Lyle Denniston of SCOTUSBlog reports that the plaintiff’s argument in the Court’s highest-profile Takings case of the year, Koontz v. St. John’s River Water Management District, did not go well. Both Rick and I have blogged about the case before, and the more I think about it, it seems to me that the case has been conceptualized incorrectly.

Supposedly, *Koontz* is about a “failed exaction”: in exchange for granting Koontz a permit, the Water District insisted on a monetary exaction. Koontz refused, and the two sides have been stalemated for 11 years. But why is this an “exaction” under the meaning of the Takings Clause (and the two key precedents, *Nollan v. California Coastal Comm’n* and *Dolan v. City of Tigard*)? The Court gives greater scrutiny to exactions because the government has actually taken a piece of property from the landowner. But in a case like *Koontz,* the government hasn’t taken anything. Justice Scalia made this very point at oral argument: it’s never good for a Takings plaintiff when it’s got problems getting Scalia’s vote.

Now, one might immediately object: “that’s absurd! Instead of granting the landowner a permit with conditions, the government seems to have denied him *everything*. How in the world can that *not* be a Taking?” Good question, and there is a good answer: if in fact the government has denied the landowner everything, then this isn’t an exactions case under *Nollan* or *Dolan,* but rather a “total wipeout” regulatory taking case under *Lucas v. South Carolina Coastal Council.*

Essentially, what the plaintiffs are trying to do here is use the “failed exaction” language to reconceptualize this case and adjudicate it under the exactions prong of the Takings Clause, rather than the regulatory takings prong. This is hardly the first time that the private property rights bar has tried this. Private property rights lawyers tried, in *Monterey v. Del Monte Dunes,* to argue that if a city denies a permit and gives its reasons, those reason should be subject to *Dolan*‘s “rough proportionality” test. The Court shot that one down: *Dolan* is about exactions, not permit denials.

So now the government might object: “wait a minute! We told the landowner that if he wants a particular permit, he needs to take certain actions. [actually, the government says it only “suggested” them and waited for a counter-offer]. The landowner didn’t make another proposal, and now he is suing us. We haven’t denied him all economic use of his land: we just denied his proposal to develop his land without the exactions we wanted.” Fair enough. If that is the case, then before we get to the *Lucas* test, then we have a garden-variety ripeness case to be

adjudicated under *Williamson County Planning Comm’n v. Hamilton Bank*.

But whether you accept the landowner’s argument here, or the government’s, seeing *Koontz* as an **exactions** case makes little sense. I understand why the Pacific Legal Foundation wants to reconceptualize the case. PLF, like most private property rights lawyers, hates the standard regulatory takings test set forth in *Penn Central R.R. v. City of New York.* They think it does not give sufficient protection to property. So they are trying to shoehorn regulatory takings cases into the exactions prong of takings analysis in order to get away from *Penn Central.*

In the middle of the argument, Justice Sotomayor pulled an Admiral Stockdale and asked, “Why are we even in this case? Why are we here?” The answer is because PLF cleverly reconceptualized the case to try to get around Supreme Court doctrine unfavorable to its ideology. That’s fair. It’s their right to try it. But that’s no reason why anyone else should fall for it.