particular government body's intrusion with a particular parcel of land.<sup>47</sup>

Therefore, Justice Stevens looked to *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) and *First English* as examples where the full taking of the individual parcel was not an issue for the Court. Justice Stevens reasoned that the only issues in those cases involved whether the regulation “went too far”—as opposed to whether the “whole parcel” lost value.<sup>48</sup> Conversely, Justice Stevens reasoned that *Lucas* involved the “valueless” nature of a single parcel where a taking was declared at the trial court level.<sup>49</sup> The rule in *Lucas* involved the loss of “all economically beneficial use” to the whole parcel.<sup>50</sup>

This caused Justice Stevens to find *Lucas* completely inapplicable to the facts in *Tahoe-Sierra*—particularly because there were no fact-issues in the case involving individual parcels.<sup>51</sup> Instead, he applied the *Penn Central* factor analysis for a

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<sup>41</sup> *Id.* at 323–24.

<sup>42</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

<sup>43</sup> *Id.* at 1019.

<sup>44</sup> *Tahoe-Sierra*, 535 U.S. at 328 (citing *First English*, 482 U.S. at 311).

<sup>45</sup> *Id.* at 326 (quoting *Penn Coal*, 260 U.S. at 415).

<sup>46</sup> *Id.* at 326, n.22 (citing *Penn Coal*, 260 U.S. at 417 (Brandeis, J., dissenting)).

<sup>47</sup> *Id.* at 326–28.

<sup>48</sup> *Id.* at 326–29.

<sup>49</sup> *Id.* at 329.

<sup>50</sup> *Id.* at 329–30.

<sup>51</sup> *Id.* at 330–31.

regulatory taking.<sup>52</sup> But why abrogate *Penn Coal* into two rules when applying the rule in *Lucas* to regulatory takings could create an incredibly high burden for impacted property owners? Fascinatingly, Justice Stevens stated significant concerns regarding the decisions of government administrators across the board.<sup>53</sup> He noted that *First English* addressed the issue of local governments taking the time to administer land use issues without running afoul of takings issues.<sup>54</sup> Justice Stevens again cited the natural delay in the administrative process to create proper land use guidelines in order to sustain Lake Tahoe's ecological value. Justice Stevens opined that this is a well-reasoned principle which should apply broadly.<sup>55</sup> This was consistent with Justice Stevens' extensive dissent in *First English* which passionately argued that a government body's administrative actions deserve significant deference in a regulatory takings analysis.<sup>56</sup>

Sitting in the Supreme Court in 2002, deciding *Tahoe-Sierra*, Justice Stevens' argument makes a great deal of sense. First, there was not a lot of sympathy for multi-millionaire retirees who wanted to build their dream mansions at the expense of turning brown and muddy one of the most pristine lakes in the world. Furthermore, the "go green" movement was starting to gain mainstream popularity when significant programs like LEED® were unveiled in 2000.<sup>57</sup> As evidenced in the facts of *Tahoe-Sierra*, *Rapanos*, and even in circuit decisions like *Deaton*, government regulators from the federal to local level were emboldened during this time period to aggressively regulate water quality. As Justice Stevens indicated, *Tahoe-Sierra* may have turned out differently if individual landowners came forward as they had in *Nollan* and *Penn Coal*.<sup>58</sup>

By stating that only individuals can challenge per se takings while groups must challenge policy-based takings, Justice Stevens successfully added a layer of cost and litigation to one who seeks to accuse the government of taking his land. Justice Stevens is not only siding with regulators, but also betting that the regulators will not abuse their power and only target major sustainability projects. After all, a 32-month moratorium on development for dozens of landowners is patently absurd—unless applied to the rights facts. Justice Stevens' distinction was clearly a decision based upon previous Opinions, but there was a risk associated with it. The risk was that government administrators would not act with unreasonable aggression in response. If they did, the Court might well make it far easier for individual property owners to assert a taking. That risk was realized in *Sackett*.

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<sup>52</sup> *Id.* at 331.

<sup>53</sup> *Id.* at 329.

<sup>54</sup> *Id.* (citing *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 321 (1987)).

<sup>55</sup> *Id.* at 339.

<sup>56</sup> *First English*, 482 U.S. at 329–40 (Stevens, J., dissenting).

<sup>57</sup> U.S. GREEN BUILDING COUNCIL, <http://www.usgbc.org/about/history>.

<sup>58</sup> *Tahoe-Sierra*, 535 U.S. at 332.

