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KOONTZ: THE VERY WORST TAKINGS DECISION EVER?

JOHN D. ECHEVERRIA*

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INTRODUCTION

Koontz v. St. Johns River Water Management District[1] is one of the worst—if not the worst—decision in the pantheon of Supreme Court takings decisions. The majority opinion conflicts with established doctrine in several respects and even misrepresents applicable precedent.[2] At the same time, the Court does not explain whether or how it thinks established doctrine could or should be reformulated to accommodate its novel conclusions. As a result, the Court has not only reached an unfortunate result in this particular case but it has cast a pall of confusion over takings law as a whole. *Koontz* represents a striking reversal of the Court's recent, successful efforts to improve the coherence and predictability of takings doctrine.[3]

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[1] 133 S. Ct. 2586 (2013).

[2] *See infra* note 156 (discussing Justice Alito's misrepresentation of the Court's language and reasoning in *Nollan*).

[3] *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) (unanimously repudiating the "substantially advance" takings theory and articulating a coherent framework for analyzing claims under the Takings Clause); *cf.* John Paul Stevens, *Tribute to Justice O'Connor*, 31 J. SUPREME

The defects of the Court's opinion in *Koontz* undoubtedly partly reflect the challenges Justice Samuel Alito, the author of the opinion, confronted in forming or holding a 5 to 4 majority willing to overrule the decision of the Florida Supreme Court and join in a single opinion for the Court. This surmise is supported by the fact that it took the Court over five months from the date of the oral argument in mid-January 2013 to release the decision in late June, making the deliberations in this case more time-consuming than in all but a handful of other cases in the 2012–13 term.[4] Justice Elena Kagan's dissent, joined by three other justices, presents the kind of cogent critique of the Court's analysis that a cobbled together majority opinion virtually invites.

The decision in *Koontz* includes two major doctrinal innovations. First, the Court ruled that the stringent standards the Court established in *Nollan v. California Coastal Commission*[5] and *Dolan v. City of Tigard*[6] for the review of land use exactions also apply to challenges to government decisions to deny development permits after a landowner has rejected a government "demand" for an exaction.[7] Second, the Court ruled that the *Nollan/Dolan* standards apply not only to permit conditions requiring landowners to accept "physical takings" of their property, but also to conditions requiring them to pay monetary fees to the government or otherwise expend money at the public's behest.[8] For different reasons, neither of these rulings can be explained or justified in light of pre-existing law, none of which the Court explicitly questioned, much less purported to modify or overrule.

Apart from its doctrinal failings, the Court's decision will

COURT HISTORY 99 (2006) ("[Justice O'Connor's] lucid and honest opinion in *Lingle v. Chevron U.S.A., Inc.* . . . [was,] if not the very best, . . . surely one of the best opinions announced last term.").

[4] Cases that took even longer to decide in the 2012–13 term were Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013) (affirmative action); Vance v. Ball State Univ., 133 S.Ct. 2434 (2013) (Title VII retaliation claim); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (Alien Tort Statute); Moncrieffe v. Holder, 133 S. Ct. 1678 (Immigration and Nationality Act); and Descamps v. United States, 133 S.Ct. 2276 (2013) (Armed Career Criminal Act).

[5] 483 U.S. 825 (1987).

[6] 512 U.S. 374 (1994).

[7] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013).

[8] *Id.* at 2603.

have negative practical effects on local governments and developers seeking to obtain development approvals. The decision will create a perverse, wasteful incentive for local officials to decline to work cooperatively with developers to design projects that make business sense and protect the interests of the community. The decision also will make the land use regulatory process more cumbersome, expensive, and time-consuming, and will lead to the rejection of some development proposals that previously would have been approved. Ultimately, the health, vitality, and diversity of American cities and towns will suffer. Justice Kagan predicted the Court will come to "rue" its decision in *Koontz*.[9] If she is correct, one can only hope that a future Court will chart a different, better course.

