ARKANSAS GAME AND FISH COMMISSION V. UNITED STATES

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Introduction

The Fifth Amendment's Takings Clause provides that private property shall not be "taken for public use, without just compensation."[1] For most of American history, the Supreme Court construed this clause narrowly, requiring the government to pay compensation only where it permanently appropriated or destroyed property.[2] During the twentieth century, however, the Court began to embrace a significantly broader interpretation of the Takings Clause. In 1922, the Court introduced the concept of regulatory takings, holding in *Pennsylvania Coal Company v. Mahon*[3] that the government was required to pay compensation if its laws or regulations went "too far" in redefining the range of interests included in the ownership of property.[4] A series of cases during the World War II era[5] established that the government was required to retroactively compensate a property owner for a temporary physical taking.[6] And in 1987, the Court combined these two innovations, holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[7] that the government was required to retroactively compensate a property owner for a temporary regulatory taking.[8]

Last Term, in *Arkansas Game and Fish Commission v. United States*,[9] the Supreme Court was required to consider the continuing validity of this last

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[1] U.S. Const. amend. V, cl. 4.
[2] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992) (stating that prior to 1922, "it was generally thought that the Takings Clause reached only a direct appropriation of property" or its functional equivalent); Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 520 (2012) (noting that the Court first recognized the existence of temporary takings during the World War II era).
[3] 260 U.S. 393 (1922).
[4] *Id.* at 415.
[5] *See* United States v. Gen. Motors Corp., 323 U.S. 373 (1945); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Pewee Coal Co., 341 U.S. 114 (1951). These cases are referred to as the "World War II-era cases" in the *Arkansas Game and Fish* Court's opinion and in this Comment.
[6] *See* Daniel L. Siegel & Robert Meltz, *Temporary Takings: Settled Principles and Unresolved Questions*, 11 Vt. J. Envtl. L. 479, 480 (2010).
[7] 482 U.S. 304 (1987).
[8] *Id.* at 321.
[9] 133 S. Ct. 511 (2012).

development.[10] The Court was confronted with two conflicting precedents: *First English*, which established the general availability of retroactive compensation for temporary regulatory takings, and *Sanguinetti v. United States*,[11] a 1924 case holding that the Takings Clause did not require compensation for government-induced flooding unless the flooding constituted a "permanent invasion of the land."[12] The Court reaffirmed *First English* while rejecting *Sanguinetti*,[13] holding by a vote of 8 – 0[14] that the federal government was required to retroactively compensate a landowner whose property it temporarily took by flooding.[15]

In this Comment, I argue that the *Arkansas Game and Fish* Court erred in applying *First English* without first addressing its continuing validity. Even assuming that *First English* was correct when it was decided in 1987 — something that is far from clear[16] — it is doubtful that it remains so today. Since *First English* was decided, the Court has radically reduced the availability of implied damages relief for other constitutional violations.[17] I argue that there is no principled basis for treating temporary regulatory takings differently from other constitutional violations;[18] hence, limiting the availability of implied damages relief under *First English* is necessary to achieve doctrinal consistency.[19] Further, limiting *First English* is desirable from a policy perspective,[20] as this would return the question of compensation for temporary regulatory takings to the political process, allowing federal, state, and local governments to balance

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[10] Note that although *Arkansas Game and Fish* was not a regulatory takings case, the Court's reliance on *First English* was probably necessary to reach its holding. *See infra* note 38 (arguing that no precedent other than *First English* directly supports the proposition that a temporary incidental taking can be compensable).

[11] 264 U.S. 146 (1924).

[12] *Id.* at 149.

[13] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 520 (stating that *Sanguinetti*'s language regarding permanence had been "superseded by subsequent developments in our jurisprudence").

[14] Justice Kagan took no part in the consideration or decision of the case.

[15] Note that the Court did not rule on whether a taking had occurred in the case before it. *See infra* Part I.

[16] Note that *First English*'s holding contradicted previous holdings by state courts in Pennsylvania, New York, and California, *see Temporary Takings, supra* note 6, at 480, and was strongly opposed by three Justices. First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 340 (1987) (Stevens, J., dissenting) (joined by Blackmun and O'Connor, JJ.) (arguing that "the loose cannon the Court fires today is . . . unattached to the Constitution, [and] takes aim at a long line of precedents in the regulatory takings area").