IV. *SACKETT*: UNREASONABLE BEHAVIOR FOR THE SAKE OF WATER AND JUSTICE  
ALITO'S DISCONTENT

In retrospect, the decision in *Sackett* was foreseeable. The Opinion, in part, reads like a scolding from a unanimous Court. As previously referenced, the years preceding 2007 saw a mix of emboldened government water quality administrators, a highly-subjective attitude of administrators regarding rules and procedures, and a questioning of the effectiveness of wetlands protection in certain cases. *Sackett* involved one legal fact-issue for resolution: whether the EPA had jurisdiction over the Sacketts' property.

In 2007, Mr. & Mrs. Sackett were building their home on a parcel of land near Priest Lake in Idaho. However, several lots separated the parcel from the lake.<sup>59</sup> The Sacketts filled their small lot with dirt for construction of their home.<sup>60</sup> Priest Lake is a navigable water of the United States as defined under the CWA 33 U.S.C. § 1362(7).<sup>61</sup> However, the EPA found the Sacketts' property was an "adjacent" wetland to Priest Lake and issued a compliance order against the Sacketts alleging they violated the CWA when they filled in a protected wetland.<sup>62</sup> The EPA implemented a potential \$75,000 fine for each day the Sacketts failed to comply with its order.<sup>63</sup>

Worse, the EPA declined to hold a hearing on the issue because 33 U.S.C. § 1319(a), unlike 33 U.S.C. § 1319(b) and (g), did not explicitly provide for any kind of review.<sup>64</sup> The EPA's position that compliance orders under 33 U.S.C. § 1319(a) were precluded from pre-enforcement judicial review, as opposed to the definition of a wetland under the CWA as applied to the Sacketts' property, fueled the litigation to come. In no uncertain terms, the position of the EPA was "comply so that you can appeal, or pay \$75,000 per day."

The tactics and attitudes of the EPA did not go over well with the Supreme Court. A unanimous Court used the term "strong-arming" and derided the idea that the EPA could claim it achieved "voluntary compliance" with such tactics.<sup>65</sup> But the EPA appeared undeterred, with an EPA official stating that it was "business as usual" after *Sackett*.<sup>66</sup> The attitude of the government administrators in the case led to two completely different concurrences.

Justice Ginsberg first wrote a concurrence which, by itself, read in an almost counterintuitive manner. In part, she wrote:

The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question. Whether the Sacketts could challenge not

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<sup>59</sup> *Sackett v. EPA*, 132 S. Ct. 1367, 1370–71 (2012).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Maguire, *supra* note 1, at 63–64.

<sup>65</sup> *Sackett*, 132 S. Ct. at 1367, 1374.

<sup>66</sup> Maguire, *supra* note 1, at 69.

only the EPA's authority to regulate their land under the Clean Water Act, but also, at this pre-enforcement stage, the terms and conditions of the compliance order, is a question today's opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court's opinion.<sup>67</sup>

Here is the odd part: the Sacketts were fighting for the ability to challenge the regulatory actions of the EPA—whereas the EPA argued this challenge was not yet ripe. But a challenge to the EPA's authority in this case was inherently a challenge of the conditions and penalties. The penalties for not complying with the EPA's rules were automatic once jurisdiction was established. Justice Alito, as referenced below, appeared to understand the significant issue which was dodged in *Sackett*—the breadth of the EPA's jurisdiction under the CWA. To Justice Alito, there was no tangible distinction between the jurisdiction of the CWA and the aggressive tactics of individual water quality regulators.

Again, the reason for Justice Ginsburg's short, seemingly out of place concurrence, rests with a concern for the power of water a quality administrator to regulate water quality. It was beyond argument that the EPA administrators in this case “strong armed” the Sacketts through the use of jurisdictional keep away. But Justice Ginsburg expresses concern for the value of water quality regulation as a whole—as though the facts in *Sackett* were an isolated incident. However, it was well-established that this behavior was nothing more than the typical process of the EPA.<sup>68</sup>

That was right where Justice Alito picked up his concurrence. It is worth taking a moment to consider perceptions regarding Justice Alito and his positions on the Court. At the time of Justice Alito's confirmation hearings, he was considered a strong conservative nominee with support from leading neocons in the Bush Administration.<sup>69</sup> Indeed, observers such as Professor Cass Sunstein researched Justice Alito's dissents before joining the Supreme Court and found that Justice Alito was against “individual rights” in 84% of cases—many times on panels with all Republican-appointed Judges.<sup>70</sup> Therefore, one might not pick Justice Alito as a coalition-builder. Indeed, his concurrence in *Sackett* advocates a step further than the unanimous Court is willing to go. But Justice Alito was also setting the stage for a future agreement among five of the Justices.