This article analyzes *Koontz* relative to the baseline defined by prior law, including *Nollan* and *Dolan*, as well as *Loretto v. Teleprompter Manhattan CATV Corp.*,[10] which established the per se rule for physical takings that provides the linchpin for the analysis in *Nollan* and *Dolan*. All of these rulings were and are objectionable on the normative ground that they improperly expanded the authority of the judiciary at the expense of the other branches of government, and more specifically because they undermined the local democratic process governing land use. In addition, these cases were wrongly decided as a doctrinal matter, largely for the reasons expressed by the dissenters in each case.[11] But *Nollan* and *Dolan* applied to a manageable, reasonably well defined category of cases. *Koontz* has taken the unfortunate step of expanding upon *Nollan* and *Dolan,* raising the same normative concerns as *Nollan* and *Dolan* but in a far more expansive fashion. The objectives of this article are to explain how the Court failed to justify in logical, doctrinal terms this latest ill-advised expansion of takings law, and to cast some light on the practical harms that will flow from the decision.

This article is organized as follows. Part I describes several prior Supreme Court takings decisions, including *Nollan*, *Dolan*,

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9 *Id.* at 2612 (Kagan, J., dissenting).

10 458 U.S. 419 (1982).

11 *See Dolan*, 512 U.S. at 396–411 (Stevens, J., dissenting); *id.* at 411–14 (Souter, J., dissenting); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 842–64 (1987) (Brennan, J. dissenting); *id.* at 865–66 (Blackmun, J., dissenting); *Loretto*, 458 U.S. at 442–56 (Blackmun, J., dissenting).

City of Monterey v. Del Monte Dunes at Monterey,[12] and *Lingle v. Chevron USA, Inc.*,[13] to provide necessary background for a critical analysis of *Koontz.* Part II provides a thumbnail sketch of the facts of the *Koontz* case, the lower court rulings, and the Supreme Court decision. Part III discusses the doctrinal problems with the Court's ruling that the *Nollan/Dolan* standards apply in a challenge to a permit denial. Part IV discusses the doctrinal problems with the Court's ruling that the *Nollan*/*Dolan* standards apply in a challenge to permit conditions imposing fees or otherwise requiring expenditures of money. Part V describes the numerous negative practical implications of the Court's rulings. Part VI discusses the significance of *Koontz* for the current state and potential future direction of takings doctrine, assesses the prospects that the Court will reverse course in part or in whole in the future, and offers some suggestions on how litigants and lower courts might cabin the damage that the rulings in *Koontz* inflict.

I. THE SUPREME COURT PREQUELS TO *KOONTZ*

To appreciate both the significance and problematic nature of *Koontz*'s extensions of *Nollan* and *Dolan*, it is necessary to understand the logical and doctrinal underpinnings of these two decisions.

On the one hand, the Supreme Court has long recognized that direct appropriations of private property (such as government seizure of a factory[14] or taking over of a leasehold[15]) are necessarily takings of private property under the Takings Clause. In addition, the Court has recognized that permanent physical occupations of private property (such as government flooding of land behind a dam[16] or forcing a landlord to accept a cable television company's equipment on her building[17]) are also *per se* takings.[18]

On the other hand, the Court has said that takings challenges

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12 526 U.S. 687 (1999).
13 544 U.S. 528 (2005).
14 United States v. Pewee Coal Co., 341 U.S. 114 (1951).
15 Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).
16 Pumpelly v. Green Bay Co., 20 L.Ed. 557 (1872).
17 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
18 *See* Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012).

to regulatory restrictions on the use of private property are subject to a more forgiving standard and should generally fail.[19] Most takings claims based on regulations are evaluated under the three-part analytic framework established in *Penn Central Transportation Co. v. New York City*.[20] This analysis focuses on the economic impact of the restriction, the degree of interference with investment-backed expectations, and the character of the regulation.[21] In the extraordinary situation where a regulation deprives the owner of "all value,"[22] the Court has said the regulation represents a *per se* taking.[23] Overall, awards of compensation under the Takings Clause based on regulatory restrictions are the exception rather than the rule.