[17] *See infra* Part III (discussing the Court's dramatic retreat from the doctrine established in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

[18] Whether there is a principled basis for treating temporary *physical* takings differently from other constitutional violations is beyond the scope of this Comment.

[19] I assume for the purpose of this Comment that the Roberts Court is unlikely to rethink its approach to implied damages relief for other constitutional provisions.

[20] *See generally* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 784 (1995) (arguing against judicial enforcement of the Just Compensation Clause, except where process failure is particularly likely); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 391–92 (2000) (arguing that judicial enforcement of the Just Compensation Clause forces non-property owners to effectively insure property owners, thereby "effect[ing] an arbitrary, and probably regressive, transfer to property owners").

the public's interest in regulation with the interests of individual property owners on a case-by-case basis.[21]

I. Background

In the late 1940s, the Army Corps of Engineers (the "Corps") dammed the Black River in southeast Missouri in order to provide flood protection for downstream areas.[22] As per its usual procedure, the Corps adopted a water control plan for the dam (the "Water Control Manual"),[23] which set seasonal release rates but permitted temporary deviations from the default rates for "agricultural, recreational, and other purposes."[24] Periodically between 1993 and 2000, the Corps authorized deviations from the Water Control Manual for agricultural purposes,[25] at first on an ad hoc basis and later pursuant to an interim operating plan, which was intended to remain in effect until a group of stakeholders approved permanent changes to the Water Control Manual.[26] As a result of these deviations, flooding extended into the peak growing season for timber on property owned by the Arkansas Game and Fish Commission (the "Commission"), destroying or damaging more than 18 million board feet of timber owned by the Commission.[27]

The Commission filed suit in the Court of Federal Claims, alleging that the United States had taken its property without just compensation.[28] The court found in favor of the Commission, holding that the United States had taken a temporary flowage easement over the Commission's property and awarding the Commission almost $5.8 million in damages.[29]

The Court of Appeals for the Federal Circuit reversed.[30] Circuit Judge Dyk, writing for the court, acknowledged that as a general matter, a temporary interference with property rights is compensable under the Takings Clause if the same interference would constitute a taking if permanently continued.[31] However, he read Supreme Court precedent — in particular, *Sanguinetti v. United States*[32] — to stand for the proposition that "cases involving flooding

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[21] The existence of the Federal Tort Claims Act suggests that the political process is perfectly capable of achieving such a balance. *See* 28 U.S.C. § 2674 (2006) (establishing that "[t]he United States shall be liable, respecting . . . tort claims, in the same manner and to the same extent as a private individual under like circumstances").
[22] *See generally* Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1367 (Fed. Cir. 2011).
[23] *Id.*
[24] Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 516 (2012).
[25] *Id.* at 515.
[26] *Ark. Game & Fish Comm'n*, 637 F.3d at 1369–71.
[27] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 515.
[28] *Ark. Game & Fish Comm'n*, 637 F.3d at 1367.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1374.
[32] 264 U.S. 146 (1924).

and flowage easements are different."[33] In these cases, compensation is only available where inundation is permanent or "intermittent but inevitably recurring;" government-induced flooding that is not permanent or inevitably recurring is a tort, not a taking.[34] The Commission petitioned the Federal Circuit for a rehearing en banc; their petition was denied in a brief per curiam opinion.[35]

The Supreme Court reversed.[36] Writing for a united Court, Justice Ginsburg framed her conclusion as resting on a simple syllogism. First, permanent government-induced flooding can constitute a compensable taking.[37] Second, if a government action can give rise to Takings Clause liability when its effects are permanent, it can also give rise to Takings Clause liability when its effects are only temporary.[38] Therefore, government-induced flooding can constitute a compensable taking, even if it is only temporary.[39]

The Court then addressed *Sanguinetti*. The key sentence of that opinion states that "in order to create an enforceable liability against the Government [in a flooding case], it is . . . necessary that the overflow . . . constitute an actual, permanent invasion of the land."[40] Justice Ginsburg concluded that this sentence was nondispositive, and thus not binding on the Court; in any case, the statement had been "superseded by subsequent developments."[41] Absent a good reason for setting flooding apart from other government intrusions on

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[33] *Ark. Game & Fish Comm'n*, 637 F.3d at 1374. The Federal Circuit also cited *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which, in dicta, stated that the Court had "consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion . . . on the other." *Id.* at 428.