In his concurrence, Justice Alito's distaste for the EPA's position was apparent in the opening line of this concurrence:

The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights

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<sup>67</sup> *Sackett*, 132 S. Ct. at 1374–75 (Ginsberg, J., concurring).

<sup>68</sup> Maguire, *supra* note 1, at 62 (citing *Sackett v. EPA*, 622 F.3d 1139, 1141 (9th Cir. 2010)).

<sup>69</sup> RONALD DWORKIN, *THE SUPREME COURT PHALANX: THE COURT'S NEW RIGHT WING BLOC* 24 (2008).

<sup>70</sup> *Id.* at 25–6.

of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.<sup>71</sup>

Justice Alito then decried the CWA as “notoriously unclear.”<sup>72</sup> He noted that almost any piece of land that is wet for part of the year “is in danger of being classified by EPA employees as wetlands covered by the [CWA].”<sup>73</sup> Again, the focus was on the decisions of administrators charged with water quality management.

Next Justice Alito engaged in an analysis that should appear familiar to those who have read his Opinion in *Koontz*:

The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. *By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.*<sup>74</sup>

In Justice Alito's reasoning, there are strong undertones of a takings analysis. He continued to analyze the breadth of the CWA jurisdiction that administrators interpret through reference to *Rapanos*.<sup>75</sup> He then beseeched Congress to address jurisdictional issues under the CWA.<sup>76</sup>

Justice Alito's final thoughts in his concurrence were focused on the concerns of property owners. In the regime of water quality and control, he noted a significant amount of ambiguity and uncertainty.<sup>77</sup> In this context, Justice Alito only referenced the CWA—a federal standard for federal agencies.<sup>78</sup> But what about even more expansive state statutes, or other federal water programs? Would Justice Alito's attitudes translate to a broader impact? The answer proved a resounding ‘yes’, with Justice Ginsburg offering caution the entire way.

V. *ARKANSAS FISH & GAME: THE WATER RISES IN 2013 WITH THE NEW ATTITUDE TOWARD TAKINGS*

Observers have noted a strong push by property owners—in litigation and advocacy—to thwart the actions of environmentalist and/or government agency

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<sup>71</sup> *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) (emphasis added).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1375–76.

<sup>78</sup> *Id.*

actions impacting private land. Both *Rapanos* and *Sackett* were considered significant victories for private property owners.<sup>79</sup> The year 2013 may stand as the year of the private property owner in modern Supreme Court history.

Though technically decided on December 4, 2012, *Arkansas Fish & Game Commission v. U.S.* kicked off the year with a victory for property owners. Interestingly, the property owner who brought the claim also happened to be a state agency.<sup>80</sup> Still, the decision impacts all property owners.

Interestingly, the case arose because the U.S. Army Corps of Engineers was heeding the wishes of private farmers who had requested that the Corps not release run-off from the Black River onto their lands.<sup>81</sup> Instead, the Corps deviated from its normal plan and ran the water in such a way as to flood state land. The state took exception and sued for a temporary taking of its land.<sup>82</sup> Hunters frequently used this land—which lost all of its value to the public during these flooding periods and caused economic damage to the state agency.<sup>83</sup> The federal circuit found that there was no temporary taking for government flooding of lands.<sup>84</sup> Critically, the issue before the Supreme Court was whether a government policy of intentional flooding could constitute a temporary taking, not whether a taking had occurred—with specific reference to *First English*.<sup>85</sup>

Writing the Opinion of the Court, Justice Ginsburg quickly dispatched the idea that temporary federal flooding was not a potential taking:

Tellingly, the Government qualifies its defense of the Federal Circuit's exclusion of flood invasions from temporary takings analysis. It sensibly acknowledges that a taking might be found where there is a “sufficiently prolonged series of nominally temporary but substantively identical deviations.” This concession is in some tension with the categorical rule adopted by the Court of Appeals. Indeed, once it is recognized that at least some repeated nonpermanent flooding can amount to a taking of property, the question presented to us has been essentially answered. *Flooding cases, like other takings cases, should be assessed with reference to the “particular circumstances of each case,” and not by resorting to blanket exclusionary rules.*<sup>86</sup>

Because the case at bar was policy-driven, without a specific whole parcel analysis before the Court, the *Penn Central-First English-Tahoe-Sierra* analysis applied to *Arkansas Game & Fish*. Justice Ginsburg immediately qualified the Opinion to keep open the issue of whether a government temporary taking required intent—noting

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<sup>79</sup> See, e.g., Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847, 908 (2013).