The *Nollan* and *Dolan* cases arose at the intersection of these two distinct lines of authority. In *Nollan,* the California Coastal Commission permitted the owners of costal property to replace an existing building on their property with a bigger building, but on the condition that they grant the public lateral access across their private beach in front of the building.[24] In *Dolan*, the City of Tigard granted Mrs. Dolan permission to build a larger hardware store on her property, but on the condition that she grant the public easements for a bike path and a public greenway along the edge of her land.[25] The Court indicated in both cases that, if the government had denied the development applications outright, the owners would not have had viable claims under the regulatory takings standards.[26] At the same time, the Court observed that the

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[19] *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (observing that "governmental land-use regulation may under extreme circumstances amount to a 'taking' of the affected property").

[20] 438 U.S. 104, 124 (1978).

[21] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538–39 (2005) (citing Penn Cent. Transp. Co., 438 U.S. 104, 124 (1978)).

[22] Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002).

[23] Lucas v. S.C. Coastal Council*,* 505 U.S. 1003, 1016 (1992).

[24] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).

[25] Dolan v. City of Tigard, 512 U.S. 374, 382 (1994).

[26] *See Nollan*, 483 U.S. at 835–36 (assuming "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches" are "permissible" government purposes, "the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the

exactions in each case, if they had been imposed directly and outside the context of the regulatory processes, would have constituted *per se* takings because they involved permanent physical occupations.[27] Thus, the question presented in *Nollan* and *Dolan* was how to evaluate a takings challenge to an exaction when the government has granted development approval, which it could have denied without serious risk of takings liability, but the exaction would have constituted a *per se* taking if imposed independently.

The Court's answers to this puzzle were the unique, relatively demanding "essential nexus" and "rough proportionality" tests. An exaction will not result in a taking, the Court ruled in *Nollan*, if there is a logical relationship, or "essential nexus," between the purposes served by the exaction and the purposes that would have been served by an outright permit denial.[28] The Court ruled that the exaction in *Nollan* was a taking because there was no logical connection, in the Court's view, between providing lateral pedestrian access along the beach and the Commission's stated goal of preserving views of the ocean.[29] In *Dolan*, the Court ruled that, even if the essential nexus test is satisfied, there must also be a "rough proportionality" between the magnitude of the project's impacts and the magnitude of the burden imposed by the exaction.[30] The Court vacated and remanded the case to the Oregon Supreme Court to evaluate whether the exactions imposed by the city were roughly proportional to the projected increases in

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denial would interfere so drastically with the Nollans' use of their property as to constitute a taking."). The Court makes the point more elliptically in *Dolan*. *See* 512 U.S. at 384–85 & n.6; *cf. id.* at 396 (Stevens, J., dissenting) ("The enlargement of the Tigard unit in Dolan's chain of hardware stores will have an adverse impact on the city's legitimate and substantial interests in controlling drainage in Fanno Creek and minimizing traffic congestion in Tigard's business district. That impact is sufficient to justify an outright denial of her application for approval of the expansion.").

[27] *Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."); *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.").

[28] *Nollan*, 483 U.S. at 837.

[29] *Id.* at 838–42.

[30] *Dolan*, 512 U.S. at 391.

traffic and storm water flows from the new store.[31]

Nollan and *Dolan* plainly establish a distinctive, heightened standard for the review of land use exactions under the Takings Clause.[32] They require a unique, particularized analysis, involving what the Supreme Court in *Lingle* called a "special application of the 'doctrine of unconstitutional conditions.'"[33] The decisions assign the ultimate burden of proof to the government to demonstrate that the *Nollan/Dolan* standards are satisfied,[34] departing from the Court's usual practice of assigning the burden of proof to the plaintiff in takings and other constitutional challenges to property regulations.[35] Not surprisingly, therefore,

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[31] *Id.* at 396.