[34] *Ark. Game & Fish Comm'n*, 637 F.3d at 1374.

[35] Ark. Game & Fish Comm'n v. United States, 648 F.3d 1377 (2011). Circuit Judge Dyk filed a concurring opinion, and Circuit Judges Moore and Newman each filed a dissenting opinion.

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

[37] *Id.* at 518 (citing Pumpelly v. Green Bay Co., 13 Wall. 166 (1872)).

[38] *Id.* (citing *First English*, 482 U.S. 304 (1987); United States v. Causby, 328 U.S. 256 (1946); General Motors Corp., 323 U.S. 373 (1945); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Pewee Coal Co., 341 U.S. 114 (1951)). Note that although the Court cited two other lines of cases, its reliance on *First English* was necessary to support its conclusion. *Arkansas Game and Fish* involved a challenge to the incidental, unexpected effects of a government policy or action. Hence, it was not covered by the holdings of *General Motors Corp.*, *Kimball Laundry Co.*, or *Pewee Coal Co.*, each of which involved a direct physical taking. The *Arkansas Game and Fish* Court recognized that these cases were not directly on point, and took care to emphasize that a temporary interference with property rights could be compensable under the Takings Clause even if the government did not take "outright physical possession of the property involved," citing *United States v. Causby* in support. 133 S. Ct. at 519–20. The Court's reliance on *Causby* was misplaced; the *Causby* Court expressed no opinion on whether a temporary taking could be compensable. 328 U.S. at 268 (stating that because "it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper;" remanding to the Court of Claims for further findings.). Therefore, the *Arkansas Game and Fish* Court's holding rested on the continuing validity of *First English*; no other precedent directly supports the proposition that a temporary incidental taking can be compensable.

[39] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518.

[40] Sanguinetti v. United States, 264 U.S. 146, 149 (1924).

[41] *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518.

property, the Court concluded, *Sanguinetti* must give way to the general rule of *First English*.[42]

It is hard to find fault with the Court's conclusion that no reasonable basis exists for treating flooding differently from other interferences with private property, and if one accepts this conclusion and the continuing vitality of *First English* as a precedent, the Court's holding follows as a matter of simple logic. Therefore, if there is a problem with the Court's holding, it lies in the Court's decision to mechanically apply *First English*.

II. *First English* and the *Bivens* Era

First English was decided during an era when the Court frequently implied damages relief for past constitutional violations.[43] The seminal case on implied constitutional remedies was *Bivens v. Six Unknown Federal Narcotics Agents*.[44] In *Bivens*, the Court held (in an opinion by Justice Brennan) that an individual whose home was illegally searched by federal agents could sue the government for damages under the Fourth Amendment.[45] In so holding, the Court acknowledged that the text of the Fourth Amendment did not compel this result.[46] But the Court felt that it was bound to provide a remedy, citing *Marbury v. Madison* for the proposition that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[47]

The Court extended *Bivens* in two subsequent cases. In *Davis v. Passman*,[48] the Court held that an individual who had suffered sexual discrimination at the hand of a government employer in violation of the Fifth Amendment's Due Process Clause could avail herself of a *Bivens* action.[49] And in *Carlson v. Green*,[50] the Court held that a prisoner who had suffered injuries in violation of the Eighth Amendment's prohibition on cruel and unusual punishment could avail himself of a *Bivens* action.[51]

The vision underlying these cases — of a Constitution that establishes tort-like duties in addition to criminal-like prohibitions — is the same vision underlying the majority's opinion in *First English*.[52] In *First English*, the Court