<sup>80</sup> *Arkansas Game & Fish Comm’n v. United States*, 133 S. Ct. 511, 512–13 (2012).

<sup>81</sup> *Id.* at 513.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 513–14.

<sup>86</sup> *Id.* at 521 (emphasis added) (citations omitted).

this issue was not addressed at the court of appeals and so the Court could not hear it.<sup>87</sup>

*Arkansas Fish & Game* was another unanimous Opinion of the Court. Like in *Sackett*, unanimity was gained through a narrow Opinion. Again, the Court specifically refused to go down the path of *Lucas*, *Nollan*, and *Dolan*:

For the same reason, we are not equipped to address the bearing, if any, of Arkansas water-rights law on this case. The determination whether a taking has occurred includes consideration of the property owner's distinct investment-backed expectations, a matter often informed by the law in force in the State in which the property is located. But Arkansas law was not examined by the Federal Circuit, and therefore is not properly pursued in this Court.<sup>88</sup>

So what did the Court decide? The Court ruled “simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.”<sup>89</sup> Referencing *Tahoe-Sierra*, the Court then reaffirmed that time is a factor in assessing a temporary taking.<sup>90</sup> Justice Ginsburg again looked to the somewhat nebulous *Penn Central* test for assessing government policies as opposed to direct government actions. This was similar to her unique concurrence in *Sackett*, which attempted to couch the issue purely in a government policy and not the actions of the government actors.

Reactions to *Arkansas Fish & Game* were mixed. It was widely acknowledged that no major step was taken in the realm of takings law.<sup>91</sup> However, it was also noted that the Court had unanimously agreed with property owners—perhaps a significant outcome.<sup>92</sup> But maybe the more significant accomplishment was that the Court unanimously agreed with property owners in both *Sackett* and *Arkansas Fish & Game*. Both cases involved government actors and water regulation. In both cases, it proved difficult for the government actors to objectively explain why the actions of the governments were utterly free from legal challenges and reasonable examination.

Contrary to Justice Ginsburg's tone in her Concurrence in *Sackett* and her Opinion in *Arkansas Fish & Game*, both cases featured government actors' actions in the context of water regulation. After all, the policies challenged in those cases existed long before those policies were challenged. So, what changed over the years to alter government attitudes and actions? The explanation may prove as straightforward as physics—for every action, there is an equal and opposite reaction.<sup>93</sup> The Court, through Justice Stevens, decided *Kelo* and *Tahoe-Sierra* to embolden government administrators. By all appearances, that has led to the aggressive reactions of property owners in litigation.

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<sup>87</sup> *Id.* at 521–22.

<sup>88</sup> *Id.* at 522 (emphasis added) (citations omitted).

<sup>89</sup> *Id.* at 522 (emphasis added).

<sup>90</sup> *Id.*

<sup>91</sup> Robert H. Thomas, *Supreme Court: Flooding, Even if Temporary, Could be a Taking*, 36 No. 10 ZONING AND PLANNING LAW REPORT 1 (2013).

<sup>92</sup> *Id.*

<sup>93</sup> NEWTON'S THIRD LAW OF MOTION.

As some like Professor Richard Epstein further argue, government attitudes toward wetlands and water management create a haven for government abuse and behavior our society generally abhors:

Yet under the current law, behavior that is unconscionable in the private sphere seems acceptable to government actors who regard themselves as wholly unconstrained by any concerns with private property or with demonstrating the imminence of any potential harms. Further, there is no noneconomic value that justifies the government beating up small people by threatening them with overwhelming fines if they dare challenge a government edict. The government action from start to finish was ugly and odious and should be condemned by all people on all sides of any legitimate environmental dispute.<sup>94</sup>

Whether individual government regulators take their regulations personally, it is difficult for the average real property owner not to have a strong, personal connection with any property use dispute.

The Takings Clause has always provided a “psychological lift” to property owners, if not always an actual remedy in a court.<sup>95</sup> Starting at *Rapanos*, and picking up significant steam in 2012–2013, property owners have forced the Supreme Court to define and redefine their rights in the context of water management regulations.<sup>96</sup> Furthermore, property owners value an economic analysis of all property issues.<sup>97</sup> This often puts them at odds with regulators, who, at least publicly, attribute their values to ecological motivations. Property owners have created a steady stream of litigation which always includes either representation or amicus briefs from groups who traditionally support property owners such as The Cato Institute, The Heritage Foundation, Institute for Justice, and the Pacific Legal Institute. Again, the distinction between a “policy” takings analysis and a “parcel” takings analysis is that *Penn Central* is problematic if the ultimate goal is to support government regulators. A clever jurist like Justice Alito will find enough populist support to make a “parcel” takings analysis easier to win for the property owner.

