Draining the Backwater: The Normalization of Temporary Floodwater Takings Law in *Arkansas Game and Fish Commission v. United States*

DANIEL T. SMITH*

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INTRODUCTION

This case comment will examine the recent Supreme Court decision *Arkansas Game & Fish Commission v. United States*,[1] delivered by Justice Ginsberg in the first opinion of the October 2012 term. The decision reversed the judgment of the Federal Circuit and held that flooding caused by the government need not be permanent to be a taking of property that requires just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution.[2] Ultimately, the Court did not determine whether a taking had occurred, instructing the lower court on remand to apply the "situation-specific factual inquir[y]" under *Penn Central*, which is followed to decide many takings

* Georgetown University Law Center Class of 2015. The author would like to thank Professor J. Peter Byrne, Associate Dean for the J.D. Program and Professor of Law at Georgetown University Law Center, for his thoughtful suggestions and insight during the preparation of this comment.

[1] 133 S. Ct. 511 (2012).

[2] *Id.* at 515 (2012) ("We . . . conclude that recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability."). The Takings Clause states, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

cases outside the floodwater context.[3] The Court used its Arkansas opinion primarily for doctrinal maintenance, bringing floodwater takings jurisprudence back into the fold of ordinary takings analysis and rejecting any new per se rules for takings like the bright lines drawn in *Loretto* and *Lucas*.[4] By merely rejecting the recognition of a new bright-line rule and avoiding more controversial questions, the Court was able to craft a unanimous ruling[5] with a relatively quick turnaround.[6]

This comment will first review the factual background of *Arkansas*, its narrow question presented as compared to the question actually addressed by the Court, and the precedent relied on by the lower courts. The comment will then describe the decision's analysis and holding and evaluate how the Court could have achieved a similar result by using a narrower reading of the question presented. Other arguments rejected or not adopted by the Court, including two competing per se takings theories, will also be examined, in addition to two other arguments the Court explicitly declined to discuss. Notable among these arguments is the proposition that the claim should be blocked by Arkansas state reasonable-use water-rights law. Last, the comment will review the factors to be relied upon on remand and how the Court of Federal Claims has applied the *Arkansas* decision in a recent high-profile case.

I. BACKGROUND

The case centered on flooding impacts that were caused by the operation of a dam in southern Missouri by the U.S. Army Corps of Engineers (Corps). The Corps deviated from the provisions of a water control plan concerning the amount and rate of dam-water releases. The deviations caused intermittent flooding of the Arkansas Game and Fish Commission's (Commission) Management Area over a number of years and resulted in significant timber loss.[7] The Commission originally succeeded in its takings claim in the Court of Federal Claims on the theory that the government had taken a flowage easement from the Commission, albeit temporarily, as the Corps eventually relented and ceased the intermittent flooding.[8] Although the Supreme Court has long recognized flowage easements as property interests,[9] the Federal Circuit rejected that a *temporary* flowage easement could be the basis for a taking because the flooding was not permanent or inevitably recurring, an element of floodwater takings found in precedent cases.[10]

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[3] *Id*. at 518, 521 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).
[4] *Id*. at 518 (referring to the bright lines drawn in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) and Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).
[5] The opinion was joined by all members of the Court but Justice Kagan, who recused herself from the proceedings. *Id.* at 515, 523.
[6] *Arkansas* was argued before the Court on October 3, 2012, and the Court released its opinion on December 4, 2012. *Id.* at 511.
[7] Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594, 629 (Fed. Cl. 2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).
[8] *Id.* at 634 (rejecting the government's alternative explanations for the "excessive mortality").
[9] *See* United States v. Dickinson, 331 U.S. 745, 751 (1947); United States v. Cress, 243 U.S. 316, 329 (1917).
[10] Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1377–78 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).