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[42] *Id.*
[43] Note that the Court's practice of implying *injunctive* relief to prevent future constitutional violations is longstanding and uncontroversial. *See* Erwin Chemerinsky, Federal Jurisdiction 632 (2012).
[44] 403 U.S. 388 (1971).
[45] *Id.* at 388.
[46] *Id.* at 396.
[47] *Id.* at 397 (citing *Marbury v. Madison*, 1 Cranch 137, 163 (1803)).
[48] 442 U.S. 228 (1979).
[49] *Id.*
[50] 446 U.S. 14 (1980).
[51] *Id.*
[52] *See* Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1619–20 (1988) (arguing that *First English* and *Bivens* are instantiations of a single constitutional idea central to Justice Brennan's jurisprudence: *ubi jus, ibi remedium*, that is, "for a perpetrated violation of constitutional

was faced with two conflicting readings of the just compensation component of the Takings Clause, one that saw the provision as criminal-like and another that saw it as tort-like. The criminal-like interpretation had been adopted by state courts in California, New York, and Pennsylvania[53] and was advanced by the United States as amicus curiae.[54] On this view, a landowner subject to an exercise of the police power exceeding constitutional limitations could seek an injunction to halt the abusive practice — just as an individual harmed by criminal conduct can call the police — but could not "elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid."[55] This interpretation was consistent with the pre-*Bivens* understanding of the remedies available to the victim of a constitutional violation[56] and, indeed, with the Court's practice in previous regulatory takings cases, including *Pennsylvania Coal*.[57]

According to the alternative tort-like interpretation — advanced by the appellant in *First English* and by Justice Brennan in his dissent in *San Diego Gas & Electric Co.* — injunctive relief would be insufficient, as this would "hardly compensate the landowner for any economic loss suffered during the time his property was taken."[58] Compensation for the entire duration of the taking was necessary because the landowner had suffered a constitutional viola-

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right, there is supposed, by a fundamental principle of legality, to be full redress at law."); *see also* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1128 (1997) (suggesting that Justice Brennan's decision to join the majority opinion in *First English* was motivated by his "general support for constitutional damages remedies."). Note that although Brennan did not write the majority opinion in *First English*, he joined this opinion, and his opinion in *San Diego Gas & Electric Co. v. City of San Diego* served as a template for the Court's opinion in *First English*. *See* 450 U.S. 621, 653–54 (1981) (Brennan, J., dissenting).

[53] *See Temporary Takings, supra* note 6, at 480.

[54] *See* David A. Westbrook, *Administrative Takings*, 74 NOTRE DAME L. REV. 717, 736 (1999).

[55] *San Diego Gas & Elec. Co*., 450 U.S. at 641–42 (1981) (Brennan, J., dissenting) (quoting *Agins v. City of Tiburon*, 598 P.2d 25, 28 (Cal. 1979)).

[56] *See* FEDERAL JURISDICTION, *supra* note 43 at 634 ("Prior to [*Bivens*] . . . plaintiffs were not allowed to sue federal officers for monetary remedies in federal court.")

[57] *See* Westbrook, *supra* note 54, at 736 ("[I]f the [Takings Clause] so clearly requires compensation rather than equitable relief, why do so many cases, notably Pennsylvania Coal, grant equitable relief?"). Note that the criminal-like view of the Takings Clause may be more reflective of the original understanding of the clause. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 60–61 (1999). Brauneis argues that "for most of the nineteenth century, just compensation clauses [in federal and state constitutions] were generally understood not to create remedial duties . . . ;" instead, they functioned to limit the defenses available to an individual who seized property under the sanction of a legislative act. *Id*. at 58, 60. Thus, if a property owner sued an appropriator for common law trespass and the defendant claimed that a legislative act shielded her from liability, the property owner could counter that the legislative act was void as exceeding the limitation placed on government power by the Just Compensation Clause. *Id*. Note that on Brauneis's account, the original function of the Just Compensation Clause was essentially the same as that suggested by the government, and rejected by the Court, for the Fourth Amendment in *Bivens v. Six Unknown Federal Agents of Federal Bureau of Narcotics*. *See* 403 U.S. 388, 390–91 (1971) (rejecting the argument that the Fourth Amendment's sole function is to limit the ability of federal agents to defend state tort suits by asserting that their actions were authorized by federal law).

[58] 450 U.S. at 655 (1981) (Brennan, J., dissenting).

tion at the moment the private property was taken, and this violation triggered the "self-executing character of the [Just Compensation Clause]."[59]

In *First English*, Justice Brennan's tort-like view of the Takings Clause prevailed. The Court held 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."[60] Like the *Bivens* Court, the *First English* Court embraced Justice Brennan's vision of the Constitution, according to which certain constitutional violations are tort-like wrongs that give rise to an obligation upon the wrongdoer to make the injured party whole.