Why? Because the narrative of CWA regulation and water-related takings is a frightening one for almost anyone who is not a government regulator. It is a narrative of government tyranny predicted and reinforced through repetitive litigation. Though the liberal faction of the Court worries on ecological principle, the conservative faction of the Court has proven that—in the context of water regulation—government accountability and objectivity is highly questionable. Maybe government regulation of water resources is not as aggressive as the recent Supreme Court cases depict; but perception becomes reality when the Court issues a significant Opinion.

There is no more Justice Stevens on the Court. He was the leading force of property owner-government cases, acquiring the ear and signature of Justice Kennedy in both 2002’s *Tahoe-Sierra* and 2006’s infamous *Kelo*. Indeed, the “right bloc” of the Court has come together on many issues—some would say with

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<sup>94</sup> Epstein, *supra* note 27, at 35 (emphasis added) (discussing *Sackett*).

<sup>95</sup> Butler, *supra* note 79, at 888–89.

<sup>96</sup> *Id.* at 888.

<sup>97</sup> *Id.*

destructive intentions toward precedent-setting decisions.<sup>98</sup> Surely, Justice Alito wrote the Opinion in *Koontz* using *Tahoe-Sierra* as a weapon against Justice Stevens' interests related to insulating government regulators. But it is fair to say that the reasoning in *Koontz* logically builds off the reasoning in *Tahoe-Sierra*—a case where Justice Stevens found support from Justice Kennedy. Therefore, this is more of an example of Justice Alito's tone and reasoning carrying the day as a leader on property rights and water regulation issues.

Still, one can understand the concern of liberal jurists because the concepts presented in *Koontz*, as foreshadowed in *Sackett*, cast doubt upon all the motivations of all government water regulation. Therefore, it is hardly a surprise that the federal government filed a special amicus brief in *Koontz*; or that the Pacific Legal Foundation—the Sacketts' counsel before the Court a year earlier—represented the property owner in *Koontz*.<sup>99</sup>

#### VI. JUSTICE ALITO BRINGS THE PRO-PROPERTY OWNERS' MOMENTUM FULL CIRCLE IN *KOONTZ*

In *Koontz*, Justice Alito laid out the general *Penn Central* test.<sup>100</sup> He listed the balancing test factors when assessing the government regulation such as “character” and “economic impact.”<sup>101</sup> But as Justice Stevens pointed out in *Tahoe-Sierra*, Justice Alito recited that parcel-specific government actions, such as exactions, were different.<sup>102</sup> These government actions are viewed through the lens of *Nollan* and *Dolan*—even *Lucas* falls into this camp because of Stevens' Opinion in *Tahoe-Sierra*.<sup>103</sup> As Justice Alito announced, the protections of *Nollan* and *Dolan* apply to any government restriction which does not have a substantial nexus and rough proportionality to the restricted development.<sup>104</sup>

With that line of thinking, the Court examined a situation where private developer *Koontz* looked to develop the northern 3.7 acres of his 14.9 acre property outside of Orlando, Florida.<sup>105</sup> The southern section of the property featured a small creek and assorted wetlands. Further, standing water was found in and around the power lines which bisected the property east to west. There was also a drainage ditch on the western edge of the property.<sup>106</sup> The developer proposed deeding the 11

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<sup>98</sup> DWORKIN, *supra* note 69, at 47.

<sup>99</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013).

<sup>100</sup> *Id.* at 2604.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2604–05 (emphasis added).

<sup>105</sup> *Id.* at 2591–92.

<sup>106</sup> *Id.* Justice Alito specifically referenced a point in the record that the land “may be a suitable habitat for opossums;” even taking a sentence of the Opinion to do so. One has to wonder what motivated a sentence like this. Perhaps this was a way to mock the alleged ecological motivations of the regulatory agency. The previous sentence referencing the results of a wildlife survey appears to indicate an actual appreciation for the inherent ecological concerns regarding the development. Though, he did state that the wildlife survey found “a turtle.” This represents a not insignificant question within the current American conservative

southern acres of the property as a conservation easement to the St. John River Water Management District—the government water and wetlands regulator for that region of Florida.<sup>107</sup> Because the development would impact land that “draws water from, drains into, or is placed into the waters of the state” under Fla. Stat. § 373.403(5), the regulator had to approve a permit in order for the project to go forward.<sup>108</sup>

The regulator found the easement inadequate. Instead, the regulator offered two conditions to the developer before the developer granted the permit:

First, the District proposed that petitioner reduce the size of his development to 1 acre and deed to the District a conservation easement on the remaining 13.9 acres. To reduce the development area, the District suggested that petitioner could eliminate the dry-bed pond from his proposal and instead install a more costly subsurface stormwater management system beneath the building site. The District also suggested that petitioner install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.