A. FACTS

In 1948, the U.S. Army Corps of Engineers completed construction of the Clearwater Dam on the Black River in southeast Missouri to provide flood protection below the dam.[11] The dam was located 115 miles upstream of the Dave Donaldson Black River Wildlife Management Area in northeast Arkansas, an area owned by the Arkansas Game and Fish Commission.[12] As required by Army Corps regulations, the Corps implemented a water-control plan in 1950 and adopted a Water Control Manual in 1953 that set the agricultural season releases at levels that remained unaltered until 1993.[13] When originally determining maximum rates and quantities of water releases, the Corps was attentive to differences between the non-agricultural season (December–March) and the agricultural season (April–November), during which the Commission's hardwoods would grow.[14]

The Corps began deviating from the Water Control Manual in 1993.[15] In what it termed a "planned deviation," the Corps lowered the release levels (and thereby prolonged the duration of the release period) to give farmers more time for harvest at the end of the agricultural season.[16] The White River Ad Hoc Work Group was formed in 1993 to make recommendations for regulating dams across an area that included the Clearwater Dam, and a Black River subcommittee was created in 1996, but neither group was able to agree on a set of permanent regulations.[17] The Corps instead adopted a series of contested "interim plans" from the working groups, which it followed until 2001.[18] The Commission had objected to these planned deviations and interim plans in meetings with both groups, predicting adverse affects on water-intolerant hardwood resources in the Management Area.[19]

The Corps initiated an Environmental Assessment in 1999 to evaluate a proposed permanent revision[20] that would have incorporated deviations similar to those of the previous years.[21] The Assessment resulted in a "Finding of No Significant Impact" (FONSI) after the Corps preliminarily concluded that the deviations would not have a significant effect beyond the Arkansas border.[22] Faulting the Corps for insufficient data, the Commission and the U.S. Fish and Wildlife Service both opposed the FONSI.[23] After additional testing, the Corps acknowledged the concerns of potential

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[11] *Id.* at 1368.
[12] *Id*.
[13] 87 Fed. Cl. at 603. Water releases were to be "'in concert with all basin interests which are or could be impacted by . . . project regulation.'" 637 F.3d at 1367 (quoting U.S. ARMY CORPS OF ENG'RS, ENGINEER REGULATION NO. 1110–2–240, at 3–4 (1982)).
[14] 87 Fed. Cl. at 602.
[15] *Id*. at 603.
[16] 637 F.3d at 1369.
[17] *Id*. at 1369–70.
[18] *Id*. at 1370. The Corps briefly returned to the 1953 levels from April 1997 to June 1998. *Id*.
[19] 87 Fed. Cl. at 603–04.
[20] 637 F.3d at 1370.
[21] 87 Fed. Cl. at 604.
[22] *Id*.
[23] *Id*.

damage to the Commission's timber in the Management Area and abandoned its interim deviations in April 2001.[24]

B. QUESTION PRESENTED

When the Supreme Court granted certiorari in *Arkansas*, it formally framed the single issue to be decided as whether government actions imposing recurring flooding must continue permanently to constitute a taking.[25] The Federal Circuit had, after all, focused entirely on the impermanence of the Corps' interim planned deviations, not the temporariness of the seasonal flooding those deviations caused.[26] To the Federal Circuit, policies characterized by the government as "ad hoc" or temporary were inherently subject to change and therefore could not be inevitably recurring "by their very nature."[27]

At oral argument, however, the Supreme Court was less interested in whether the government's *actions* resulting in flooding must be permanent, but instead focused on the larger question of whether the *flooding* itself must be permanent or inevitably recurring to effect a taking.[28] And in its opinion in *Arkansas*, the Court noted it already "ha[d] rejected the argument that government action must be permanent to qualify as a taking"[29] but went further than merely deciding whether the temporariness of the Corps' plans could prevent the finding of a taking. The Court extended its holding to the physical aspect of the flooding itself, reaffirming that a temporary government invasion can be a taking, whether that invasion is an "outright physical possession"[30] or an external action causing "a direct and immediate interference with the enjoyment and use of the land."[31] Neither the government action—formally the question before the Court—nor the resulting physical government invasion, including government-induced flooding, need be permanent or inevitably recurring to result in a taking of property requiring compensation.[32]

C. BACKGROUND PRECEDENT AND THE DEVEOPMENT OF THE PERMANENCY REQUIREMENT

The Supreme Court case *Pumpelly v. Green Bay Co.* established constitutional takings liability when property is permanently flooded by government action.[33] In *Pumpelly*, the Court required compensation for the permanent invasion of floodwater over a large area caused by the