III. The Demise of *Bivens*

Since *First English* was decided, the Court's approach to implied constitutional damages remedies has undergone radical change. While *Bivens* remedies were once treated as presumptively available, even in circumstances where a plaintiff could obtain an alternative remedy under federal law,[61] the Court has reversed this presumption in recent years,[62] holding that *Bivens* relief should be denied where there is *any* alternative procedure sufficient to protect the constitutionally-recognized interest or where there are "special factors" counseling against authorizing a new remedy.[63] It is not necessary that the alternative procedure be as generous as a direct constitutional remedy might be.[64] Nor is it necessary that the interest protected by the alternative remedy be perfectly congruent with the constitutional interest[65] or that the rules governing the availability of relief be uniform across the nation.[66] As long as the alternative remedy provides compensation to the victim and incentives to potential defendants that are "roughly similar" to those provided by a *Bivens* action, the Court will not recognize a new *Bivens* action.[67]

No single rationale explains the Court's dramatic retreat from *Bivens*. Some Justices appear to accept the idea of constitutional torts in principle, but nonetheless feel that prudential or separation-of-powers concerns counsel against creating new *Bivens* actions.[68] By contrast, Justices Scalia and Thomas

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[59] *Id.* at 654 (internal citation omitted).
[60] First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 321 (1987).
[61] *See* Carlson v. Green, 446 U.S. 14, 18–19 (1980).
[62] *See* Pollard v. GEO Grp., 607 F.3d 583, 606–07 (9th Cir. 2010) (Restani, J., dissenting in part and concurring in part).
[63] Wilkie v. Robbins, 551 U.S. 537, 550 (2007).
[64] *See* Minneci v. Pollard, 132 S. Ct. 617, 625 (2011).
[65] *Id.*
[66] *See id.*
[67] *See id.*
[68] *See* Email from Laurence H. Tribe, Professor, Harvard Law School, to author (Jan. 22, 2013) (on file with author) (suggesting that the Court "accepts, in many of the cases in which it refuses to imply a *Bivens* remedy, that the result will be an 'uncured' constitutional wrong," but nonetheless takes the position that the judiciary is the wrong branch of government to remedy this wrong

reject the idea of constitutional torts altogether, and have stated that they will refuse to grant *Bivens* relief in future cases, except on stare decisis grounds.[69] Although there is disagreement on the rationale for rejecting *Bivens*, all of the current Justices except Justice Ginsburg appear united in the view that it will almost never be appropriate to imply a new *Bivens* action.[70]

IV. The Future of *First English*

One might think that *Bivens*'s fall from grace would coincide with a re-evaluation of *First English*, given that the two cases are rooted in a shared constitutional vision[71] and give rise to similar separation-of-powers[72] and prudential[73] concerns. But as *Arkansas Game and Fish* demonstrates, this does not seem to be happening. All eight Justices who sat on the case — including

in light of prudential and separation-of-powers concerns); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 69 (2001) (stating that "bedrock principles of separation of powers foreclose[ ] judicial imposition of a new substantive liability" under the Constitution, so long as a plaintiff has an alternative means of obtaining redress); *Wilkie*, 551 U.S. at 550 (stating that "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee" and emphasizing the need for hesitation before authorizing a new federal cause of action). Note that although some have questioned whether the federal judiciary has authority under Article III to imply remedies for constitutional violations, *see, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 427–28 (1971) (Black, J., dissenting), the Court recently reaffirmed the existence of this authority, even as it declined to exercise it to extend *Bivens*. *See Malesko*, 534 U.S. at 66 ("Our authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'").

[69] *See, e.g.*, *Minneci*, 132 S. Ct. at 626 (Scalia, J., concurring) ("We have abandoned [the power to create damages remedies by implication] in the statutory field . . . and we should do the same in the constitutional field . . . .").

[70] *See id.* at 617, 620.

[71] *See supra* Part II.