In the alternative, the District told petitioner that he could proceed with the development as proposed, building on 3.7 acres and deeding a conservation easement to the government on the remainder of the property, if he also agreed to hire contractors to make improvements to District-owned land several miles away. Specifically, petitioner could pay to replace culverts on one parcel or fill in ditches on another. Either of those projects would have enhanced approximately 50 acres of District-owned wetlands. When the District asks permit applicants to fund offsite mitigation work, its policy is never to require any particular offsite project, and it did not do so here. Instead, the District said that it “would also favorably consider” alternatives to its suggested offsite mitigation projects if petitioner proposed something “equivalent.”<sup>109</sup>

The Florida District Court of Appeal for the Fifth Circuit sided with the developer in the ensuing litigation—finding that the regulator had unlawfully imposed upon the developer’s land based upon *Nollan* and *Dolan*. However, the Florida Supreme Court sided with the regulator.<sup>110</sup> Justice Alito’s unmistakable tone toward water resource regulators shone through again in his analysis of the procedural history:

The Florida Supreme Court blessed this maneuver and thus effectively interred those important decisions. Because we conclude that *Nollan* and

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ethos—how seriously to take conservation efforts as balanced against property rights concerns? In this sense, Justice Alito’s rule may actually force proportionality between development and conservation—only with public dollars.

<sup>107</sup> *Id.* at 2592–93.

<sup>108</sup> *Id.* at 2592.

<sup>109</sup> *Id.* at 2593.

<sup>110</sup> *Id.*

*Dolan* cannot be evaded in this way, the Florida Supreme Court's decision must be reversed.<sup>111</sup>

The regulator relied on the long-standing law in *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926). In short, the regulator argued that the developer should tolerate the cost of good land use policy.<sup>112</sup> But Justice Alito instructed that *Village of Euclid* is tempered through the realities explored in *Nollan* and *Dolan*. In short, the government regulator had to show that there was a substantial nexus and rough proportionality between the development and the regulator's demands.<sup>113</sup>

The Supreme Court found no substantial nexus or rough proportionality between developing Koontz's small wetland parcel and paying money to improve the completely distinct parcel which the regulator owned. This was decided even though no land was necessarily taken, but rather that it could have been taken if the regulator was not challenged.<sup>114</sup> Then Justice Alito hit on a fascinating point that may have many implications. He notes that the regulator is correct to say that offering to only develop one acre of the land was not a taking under *Nollan* and *Dolan*.<sup>115</sup> However, the act of offering the unsupported mitigation in exchange for 2.7 more developable acres was a taking under *Nollan* and *Dolan*. Therefore, only 2.7 acres were taken because 1 acre could have proven a reasonable outcome. It was the overreaching act of the water and wetland regulator that caused the taking.<sup>116</sup>

Justice Alito's reasoning appears to bring *Nollan*, *Dolan*, and the whole parcel theory in *Penn Coal* into close proximity. The whole taken parcel is that which is encumbered by an unreasonable condition, even if the taken property is overlaid by untaken property. Again, it is the step too far from the water regulator that brought the wrath of the Court. The law itself was not unreasonable, having existed since 1972—the very year Koontz purchased the property in question.<sup>117</sup> *Nollan* was a 1987 case *Dolan* from 1994. What changed? Was it an attitude in society, an attitude in the Court, or both?

Perhaps Justice Stevens believed in the decency of regulation juxtaposed against the arbitrary whims of private property owners. He extolled the values of planning and the collective community interest in *Kelo*. He added a layer of environmental concerns in *Tahoe-Sierra*. Since Justice Stevens' retirement, his successors lack the dynamic ability to rally a majority to his view in this area of the law. Yet when you read the facts of *Sackett*, *Arkansas Fish & Game*, and *Koontz*, where are the sympathetic facts for the regulator? The sympathy is nowhere in the facts of these recent cases. The regulator is “in the wrong” in the court of law and the court of public opinion. But is this because the regulator's policy is inherently unjust? Absolutely not. Rather, the vitriol toward water and wetlands regulators comes from

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<sup>111</sup> *Id.* at 2591 (emphasis added). One would expect no less in terms of creative criticism from someone who “corrected” the President of the United States during the State of Union.