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[24] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 516 (2012).
[25] Question Presented, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (No. 11-597), http://www.supremecourt.gov/qp/11-00597qp.pdf ("The question presented is: Whether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.").
[26] *See* Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1377–78 (Fed. Cir. 2011).
[27] *Id.* at 1377.
[28] *See* Transcript of Oral Argument, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (No. 11-597), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-597.pdf.
[29] 133 S. Ct. at 519. The Court relied on the regulatory takings cases to establish this point. *See id.*; *see also infra* notes 43–46 and accompanying text.
[30] 133 S. Ct. at 519.
[31] *Id.* (quoting United States v. Causby, 328 U.S. 256, 266 (1946)).
[32] *Id.* ("[O]ur precedent indicates that government-induced flooding of limited duration may be compensable.").
[33] 80 U.S. (13 Wall.) 166, 181 (1871) ("[W]here real estate is actually invaded by superinduced additions of water . . . , so as to effectually destroy or impair its usefulness, it is a taking . . . .").

construction of a dam.[34] Not long after, the Court in *United States v. Lynah* similarly found a taking after river dams and walls turned lands into a bog so "as to substantially destroy their value."[35] In *United States v. Cress*, by contrast, the erection of a lock and dam resulted in frequent overflows but not permanent inundation.[36] Although the government had not taken full ownership by flooding the land, the Court reasoned that a flowage easement had nonetheless been established and taken by the government's actions because the overflows would inevitably recur.[37]

The *Cress* Court compared the permanent flooding in *Pumpelly* with the inevitably recurring overflows in *Cress* by establishing a takings continuum, stating, "There is no 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."[38] This observation allowed the *Cress* Court to link the circumstances of that case to the established takings liability found in *Pumpelly*. Without this link, recovery for a taking of property in *Cress* would most likely have been barred. Notwithstanding the holding in *Cress*, the opinion's strong language set the stage for a permanency requirement in floodwater takings.

In *Sanguinetti v. United States*, a subsequent temporary flooding case, the Supreme Court rejected a takings claim where land was inundated after a government-constructed canal overflowed during unusually severe flooding.[39] The Court held that no taking had occurred because the flooding was not the direct or natural result of government action, it was not permanent, and it could not have been reasonably anticipated by the government.[40] *Sanguinetti* dicta contained language that government-induced flooding must be "an actual, permanent invasion of the land" or "intermittent but inevitably recurring overflows" to constitute a taking.[41] Lower courts, therefore, have read *Sanguinetti* as creating a per se requirement for government-induced floodwater in addition to the normal elements of a takings claim.[42]

II. ANALYSIS AND HOLDING

A. THE ANALYSIS AND HOLDING OF *ARKANSAS*

In *Arkansas*, the Supreme Court chose to drain the doctrinal backwater that floodwater takings had become and treat the decisions like other temporary physical invasions of government, which are not automatically barred from takings claims. The Court pointed out the trend since World

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[34] *Id.*
[35] 188 U.S. 445, 470 (1903).
[36] 243 U.S. 316, 329 (1917).
[37] *Id*.
[38] *Id*.
[39] 264 U.S. 146, 147 (1924).
[40] *Id*. at 149–50.
[41] *Id*. at 149. The language "intermittent but inevitably recurring overflows" comes from the Court's opinion in *Cress*. 243 U.S. at 328.
[42] *See* Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1381 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012); Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (citing with approval Barnes v. United States, 210 F.2d 865, 870 (Ct. Cl. 1976) ("Government-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort.")).

War II that temporary government intrusions can effect takings liability.[43] The Court also noted the similarity between *Arkansas* and *United States v. Causby*, where off-property activity (overflights) interfered with "the enjoyment and use of the land" (as a chicken farm) to give rise to takings liability.[44] Further, in *Dickinson*, a landowner's subsequent reclamation of his property that had been flooded by a government dam did not absolve the government from compensation.[45] The Court also relied on its more recent temporary regulatory takings cases, clarifying that the lessons learned in *First English* (the government cannot undo takings liability by ceasing burdensome regulation)[46] and *Tahoe-Sierra* (temporary regulations are not barred from takings liability)[47] are applicable to physical takings as well.[48]

Distinguishing *Sanguinetti's* apparent requirement that floodwaters be permanent or inevitably recurring to constitute a taking was not difficult for the Court in *Arkansas*. The Court explained that the rejection of a taking in *Sanguinetti* was based on foreseeability and causation; its discussion of permanency was extraneous dicta and not necessary to the result.[49] The development of temporary takings jurisprudence since World War II gave the Court in *Arkansas* ample basis to reject the special permanency requirement for floodwater takings that the dicta in *Sanguinetti* had spawned.[50]