[72] Implying a damages remedy for a violation of the Takings Clause is no more consonant with separation-of-powers principles than implying a damages remedy for a violation of any other constitutional provision. There is no statutory cause of action for a violation of the Takings Clause; the Tucker Act merely confers jurisdiction on the Court of Federal Claims to consider claims founded upon the Constitution, and it does so without specifying which provisions of the Constitution are capable of supplying a cause of action. 28 U.S.C. § 1491(a)(1) (2006). If one believes (as many critics of *Bivens* do) that "legislative action is required before suits for money damages can be brought . . . for violations of constitutional rights," Federal Jurisdiction, *supra* note 43 at 638, one should reject implied damages relief for *all* constitutional violations, including violations of the Takings Clause.

[73] Some of the prudential arguments that the Court has given against extending *Bivens* are equally applicable in *First English* cases. For example, the Court has cited "the difficulty in defining a workable cause of action" as an argument against providing a *Bivens* remedy where the constitutional violation consisted of a series of government actions that, although individually legitimate, went "too far" toward an illegitimate end. *Wilkie*, 551 U.S. at 555–57. But the Court's regulatory takings jurisprudence requires it to make the exact determination it refused to make in *Wilkie*. *See Pennsylvania Coal Co.*, 260 U.S. at 415 (holding that the government is required to pay compensation if its laws or regulations go "too far" in redefining the range of interests included in the ownership of property). Similarly, the Court has cited the threat of opening a floodgate to new federal litigation as an argument against extending *Bivens*. *See Wilkie*, 551 U.S. at 561 (refusing to imply a new *Bivens* action, in part because doing so would open an "enormous swath of potential litigation"). But the Court has brushed aside this concern when extending *First English*. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 521 (rejecting, with a clever turn of phrase, the government's

seven who voted in *Minneci* to drastically limit *Carlson* and deny a *Bivens* remedy to a federal prisoner in a privately run prison[74] — voted to reaffirm *First English*.[75] What explains this seeming incongruity?

The short answer is that we do not know, because the Court has never offered an explanation or, indeed, shown any awareness that an incongruity exists. There is no historical argument for this differential treatment; as noted, the Takings Clause was originally understood to impose a limitation on government power, and not to mandate a judicial remedy.[76] Nor is there a particularly satisfying textual argument for this differential treatment. Although it is true that the text of the Takings Clause is unique in referring to just compensation, this text is not sufficient to justify implying a remedy in a case like *First English*. Rather, it is necessary to abstract considerably from the Takings Clause's text in order to justify such a remedy; one must derive a general commitment to socializing economic loss caused by government actions that burden constitutionally-recognized property rights from a provision requiring just compensation when property is "taken for public use." There is no value-neutral argument for ending the abstraction here rather than deriving an even more general commitment to socializing economic loss caused by government actions that burden *any* constitutionally-recognized right.[77] Indeed, the Court appears to have endorsed this broader understanding of the Takings Clause's purpose in its famous dictum in *United States v. Armstrong* that the purpose of the clause 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."[78] This more general understanding of the Taking Clause's purpose — when read in light of other constitutional commitments — would justify granting an implied damages remedy in a case like *Minneci* or *Wilkie* as well as in a case like *First English*.

Nor does there appear to be a convincing policy reason to imply a damages remedy in regulatory takings cases but not in cases involving other constitutional violations. It has been argued that the Takings Clause deserves special treatment because "the political impact of compensation [for a taking] is usually direct, immediate, and predictable," and thus more likely to affect government behavior than liability for other constitutional violations.[79] Even if this is

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"floodgates" argument: "The sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability.").

[74] *Minneci*, 132 S. Ct. at 617.

[75] All of the current Justices, except Justice Ginsburg, joined the majority in *Minneci*. All of the current Justices, except Justice Kagan (who did not participate in the case), joined the Court's opinion in *Arkansas Game and Fish*.

[76] *See generally* Treanor, *supra* note 16, at 783.

[77] *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (arguing that there is no value-neutral method of choosing an appropriate level of abstraction in defining a constitutionally-protected right).

[78] United States v. Armstrong, 364 U.S. 40, 49 (1960).

[79] *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 864 (2007).

true with regard to physical takings — and it is questionable[80] — the argument has little force when applied to regulatory and incidental takings, where the imposition of liability is generally neither direct, immediate, nor predictable, due to the opacity of regulatory takings law[81] and the role of external factors in accomplishing the taking.