<sup>112</sup> *Id.* at 2595.

<sup>113</sup> *Id.* at 2595–96.

<sup>114</sup> *Id.* at 2596.

<sup>115</sup> *Id.* at 2598.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2592–93.

the mutually connected concepts that: (1) regulators want to make a true difference in water quality; and (2) they insist that it is the landowner who exclusively must pay in order to achieve that goal.

The process environmental regulators, particularly water quality regulators, use with landowners is a system of exactions which many consider unjustifiable, and “an absolute abuse of government power.”<sup>118</sup> Again, Professor Epstein frames the issue very well when he states:

The recent case of *Koontz v. St. Johns River Water Management District* comes to mind. That case tried to get around the notion that the state must pay for what it wants to take by inventing a very large notion of “harm,” and then announcing that some duty of environmental mitigation shall be imposed upon all landowners who have the temerity to want to build on their own land without creating a nuisance to anybody. The performance on every side of this particular argument was lamentably incompetent in terms of the way in which it was organized.

At the beginning of oral argument, Justice Sotomayor and Justice Ginsburg asked bluntly if the plaintiff wished to challenge the doctrine of environmental mitigation, to which the lawyer said no. That was the first mistake. What the lawyer should have said is, “Yes, there is no more pernicious doctrine in the entire armory of environmental law than that one because it upsets the proper relationship of private property to the state.” What is the danger in this case? It lies in the ad hoc view that the government somehow owns an environmental easement over all property, which it will waive only if private individuals engage in acts of environmental mitigation.<sup>119</sup>

From a policy standpoint, this is what regulators might take away from this case: pay for what you want like everyone else.<sup>120</sup> This entire analysis of the attitudes and boldness of water quality regulators has ultimately become an issue of cost. Why? Because the issue of water regulation is, to the landowner, an economic one. The sustainability and quality of water resources are societal demands, and yet society—as represented through the actions of the regulators in *Koontz*—believes that it is not society’s responsibility to shoulder the burden. Instead, society can pay regulators to force landowners to spend significantly more than the regulator’s salary. It is a net-positive investment for the regulatory unit; it is also wildly unfair government activity which is guarded against under the Constitution. From a public policy standpoint, wetlands mitigation as displayed in *Koontz* is also inappropriate because it misses the point of mass sustainability—the commitment of the masses.

The economic analysis of Justice Alito’s Opinion in *Koontz* is probably the most broad and impactful take away—even strictly monetary exactions, whether for the improvement of public or private land, “must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”<sup>121</sup> Because money and

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<sup>118</sup> See, e.g., Epstein, *supra* note 27, at 36.

<sup>119</sup> *Id.* at 36–37 (citations omitted).

<sup>120</sup> *Id.* at 37–38.

<sup>121</sup> *Koontz*, 133 S. Ct. at 2599.

regulations are omnipresent in land development, especially near water, it stands to reason that the *Nollan* and *Dolan* test will be applied to many more local, state, and federal government regulations. As applied, the legal analysis will shine a bright, revealing light on the government actor's underlying policy goals for a regulation and whether those goals are applied in a way that establishes a substantial nexus and rough proportionality—even when the regulation is a condition to obtaining a permit. Indeed, Justice Alito's Opinion seems to reinforce the legal maxim that the law will not tolerate such evasions of its power.

Professor Epstein, again, certainly supports this line of thinking as the proper solution to the problem of preserving ecological treasures:

The only way the law achieves this end is to demand that the government unbundle the development rights from the exaction and thereby insist that the state pay for what it wants. The *Koontz* situation is another illustration of government cheap talk; if the Management Board had to pay to take over these development rights, it would have resorted to general tax revenues to finance its purchase of the development rights.<sup>122</sup>

Broken down to its bare bones, wetlands mitigation is an economic proposition. Many times, the response to regulation is that the cost is passed on to the consumer. In turn, society then has to pay more and somehow this balances out the property owner's extra expense. But that thinking is faulty in the context of wetlands and water quality. For instance, if a more expensive window is required on a new building due to regulations, then that cost might be factored into the cost of leasing that building. However, the building is still leased; in theory, the occupant benefits directly from the expensive window. Therefore, the owner can pass along the cost of the expensive window.

This is not true when deciding whether a developer can even develop certain parts of land. When faced with the coercive choice to develop 3.7 as opposed to 1 acre of land, having 1 acre of developable land does not make the property more profitable than if 3.7 acres were developed. A developer cannot turn around and say to a potential occupant I will charge you 3.7 times a marketable lease rate because you are benefitting from my not developing the surrounding 2.7 acres—especially when the surrounding dozen acres are undeveloped. That potential occupant would likely think the developer was insane. Instead, the benefit of not developing the 2.7-acre remainder lies with the community as a whole. Therefore, it logically follows that the community should pay the cost of not developing this land.