B. THE SUPREME COURT BYPASSED A NARROWER HOLDING TO RESHAPE TEMPORARY FLOODING DOCTRINE

In theory, the Court had the opportunity to reject the Federal Circuit's logic that takings cannot arise from temporary government policy under a narrower holding responding to a strict reading of the question presented. The Court could have ruled that the permanency requirement for floodwater takings exists to ensure causality from government action and therefore applies only to the *physical* conditions of flooding and not to the ongoing durational *intent* behind the government action. This argument would suggest that *Cress* required inevitable recurrence and *Sanguinetti* required permanent invasion only when the government changed the physical conditions of a waterway. If the flooding is not permanent, there is a risk that an intervening factor, other than the

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[43] *See* Ark. Game & Fish Comm'n v. United States, 133 S.Ct. 511, 519 (2012) (citing with approval the "wartime cases" *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); and *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945)).
[44] *See id*. (citing United States v. Causby, 328 U.S. 256, 266 (1946)).
[45] *See id*. (citing United States v. Dickinson, 331 U.S. 745, 751 (1947)).
[46] First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 321 (1987) ("We merely hold that where the government's activities have already worked a taking of all use 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.").
[47] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 337 (2002).
[48] *See Arkansas*, 133 S. Ct. at 519. This appears to contradict the admonition in *Tahoe-Sierra* against the overlap of physical and regulatory takings precedents. *See* 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.").
[49] *Arkansas*, 133 S. Ct. at 520 ("We do not read so much into the word 'permanent' as it appears in a nondispositive sentence in *Sanguinetti*.").
[50] *Id*.

government, caused the flooding. *Sanguinetti* was concerned that "the overflow be the direct result *of the structure*".[51] Therefore, it is arguable that *Cress* and *Sanguinetti* emphasized the inevitable recurrence and the permanency of the flooding, respectively, to stress that the flooding must be *physically* caused by the government's actions, as opposed to being a one-time event or caused by unpredictable intervening natural forces.[52] In *Arkansas*, the Supreme Court could have found sufficient inevitable recurrence in the physical conditions of the waterway without overturning Court precedent.[53] After all, the lower court in *Arkansas* concluded that the flooding was "the direct, natural, and probable result" of the government's action because the primary factor in the tree mortality was the flooding, as healthy trees withstood the drought.[54]

The Supreme Court's choice to ignore the narrow question presented and instead focus on the larger question of whether any flooding caused by government action must be permanent makes sense in light of the Court's desire to normalize floodwater takings jurisprudence. Maintaining the permanency requirement would have perpetuated the isolation of floodwater takings from mainstream takings law, which has trended toward acceptance of temporary takings.[55] The result would likely have been the same: a remand of the case for a fresh factual inquiry under *Penn Central*, keeping the petitioner's hope of victory alive. Under this alternative result, the absurdity of a takings claim failing due to the government's prospective characterization of its operational policy as ad hoc would have been avoided, but the parochialism of categorically rejecting temporary takings claims resulting from floodwater would continue.

Although not discussed in the Court's opinion, the Federal Circuit distinguished the *Dickinson* case by characterizing the flooding as arising from a permanent condition that only became temporary once the owner reclaimed the land, which did not absolve takings liability.[56] Such "retrospectively temporary" flooding was treated as permanent for takings purposes, but the Federal Circuit held that "prospectively temporary" flooding that the government intends to be temporary from the outset had never been recognized as a taking.[57] The Supreme Court, however, otherwise cited *Dickinson* as good law.[58] Even prospectively temporary government-induced flooding can rise to the level of a taking, provided the *Penn Central* factor-balancing test is met.

III. OTHER ARGUMENTS AND IMPLICATIONS

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[51] Sanguinetti v. United States, 264 U.S. 146, at 149 (1924) (emphasis added).
[52] *Cf.* United States v. Cress, 243 U.S. 316, 328 (1917).
[53] *See* Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594, 624 (Fed. Cl. 2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012). On the other hand, the water releases would not have constituted a taking if they were "only 'converted into a damaging event' due to the presence of an intervening cause." *Id.* (quoting Cary v. United States, 552 F.3d 1373, 1379 (Fed. Cir. 2009)).
[54] *See id.* at 623 (quoting *Cary*, 552 F.3d at 1379).
[55] During oral argument, Justice Scalia noted that if *Sanguinetti* required permanency as an element for takings in general, as opposed to a special floodwater takings requirement, the Court has already overruled the additional point in subsequent cases. *See* Transcript of Oral Argument, *supra* note 27, at 5.
[56] *See* Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1375 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).
[57] *See* Tyler J. Sniff, *The Waters of Takings Law Should Be Muddy: Why Prospectively Temporary Government-Induced Flooding Could Be a Per Se Taking and the Role for* Penn Central *Balancing*, 22 FED. CIR. B.J. 53, 74–75 (2012).
[58] *See Arkansas*, 133 S. Ct. at 520 (citing United States v. Dickinson, 331 U.S. 745, 751 (1947)).

