

Put Out^{to} Pasture

The Supreme Court again fails to give property rights the respect they deserve.

BY ILYA SOMIN

Lost in all the attention devoted to the Supreme Court's more high-profile end-of-term cases was an important property rights decision issued on June 25: *Wilkie v. Robbins*.

This case reinforces the long-standing second-class status of property rights relative to other constitutional rights. Ironically, the only dissenters in *Wilkie*—Justices Ruth Bader Ginsburg and John Paul Stevens—are liberals generally considered unsympathetic to property owners.

Wyoming rancher Harvey Robbins alleged that the Bureau of Land Management launched an extensive campaign of harassment against him because he refused to grant the BLM an easement across his property without compensation. According to Robbins, government agents repeatedly trespassed on his property and harassed his customers. In one instance, they even allegedly tried to videotape female customers in the act of relieving themselves.

Under the Fifth Amendment, government coercion to force Robbins to give up the easement without payment is a clear violation of the takings clause, which prevents private property from being taken for public use without just compensation. The government cannot use harassment and intimidation to try to force citizens to give up their constitutional rights. Because the case was at the summary judgment stage, the Court had to assess all factual evidence in the light most favorable to Robbins. Nonetheless, the majority refused to allow Robbins to seek a damages remedy against the bureau.

INADEQUATE REMEDIES

This was not in and of itself especially troubling. There are other ways to prevent violations of constitutional rights. For

example, the Court majority noted that Robbins could file tort suits against the BLM agents.

The problem is that the majority itself admitted that those other remedies were inadequate in this case. As the Court acknowledged:

“Robbins’s argument for a [damages] remedy that looks at the course of dealing as a whole, not simply as so many individual incidents, has the force of the metaphor Robbins invokes, ‘death by a thousand cuts.’ It is one thing to be threatened with the loss of grazing rights, or to be prosecuted, or to have one’s lodge broken into, but something else to be subjected to this in combination over a period of six years. . . . The whole here is greater than the sum of its parts.”

Yet the Court still denied Robbins the right to seek damages. This undercuts one of the most basic principles of constitutional law: that for every violation of a constitutional right there must be an adequate remedy. The *Wilkie* majority ignored this rule because of its fear that allowing “action[s] for damages to redress retaliation against those who resist Government impositions on their property rights would invite claims in every sphere of legitimate governmental action affecting property interests, from negotiating tax claim settlements to enforcing Occupational Safety and Health Administration regulations.”

Ginsburg devastated this argument in her dissent. As she pointed out, most other government regulations affecting property do not in fact have an impermissible retaliatory motive of the sort Robbins alleged. She also showed that the majority’s parade of horrors has not occurred with state governments, despite the fact that damages remedies have long been available for unconstitutional retaliatory action against property rights by state officials.

Under current Supreme Court doctrine, furthermore, a regulation does not violate the takings clause merely because it “affect[s] property interests.” To cause a taking, the government must physi-

cally occupy the property (as the BLM sought to do in this case) or eliminate virtually all the property's economic value through regulatory action. Most other regulations are not takings, even if they substantially impair property values.

Yet there is a still deeper flaw in the majority's reasoning. By its logic, citizens should be denied remedies for the violation of their constitutional rights any time setting up a cause of action for a remedy would burden the government too much. But the whole point of making the Constitution the supreme law of the land is to ensure that adherence to the Constitution trumps ordinary policy considerations, including considerations of cost.

The Court does not hesitate to follow this principle in most cases where other constitutional rights clash with real or imagined cost considerations. Federal courts routinely vindicate free speech rights and Fourth Amendment rights, among others, in cases where doing so imposes costs on the government. Unfortunately, they are unwilling to extend the same solicitude to property rights.

UNLAWFUL MEANS

Justice David Souter's majority opinion claims that the key difference between this case and other instances of government retaliation for exercising a constitutional right is the motive for the government's action. "[U]nlike punishing someone for speaking out against the Government," Souter explained, "trying to induce someone to grant an easement for public use is a perfectly legitimate purpose."

