AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Property/Takings

**Arkansas Game & Fish Commission v. United States, 568 U.S. 23 (2012)**

*The Arkansas Game & Fish Commission owned wildlife management area along the banks of the Black River. The Clearwater Dam was located 115 miles upstream of the management area. For the fall of 1993, the Army Corps of Engineers approved a deviation from the usual water release plan for the dam. More water was held back, giving farmers downstream a longer harvest time and raising the level of Clearwater Lake behind the dam. To compensate, the dam released more water than usual in the spring, which resulted in more flooding during in the management area during tree-growing season. The Corps approved similar deviations in subsequent years. The commission objected to the deviations on the grounds that it negatively impacted the management area, and in 2001 the Corps ceased its temporary deviations and declined to make a permanent change to the operating guidelines for the dam.*

*In 2005, the commission filed suit in the Court of Federal Claims. The state agency argued that the Corps’ actions destroyed timber in the management area and necessitated costly reclamation efforts and that the flooding was effectively a federal taking requiring compensation. The federal claims court ruled in favor of the commission. On appeal, a federal circuit court reversed that judgment, concluding that such flooding was not a temporary taking under the Constitution. In a unanimous decision, the U.S. Supreme Court reversed the circuit court, holding that repeated flooding can constitute a temporary takings under the Constitution and thus require compensation to property owners.*

JUSTICE GINSBURG, delivered the opinion of the Court.

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The Takings Clause is “designed 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.” *Armstrong v United States* (1960). . . . And “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.” . . . These guides are fundamental in our Takings Clause jurisprudence. We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

True, we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking. *Loretto v. Teleprompter Manhattan CATV Corp.* (1982). So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land. *Lucas v. South Carolina Coastal Council* (1992). But aside from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries. With this in mind, we turn to the question presented here—whether temporary flooding can ever give rise to a takings claim.

The Court first ruled that government-induced flooding can constitute a taking in *Pumpelly v. Green Bay Co.* (1872). The Wisconsin Legislature had authorized the defendant to build a dam which led to the creation of a lake, permanently submerging the plaintiff’s land. . . .

Following *Pumpelly*, the Court recognized that season- ally recurring flooding could constitute a taking. *United States v. Cress* (1917) involved the Government’s construction of a lock and dam, which subjected the plaintiff’s land to “intermittent but inevitably recurring overflows.” . . .

Furthermore, our decisions confirm that takings temporary in duration can be compensable. This principle was solidly established in the World War II era, when “[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government’s needs in wartime.” *United States v. Westinghouse Elec. & Mfg. Co.* (1950). In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings. . . . Notably in relation to the question before us, the takings claims approved in these cases were not confined to instances in which the Government took outright physical possession of the property involved. A temporary takings claim could be maintained as well when government action occurring outside the property gave rise to “a direct and immediate interference with the enjoyment and use of the land.” *United States v. Causby* (1946). . . .

Ever since, we have rejected the argument that government action must be permanent to qualify as a taking. Once the government’s actions have worked a taking of property, “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” . . .

Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.

In advocating a temporary-flooding exception, the Government relies primarily on *Sanguinetti v. United States* (1924). That case involved a canal constructed by the Government connecting a slough and a river. The claimant’s land was positioned between the slough and the river above the canal. The year after the canal’s construction, a “flood of unprecedented severity” caused the canal to overflow onto the claimant’s land; less severe flooding and overflow occurred in later years.

The Court held there was no taking on these facts. This outcome rested on settled principles of foreseeability and causation. The Court emphasized that the Government did not intend to flood the land or have “any reason to expect that such [a] result would follow” from construction of the canal. Moreover, the property was subject to seasonal flooding prior to the construction of the canal, and the landowner failed to show a causal connection between the canal and the increased flooding, which may well have been occasioned by changes in weather patterns. . . .

In the course of the *Sanguinetti* decision, however, the Court summarized prior flooding cases as standing for the proposition that “in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land.” The Government would have us extract from this statement a definitive rule that there can be no temporary taking caused by floods.

We do not read so much into the word “permanent” as it appears in a nondispositive sentence in *Sanguinetti*. That case, we note, was decided in 1924, well before the World War II-era cases and First English, in which the Court first homed in on the matter of compensation for temporary takings. That time factor, we think, renders understandable the Court’s passing reference to permanence. If the Court indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence.

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. . . . 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*, and today’s modest decision augurs no deluge of takings liability.

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

Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. . . . So, too, are the character of the land at issue and the owner’s “reasonable investment-backed expectations” regarding the land’s use. . . .

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*Reversed*.

JUSTICE KAGAN took no part in consideration or decision of this case.