A. REJECTED ARGUMENTS

1. Temporary Government-Induced Flooding Can Never Be a Taking

The Court rejected the government's argument that the *Loretto* case dictated that temporary physical invasions by floodwaters should be treated differently than other takings cases and can never constitute a taking.[59] After the Court in *Loretto* discussed the difference between physical and temporary flooding cases, it concluded, "A taking has always been found only in the former situation."[60] The government tried to take advantage of this statement's ambiguity, but the Court admonished the government to "[r]ead on."[61] Further, the Court pointed out that *Loretto* specifically included floodwater takings when it suggested temporary physical invasions should be subject to a balancing process,[62] not categorical rejection.

2. Temporary Government-Induced Flooding Should Always Be a Taking

Notably, the Court did not adopt a contrary per se rule proffered by an amicus for petitioner—also based on an overzealous reading of *Loretto*—that government-induced flooding should *always* be a taking because flooding represents a physical invasion of land.[63] A physical intrusion is, after all, "a property restriction of an unusually serious character for purposes of the Takings Clause."[64] But because they do not absolutely abrogate property rights of use and exclusion, government-induced temporary flooding and other intermittent government invasions do not trigger *Loretto's* per se takings rule for permanent physical occupations.[65] The Court's holding that cases like *Arkansas* should be evaluated on remand under *Penn Central*,[66] and the Court's apparent reluctance to create new per se rules, will hopefully quell future arguments that all physical intrusions by the government, however temporary, should be per se takings of property.

The government also used the specter of runaway takings claims to argue against recognizing temporary floodwater takings, but the Court rejected this slippery slope argument.[67] The Court pointed out that allowing those claims to proceed under *Penn Central* is far from a guarantee that flooded plaintiffs will always, or even often, recover against the government, and that similar parades of horribles had not come to pass after previous recognitions of takings claims.[68] The

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[59] Brief for the Respondent at 22–23, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (No. 11-597) ("Every flood-related case in which the Court has recognized a taking has involved a 'permanent' condition . . . . The Court has never suggested, much less held, that anything less could effect a taking by floodwaters.").

[60] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982).

[61] *Arkansas*, 133 S. Ct. at 520. True, takings had been found *in every case* only in the category of permanent flooding, but that did not foreclose the possibility that temporary flooding *might* be sufficient to effect a taking. The Court in *Loretto* likely distinguished permanent occupations from temporary invasions to emphasize the per se status of the former, not to diminish the possibility of recovery under the latter. *See id.* at 520–21 ("Later in the *Loretto* opinion, the Court clarified that it scarcely intended to adopt a 'flooding-is-different' rule. . . .").

[62] *Id.* at 521 (citing *Loretto*, 458 U.S. at 435 n.12 ("[S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking.")). *Loretto* did not specify the nature of this balancing test.

[63] *See* Amicus Curiae Brief for Pacific Legal Foundation and Cato Institute in Support of Petitioner at 5, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (No. 11-597).

[64] *Loretto*, 458 U.S. at 426.

[65] *Id*. at 435 n.12.

[66] *See Arkansas*, 133 S. Ct. at 521.

[67] *See id*.

[68] *See id*.

argument is notable because the federal government already enjoys immunity from tort liability arising from flood control projects under the Flood Control Act of 1928,[69] leaving the Takings Clause as the sole avenue of recovery for many injured landowners.[70]

B. DEFERRED ARGUMENTS

1. Flooding Downstream of a Dam is Merely Consequential

The Court acknowledged but did not rule on an argument the government first raised at oral argument, that flooding of downstream (as opposed to upstream or backwater) property is "collateral or incidental" and thus not compensable.[71] Were the Court to meet this argument, it would likely reject it as well. It is remarkably similar to an argument rejected by the *Pumpelly* Court that flooding from a lake caused by a government-authorized dam was not recoverable because the resulting damage was merely consequential—the *Arkansas* Court referred to that argument as "crabbed."[72] Finding that damage is collateral or incidental, and therefore merely a tort rather than a taking, is a legal conclusion, not a test for determining takings liability. Moreover, the government's argument represents the exact type of formalistic bright line drawing and special category rules the Court explicitly rejected in its holding in *Arkansas*.

