



The St. John's River: Still there!

[As Rick pointed out the other day](#), with *Koontz v. St. John's River Water Mgmt. Dist.*, the Supremes finished their Takings trifecta for this term, with unsurprisingly the plaintiff winning in all three cases. *Koontz* raised two issues: 1) do *Nollan* and *Dolan* apply when the government simply denies a permit, as opposed to attaching conditions to it?; and 2) do they apply to monetary exactions. The Court said yes on both counts.

In today's *New York Times*, [John Echeverria claims that Koontz could work a "revolution in land use law" and decries the decision as fatally impairing sustainable development](#). But this really does not withstand, well, scrutiny.

Echeverria cites Justice Kagan's dissent for the idea that applying *Nollan/Dollan* to permit denials in the exactions context means that governments will simply not negotiate for fear of triggering stricter scrutiny. But Kagan didn't say that; indeed, as Rick points out, the dissent agrees with the majority that permit denials should trigger stricter scrutiny as the result of a refusal to accept exactions. She just says that it didn't happen here. It is hard, as a matter of practical fairness, for a government to insist on an exaction, deny the project altogether, and then refuse stricter scrutiny.

Kagan does say that applying to *Nollan/Dollan* to monetary exactions is a terrible and dangerous idea, and of course Echeverria agrees. But California's experience belies this notion. California has applied *Nollan/Dollan* to monetary exactions for nearly two decades, since [Ehrlich v. Culver City](#), and it has hardly stopped the exactions process. Far from it: [as Ann and her co-author demonstrated in an article a few years ago](#), when municipalities were forced to quantify their monetary exactions for *Dolan* purposes, most of them found that they were too *low*. There are issues raised by *Nollan/Dolan*, but it really is not that huge of a burden on municipalities.

It is true, as Kagan says, that there is a weird theoretical leap at the heart of the Court opinion. Exactions of real property are subject to stricter scrutiny, claimed Justice Scalia in his *Nollan* majority opinion, because without the permit, they essentially represent a physical taking of property. An outright expropriation surely generates stricter scrutiny. Of course monetary exactions would not constitute this problem, because the government "expropriates" money all the time in the form of taxes. But one can quickly see the problem here: it is simply too easy for the government to insist on a monetary exaction, get it under rational basis scrutiny, and then take the property through eminent domain, or otherwise burden a property right with these fees. Even municipalities have to play fair.

Now, as the dissent argues, one could easily generate the slippery slope. Once the Court starts subjecting monetary exactions to stricter scrutiny, it could start doing so to taxes. In other words, *Koontz* could be the thin end of a Lochnerian wedge to subject all public finance to strict scrutiny. That is a possibility, but there are two answers to it.

- 1) That has not been the experience of those 25 states that have instituted stricter scrutiny for monetary exactions. Sometimes the parade of horrors just doesn't happen.
- 2) I have little doubt that four of the justices would actually *like* to subject all public finance to stricter scrutiny. They agree with reactionaries like David Sentelle and Janice Rogers Brown, [who want to throw out most of the Progressive Era and the New Deal to protect what they lovingly call America's "cowboy capitalism."](#) But they don't need *Koontz* to do that. In fact, they don't need *anything* to do that. One of the bracing aspects of the Roberts Court's plutocratic activism is that the Four Horsemen really don't need precedent to do anything. They overturned *McCulloch v. Maryland* sub silentio in the Health Care Cases. They just overturned Section 4 of the Voting Rights Act because they could. If they don't need precedent to do anything, then *Koontz* won't change the equation. It will make the rest of the country look like California, and that's not half bad.

So relax. This Court will proceed apace with its [revolution-from-above](#) in good time. But it didn't do so here.