This new attitude may force difficult, but critical, community land acquisition decisions. Perhaps this type of attitude would stimulate more cooperative processes leading to development agreements of land donations in exchange for tax write-offs. Rather than start a conflict over a potential taking, or seek significant public funding to create riparian buffers, property owners and governments could work together toward a mutually positive economic and ecological outcome. *Koontz* has the potential to usher in a new era or property owner rights, but will it?

## VII. CONCLUSION

That is the question which lingers over *Koontz*—does it actually mean anything for communities and local regulators? What practical conclusions can we draw from

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<sup>122</sup> Epstein, *supra* note 27, at 38.

the Opinion? Here is what we do know: (1) *Nollan* and *Dolan* apply whether a permit is denied or approved with conditions; and (2) there is no substantial distinction between a physical government invasion and a coercive request for funds, if the government action fails under *Nollan* and *Dolan*.<sup>123</sup> Clearly, there is a newly-recognized risk to water resource regulators who try to stop development in areas which are considered wetlands.

Still, why develop most or any of those areas at all? Consider the case of New Jersey's reaction to Hurricane Sandy.<sup>124</sup> The State reacted to this crisis by creating programs which encourage individuals to relocate buildings further from regulated waters and requiring buildings to be constructed at higher elevations—there was even assistance for the purchase of unusable property.<sup>125</sup> The decision to set aside wetlands as ecological treasures is a decision best left to the locals who would gain use from the land. Local, state, and federal programs already exists to buyout houses in floodplains and restore the areas to lush wetlands.<sup>126</sup> If we are in an environmental crisis, then why not take the same approach with private property designated as precious wetlands?

If Mr. & Mrs. Deaton dig a ditch in Maryland, is that really a risk to the health of the environment, or is it a risk to the U.S. Army Corps of Engineers' sense of jurisdictional pride because the Deatons never asked permission?<sup>127</sup> If the Sacketts build their dream home, does it really help the environment to recreate a wetland after it is already filled? Is it just for the Sacketts to be punished with millions of dollars in fines while they assert they have done no wrong? These actions create the perception that water resource regulators are worried about their own power and ability to exert influence, with environmental concerns a secondary consideration. That attitude is what gave rise to a unanimous Opinion in *Sackett. Arkansas Fish & Game* was a next step which confirmed the policy-versus-parcel distinction in takings law.

The Opinion in *Koontz* may cause exactly what Justice Stevens feared in *First English* and *Tahoe-Sierra*—that developers would flood administrators with challenges and litigation.<sup>128</sup> In the ultimate irony, it was Justice Stevens' Opinion in

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<sup>123</sup> Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2012–2013 CATO SUP. CT. REV. 215, 226–27 (2013).

<sup>124</sup> I undertook this analysis with my good friend Leo Rishty while in law school. Mr. Rishty hailed from outside of Atlantic City, New Jersey and was interested in the legal impact of the storm on New Jersey water law. We created an unpublished independent study which seemed to have narrow significance—until *Koontz*. He deserves a significant amount of credit for my New Jersey-specific analysis.

<sup>125</sup> *Id.* at 17.

<sup>126</sup> *E.g., Floodplain Buyout (Acquisition) Program*, CHARLOTTE-MECKLENBERG COUNTY STORM WATER SERVICES, available at [http://charmack.org/stormwater/drainageandflooding/pages/floodplainbuyout\(acquisition\)program.aspx](http://charmack.org/stormwater/drainageandflooding/pages/floodplainbuyout(acquisition)program.aspx) (last visited Apr. 12, 2014).

<sup>127</sup> This was a question Mr. Rishty and I posed in assessing the breadth and motivations of regulators under the CWA.

<sup>128</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 329 (2002).

*Tahoe-Sierra* which may well have contributed to the facts in cases like *Sackett* and *Koontz*. When these opportunities arose, Justice Alito did exactly what he was put on the Court to accomplish—offer a voice for property owners after a decade of abusing property rights. Justice Alito's voice took *Tahoe-Sierra* to its logical result, creating a potential era of positive results for property developers. We might have seen this coming in *Sackett*, which, oddly-enough, was not cited in *Koontz*. There is little doubt that the CWA itself could be impacted by this decision. But the real loser in this situation is the water resource regulator, and that was the strength of Justice Alito's voice all along.