2. Riparian Common Law Should Be Used To Evaluate Federal Constitutional Rights

The other issue the Court acknowledged but declined to rule on, as urged by an amicus brief by law professors, involved how Arkansas water-rights law should affect the ultimate outcome of the Commission's suit. Although the Court recognized that the property interest at stake in takings cases is "often informed by the law in force in the State in which the property is located," the Court did not concretely rule on how state law is relevant.[73] Because the role of state law is a doctrinally unsettled and potentially controversial area,[74] the Court did well to avoid any unnecessary division. Other recent Supreme Court decisions have reiterated the appropriateness of relying on state law principles to identify property interests protected by the Takings Clause,[75] but deploying state law should not be used *sub rosa* to abrogate recognized constitutional rights governed by federal constitutional law.

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[69] 33 U.S.C. § 702c (1994).

[70] *See* Kent C. Hofmann, *An Enduring Anachronism: Arguments for the Repeal of the 702c Immunity Provision of the Flood Control Act of 1928*, 79 TEX. L. REV. 791, 805 (2001).

[71] *See Arkansas*, 133 S. Ct. at 521–22.

[72] *Id*. at 518. The government's argument appears similar to the physical causation argument explored in section II.B, but after being reminded at oral argument that the trial court had clear findings on causation, the government replied the argument was not based on causation, but rather the consequentiality of the injury. *See* Transcript of Oral Argument, *supra* note 27, at 27.

[73] *See Arkansas*, 133 S. Ct. at 522.

[74] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1068–69 (1992) (Stevens, J., dissenting) ("The Court's holding today effectively freezes the State's common law. . . . I had thought that we had long abandoned this approach to constitutional law.").

[75] *See id.* at 1030 (majority opinion) (noting the Court's "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments . . . ." (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972))).

In their brief, the law professors conclude that reasonable use riparian law is the applicable body of Arkansas law to address takings claims. The water-rights law the professors urge is based on cases with competing uses and discharges of private parties.[76] The professors suggest the Court should evaluate the comparative reasonableness of the government's actions that caused the flooding of the petitioner's land to dispose of the entire claim, not just identify the property right at issue.[77] A state government is not liable for a taking when it completely disallows a use that is at least analogous to the state's public or private nuisance,[78] but that standard does not seem to rely on the reasonableness of the government's competing use, and it is difficult to understand how the Commission's management of its timber constituted either a public or private nuisance in this situation.

Reasonable-use riparian law is essentially a comparative utility analysis. The professors assume that the utility of the entire dam project is greater than the Commission's timber management,[79] but they should only have included the marginal agricultural gains from changing the dam's release rates when counting the benefits of the government's action. More importantly, the use of this doctrine would allow the government to escape paying just compensation for taking property whenever the public benefit is greater, as is often the case. This analysis undermines the Takings Clause's purpose, 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."[80] Granted, government regulation is less likely to be a taking when it merely "arises from some public program adjusting the benefits and burdens of economic life to promote the common good,"[81] but expanding this principle to physical invasions, which "may more readily be found" as takings, is troublesome.[82]

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[76] Brief of Professors of Law Teaching in the Property Law and Water Rights Fields as Amici Curiae Supporting Respondent at 16–17, Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (No. 11-597) [hereinafter Brief of Professors of Law].

[77] *See id*. at 21–23.

[78] *Lucas*, 505 U.S. at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's laws of property and nuisance already place upon land ownership.").

[79] *See* Brief of Professors of Law, *supra* note 75, at 22–23.

[80] *See Arkansas*, 133 S. Ct. at 518 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[81] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see also* Miller v. Schoene, 276 U.S. 272, 279–80 (1928). In *Miller*, the Virginia legislature "d[id] not exceed its constitutional powers" when it ordered the destruction of cedar trees to save apple orchards from an infectious disease. *Miller*, 276 U.S. at 279–80 ("[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").