In the absence of a textual, historical, or policy argument for distinguishing between temporary regulatory takings and other constitutional violations, the Court's current approach is incoherent and unjustifiable.[82] To cure this incoherence, doctrinal change is needed. Either the Court should revive *Bivens* or it should apply its post-*Bivens* approach to cases involving temporary regulatory takings. Assuming that the Roberts Court has little interest in reviving *Bivens*, this doctrinal reconciliation can best be achieved by limiting *First English* so that a damages remedy is not implied for a temporary regulatory taking unless (1) there is no alternative procedure sufficient to protect the constitutionally-recognized interest, and (2) there are no "special factors" counseling against authorizing the remedy.

If the Court had applied this approach in *Arkansas Game and Fish*, it might very well have declined to extend *First English* to cover temporary flooding. In *Arkansas Game and Fish*, the government had a strong argument that a "special factor" counseled against implying a remedy from the Takings Clause: Congress's explicit statement that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."[83] Under current *Bivens* doctrine, even congressional *silence* about whether a court should imply a damages remedy may be sufficient to preclude its implication,[84] and significant deference is due "to indications

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[80] *See* Levinson, *supra* note 16, at 345 (arguing that because "[g]overnment actors respond to political incentives, not financial ones," efforts to deter government from engaging in constitutionally problematic conduct — like taking of property — are "likely to be disappointing and perhaps even perverse.").

[81] *See, e.g.*, Steven J. Eagle, *Some Permanent Problems with the Supreme Court's Temporary Regulatory Takings Jurisprudence*, 25 U. HAW. L. REV. 325, 352 (2003) (criticizing the Court's approach to temporary regulatory takings as "giv[ing] judges great power, but giv[ing] no one much predictability").

[82] Of the Justices who sat on both *Arkansas Game and Fish* and *Minneci* (i.e., every sitting Justice except Justice Kagan), only Justice Ginsburg can claim jurisprudential coherence. *See* Minneci v. Pollard, 132 S. Ct. 617, 626 (2011) (Ginsburg, J., dissenting); Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012) (Opinion of Court, written by Ginsburg, J.). By contrast, Justices Scalia and Thomas have taken an approach that is startlingly contradictory. *Compare Minneci*, 132 S. Ct. at 626 (Scalia, J., dissenting) (joined by Thomas, J.) (calling on the Court to abandon the practice of implying damages remedies for violations of the Constitution) *with* Tahoe-Sierra Pres. Council, Inc. v. Tahoe-Sierra Reg'l Planning Auth., 535 U.S. 302, 355 (2002) (Thomas J., dissenting) (joined by Scalia, J.) (calling on the Court to imply a retroactive damages remedy in any case where an owner is temporarily deprived of the total economic value of a piece of property).

[83] Section 702c of the Flood Control Act of 1928, 33 U.S.C. § 702c (2012); *see also* Transcript of Oral Argument at 39, *Ark. Game & Fish Comm'n*, 133 S. Ct. 511 (No. 11-597) (discussing the relevance *vel non* of this provision).

[84] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001) (declining to impose *Bivens* liability on private prison facilities absent an indication that Congress intended such a result).

that congressional inaction [in supplying a damages remedy for a constitutional violation] has not been inadvertent."[85] It follows *a fortiori* that explicit congressional action to preclude a damages remedy against the United States should be granted preclusive effect. Hence, it is likely that a court applying current *Bivens* doctrine would have felt bound to defer to Congress and would have declined to imply a damages remedy in *Arkansas Game and Fish*.

Conclusion

In *Arkansas Game and Fish*, the Court missed an opportunity to reconsider *First English*, a precedent badly in need of reevaluation in light of the Court's recent retreat from implied damages remedies for constitutional violations. There is no compelling textual, historical, or policy reason for treating temporary regulatory takings differently from other constitutional violations. Therefore, the Court should employ the same test to determine whether to imply a remedy for a temporary regulatory taking that it uses to determine whether to imply a remedy for any other constitutional violation. This would mean restricting *First English*, so that damages relief would not be available for a temporary regulatory taking unless (1) there is no alternative procedure sufficient to protect the constitutionally-recognized interest, and (2) there are no "special factors" counseling against authorizing the remedy.

[85] Schweiker v. Chilicky, 487 U.S. 412, 423 (1988).