The problem with this reasoning is that constitutional rights restrict not only the ends that government may pursue, but also the means that it can use to achieve them. In *Wilkie*, the government's desire to acquire an easement onto Robbins' property was not in and of itself unconstitutional. But the effort to achieve this purpose by forcing the owner to give up the easement without compensation was an unconstitutional means to an otherwise legitimate end.

To take up Souter's First Amendment analogy: It is perfectly legitimate for government officials to try to stimulate public support for their policies. It is not legitimate, however, for them to suppress opposing speech as a means to this end. If public officials punish anti-government speakers for their speech, Souter surely would not deny the victims a damages remedy simply because the government's ultimate purpose was "legitimate." Yet he fails to draw the obvious parallel conclusion for property rights. For that reason, his opinion helps relegate constitutional property rights to second-class status.

Souter further suggests that the government's actions were just an instance of "hard bargaining" to achieve a legitimate end. That is a strange way to describe a six-year campaign of illegal harassment he himself analogized to "death by a thousand cuts." If the BLM had used the same kind of "hard bargaining" to force Robbins to stop criticizing BLM policy, most justices in the *Wilkie* majority would not think of denying him an adequate remedy.

NO DAMAGES AT ALL?

In contrast to the other five justices in the majority, Justices Antonin Scalia and Clarence Thomas would abolish constitutional damages remedies almost entirely, whether the rights violated by the government are property rights or not.

These two conservative justices categorically reject the principle—most clearly established in *Bivens v. Six Unknown Federal Agents* (1971)—that federal courts may sometimes order the gov-

ernment to pay damages to remedy the violation of a constitutional right. In a concurring opinion joined by Scalia, Thomas called *Bivens* "a relic" and urged the Court to confine its application as much as possible.

The Thomas-Scalia view has the virtue of treating property rights the same as other constitutional rights. Yet its shortcomings outweigh this one strength.

Perhaps the most fundamental duty of the federal courts is to overrule and remedy governmental violations of the Constitution. In some cases, an award of money damages is the only adequate remedy available, or even the only possible remedy of any kind. On other occasions, alternative remedies are available but are not sufficient to fully remedy the violation of the victim's rights. This was true in *Wilkie* itself, as the Court recognized.

In such situations, the courts have a duty to provide a remedy that fully compensates the victim for the violation of his constitutional rights. Any other approach is unjust to the victim and provides poor incentives for the government by allowing it to avoid bearing the full cost of its unconstitutional actions.

Thomas and Scalia may believe that judicial decisions that order a damages remedy somehow constitute judicial policy-making in a way that decisions mandating other kinds of remedies do not. Damage remedies are indeed sometimes unwise or inferior to available alternatives. Yet a damages remedy is not inherently more "activist" than alternatives such as injunctive relief or invalidation of a statute. In many cases, an injunction or invalidation of a statute will actually constrain the political branches more than damage payments do. The former options forbid government action outright, while the latter merely increases the cost of engaging in it.

SECOND-CLASS

In the short run, the main effect of *Wilkie* is to ensure that some property owners will not have adequate remedies for violations of their constitutional rights by federal government officials. This is a potentially serious problem in Western states such as Wyoming, where the federal government has extensive landholdings and disputes between federal agents and local property owners periodically lead to violations of constitutional rights.

More broadly, *Wilkie* reinforces the long-standing second-class status of constitutional property rights. In previous cases such as *Kelo v. City of New London* (2005), the Court often defined the scope of property rights in a much more restrictive way than is usually applied to "noneconomic" rights such as freedom of speech and religion. In *Wilkie*, it ensured that even indisputable violations of constitutional property rights will be compensated less adequately than violations of other individual rights.

At the same time, as Thomas' concurrence implies, most of the arguments for denying damage remedies for property rights violations can also be used to justify their denial for violations of other individual rights. Those who are content with the Court's relegation of property rights to second-class status should realize that the same fate may befall other constitutional rights that they value more.

Ilya Somin is an assistant professor at George Mason University School of Law. He writes extensively on constitutional law and property rights. Some of the material in this commentary originally appeared on the Volokh Conspiracy blog (www.volokh.com).