[82] *Penn Cent. Transp. Co.*, 438 U.S. at 124. The government's interest is not ordinarily a factor in permanent physical takings analysis. *See* David W. Spohr, *Cleaning Up the Rest of* Agins*: Bringing Coherence to Temporary Takings Jurispurdence and Jettisoning "Extraordinary Delay,"* 41 ENVTL. L. REP. NEWS & ANALYSIS 10435, 10435 (2011) ("[W]hen the government builds a dam and water from the project continually invades private property, the takings inquiry does not evaluate how beneficial the dam is to the region."). Some commentators argue that because *Lingle* held that the lack of a legitimate government interest behind a regulation is irrelevant to the takings analysis, *see* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005), the worthiness of a government interest should not reduce the possibility of a taking. *See* Spohr, *supra*, at n.4 and accompanying text.

A better use of Arkansas water-rights law would be to evaluate whether the Commission had a property interest[83] and leave the constitutional balancing to the *Penn Central* analysis. In light of the Court cases recognizing property interests in flowage easements,[84] Arkansas trespass law may be more appropriate to deploy. The trial court in *Arkansas* rested its judgment on the appropriation of an easement, which exists under state statute.[85] Nothing bars the taking of a flowage easement by prescription if the government's actions are of such a nature where a private party could establish a servitude by trespassing similarly over the course of time.[86] Using state law to scope the property interest at stake is the end of the reach of state law, but not the end of the inquiry: the adjudication of those claims should continue to rest on constitutional principles under the *Penn Central* test.

C. FACTORS FOR THE *PENN CENTRAL* TEST

Although the Court went no further than rejecting a categorical bar to temporary floodwater takings liability, it did provide some guidance for what factors should be used to resolve the takings claim. As in *Penn Central* itself, the Court in *Arkansas* did not indicate whether its list was exhaustive or how much weight any single factor carries. Duration of flooding is no longer a dispositive factor, but rather one factor among many in the takings analysis.[87] The intent and foreseeability of the government invasion, the character of the land, and the "'reasonable investment-backed expectations'" of the owner are also significant factors.[88] Causation remains important.[89] Given the *Arkansas* Court's deference to *Penn Central*, "the character of the governmental action" (that is, as a physical or regulatory restriction) is a central factor.[90] The Court did not adopt the petitioner's test for floodwater takings based primarily on the substantiality of the

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[83] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) ("[O]ur traditional resort to 'existing rules or understandings . . . stem from an independent source such as state law' *to define the range of interests that qualify for protection* as 'property' under the Fifth and Fourteenth Amendments . . . ." (quoting Bd. of Regents of State Colls. V. Roth, 408 U.S. 564, 577 (1972))) (emphasis added); *see also* Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010) (relying on Florida common law of avulsion and accretion to reject petitioner's claim that property had been taken).

[84] *See* United States v. Cress, 243 U.S. 316, 328–29 (1917). The government can be found to have taken an easement even when a fee simple taking via permanent flooding is not present. *Id*. The law professors emphasize an Arkansas case that chose a reasonable use riparian theary over a trespass theory when determining floodwater liability between two private parties. *See* Brief of Professors of Law, *supra* note 75, at 17 (citing S. Flag Lake, Inc. v. Gordon, 307 S.W.3d 601, 605 (Ark. Ct. App. 2009)). But when the government is a party and the Takings Clause is at stake, courts should not adjudicate constitutional rights using a body of state common law that orders private water use in light of established Supreme Court jurisprudence recognizing the taking of easements.

[85] Ark. Game & Fish Comm'n v. United States, 87 Fed. Cl. 594, 617, 640 (Fed. Cl. 2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).

[86] *See* United States v. Dickinson, 331 U.S. 745, 747–48 (1947). The statutory period to establish an easement by prescription in Arkansas is seven years, the statute of limitations for bringing an action of trespass. *See* ARK. CODE ANN. § 18-61-101 (1987).

[87] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 522 (2012).

[88] *Id*. (quoting Palazzolo v. Rhode Island, 533 U. S. 606, 618 (2001)).

[89] *Cf. id*. at 514.

[90] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The *Loretto* Court saw "the character of the government action" as the "determinative" factor when it held that permanent physical occupations are per se takings. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

government's intrusion on a property interest.[91] The Court did, however, emphasize that the "[s]everity of the interference figures in the calculus as well."[92]

The trial court found that the flooding was foreseeable and severe, but because the Federal Circuit rejected the claim only because of the impermanence of the government's policy causing the flooding, those facts remain open for review.[93] Whether the Court also left open the validity of the trial court's identification of the taken property interest as an appropriated floodway easement instead of the damaged trees—yet using the trees as the primary measure of damages—remains unclear.[94]

D. *ARKANSAS* MAY HAVE A LIMITED PRACTICAL IMPACT

After the Supreme Court's *Arkansas* decision, the Court of Federal Claims asked parties to resubmit briefs in the high-profile case *Big Oak Farms, Inc., et al. v. United States*,[95] which had originally relied on the Federal Circuit's now-overturned *Arkansas* decision.[96] *Big Oak Farms* arose after the Corps exploded a levee in Missouri under its emergency operating plan to prevent flooding in nearby Cairo, Illinois, resulting in substantial damage to property in the floodway.[97] The *Big Oak Farms* trial court initially ruled that the flooding was not a taking because the flooding was temporary and infrequent,[98] following the Federal Circuit's holding in *Arkansas* that "'[r]eleases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring.'"[99]

Upon review, the Court of Federal Claims declined to rehear the case, narrowly reasoning that the Supreme Court's decision in *Arkansas* should only apply to recurrent flooding and not one-time floods like the deluge in *Big Oak Farms*.[100] Although the severity of the intrusion was extremely substantial, estimated at $300 million to avert over $1 billion in town damage,[101] the *Big Oak Farms* reconsideration still concluded the case was not "'substantial and frequent enough to rise to the level of a taking.'"[102] In spite of the Supreme Court's doctrinal move away from per se rules that invalidate takings claims, the *Big Oak Farms* court's decision not to reconsider the case suggests

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[91] Petitioner's Brief on the Merits at 28–29, Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (No. 11–597).
[92] *Arkansas*, 133 S. Ct. at 522–23.
[93] *See id*. at 523.
[94] Courts have had difficulty in this area. *See* Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 VT. J. ENVTL. L. 479, 523 (2010) ("[L]ike Sisyphus, the courts are probably destined to forever struggle with their various ad-hoc approaches to calculating compensation for temporary takings.").
[95] .Order Following *Arkansas Game* at 2, Big Oak Farms, Inc., et al. v. United States, No. 11-275L (Fed. Cl. May 23, 2013), ECF No. 54.
[96] Big Oak Farms, Inc., et al. v. United States, 105 Fed. Cl. 48, 56 (Fed. Cl. 2012).
[97] *Id.* at 50.
[98] *Id*. at 53–54, 56 ("[i]solated invasions, including one or two floods, do not constitute a taking.").
[99] *Id*. at 56 (quoting Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1377 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012)).
[100] *See* Order Following *Arkansas Game*, supra note 95, at 2–3.
[101] Scott Moyers, *General Orders Pipes at Birds Point Levee Loaded with Blasting Agent*, SOUTHEAST MISSOURIAN, May 2, 2011, http://www.semissourian.com/story/1723455.html.
[102] *See* Order Following *Arkansas Game*, supra note 95, at 3 (quoting Ridge Line, Inc. v. United States, 346 F.3d 1346, 1357 (Fed. Cir. 2003)).

lower courts may continue to treat factors such as substantiality and frequency as dispositive, limiting the practical effect of the *Arkansas* decision.

IV. CONCLUSION

In spite of the narrow question formally presented by the case, the Supreme Court used *Arkansas* as an opportunity to bring temporary floodwater takings law back into the fold after the doctrine spent eighty-eight years in a jurisprudential backwater. Early floodwater takings cases focused on the permanence or inevitable recurrence of government-induced flooding because both were prevalent factors in the cases they encountered. Subsequent legal developments recognizing takings liability for temporary physical incursions and temporary government regulations foreclosed the possibility of a bright-line rule based on limited duration under the Takings Clause. In fact, the most durable impact of the *Arkansas* decision's deference to *Penn Central's* balancing test may be to diminish arguments both for and against bright-line rules across the domain of Takings Clause cases.

The Court's decision not to address the argument that Arkansas reasonable-use water-rights law should bar takings liability may have contributed to the unanimity of the decision in *Arkansas*. However, the decision leaves open the extent to which state law influences the relevant property interest and ultimate disposition of cases under the Takings Clause, a question that lacks a straightforward and uncontroversial conclusion. Equally thorny questions not addressed by the Court include the method for calculating damages and the relationship between those damages and the scope of the defined property interest. In spite of these unanswered questions, the Supreme Court appears committed to rejecting both parochial and unusual conceptions of what type of government action results in a compensable taking.