[32] *Nollan* and *Dolan* should both be regarded as takings cases. This is supported by the fact that the plaintiffs in both cases explicitly invoked the Takings Clause as the basis for their claims and the Court approached each case by asking whether the exactions at issue constituted takings. *See Nollan*, 483 U.S. at 827, 837 (commencing the opinion by observing that "[t]he California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment," and concluding that "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was," that is "quite simply, the obtaining [*i.e.*, taking] of an easement to serve some valid governmental purpose, but without payment of compensation"); *Dolan*, 512 U.S. at 382, 391 (stating that the plaintiff initially challenged the City of Tigard's conditions "on the ground that the[y]. . . constituted an uncompensated taking of her property under the Fifth Amendment," and concluding that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment"). It is appropriate to view *Nollan* and *Dolan* as takings cases notwithstanding the fact that Justice Stevens was surely correct in asserting that the heightened standard of review established in these cases represented "resurrection of a species of substantive due process analysis that . . . [the Court] firmly rejected decades ago." *Dolan*, 512 U.S. at 405 (Stevens, J. dissenting); *see also Nollan*, 483 U.S. at 842 (Brennan, J. dissenting) ("[T]he Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century."); Lingle v. Chevron U.S.A, Inc., 544 U.S. 528, 538 (2005) (characterizing takings claims in the "special context of land-use exactions" as involving a species of "regulatory takings" analysis). The Court's opinion in *Koontz* muddies the waters somewhat (without altering the fact that *Nollan* and *Dolan* are, in fact, takings cases) by not explicitly reaffirming that *Nollan* and *Dolan* are takings cases and instead characterizing them as involving application of the unconstitutional conditions doctrine "that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013).

[33] *Lingle*, 544 U.S. at 547 (2005) (internal quotation marks omitted).

[34] *Dolan*, 512 U.S. at 391 n.8.

[35] *See* E. Enters. v. Apfel, 524 U.S. 498, 523 (1998) (plurality opinion) ("Of course, a party challenging governmental action as an unconstitutional taking

both *Nollan* and *Dolan* were hotly contested and controversial cases, each decided over the objections of four dissenting justices.[36] The relatively heightened standard of review established by *Nollan* and *Dolan* surely has resulted in more searching judicial review of local land use decisions. A recent survey of the published appellate decisions applying the "rough proportionality" test, generally regarded as the more demanding of the two exactions tests, shows that the government flunks the test about half the time[37]—a significant figure.[38] In sum, *Nollan* and *Dolan*

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bears a substantial burden.") (citing United States v. Sperry Corp., 493 U.S. 52, 60 (1989)); *see also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) ("[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way").

[36] *See Nollan*, 483 U.S. at 842–64 (Brennan, J., dissenting, joined by Marshall, J.); *id.* at 865–66 (Blackmun, J., dissenting); *id.* at 866–67 (Stevens J., dissenting, joined by Blackmun, J.); *Dolan,* 512 U.S. at 396–411 (Stevens, J., dissenting, joined by Blackmun, J., and Ginsburg, J.); *id.* at 411–14 (Souter, J., dissenting).

[37] For examples of cases in which the government passed the rough proportionality test, see Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n, 163 Cal. App. 4th 215, 77 Cal. Rptr. 3d 432 (2009); State Route 4 Bypass Auth. v. The Super. Ct. of Contra Costa Cnty., 153 Cal. App. 4th 1546, 64 Cal. Rptr. 3d 286 (2007); N. Ill. Home Builders Ass'n v. Cnty. of Du Page, 165 Ill. 2d 25, 649 N.E. 2d 384, 208 Ill. Dec. 328 (1995); Curtis v. Town of S. Thomaston, 708 A.2d 657 (Me. 1998); Dowerk v. Charter Twp. of Oxford, 233 Mich. App. 62, 592 N.W.2d 724 (1999); Kottschade v. City of Rochester, 537 N.W.2d 301 (Minn. 1995); Twin Lakes Dev. Corp. v. Town of Monroe, 1 N.Y.3d 98, 801 N.E.2d 821, 769 N.Y.S.2d 445 (2003); Consumers Union of U.S., Inc. v. State, 5 N.Y.3d 327, 840 N.E.2d 68, 806 N.Y.S.2d 99 (2005); Matter of Joy Builders., Inc. v. Town of Clarkstown, 54 A.D.3d 761, 864 N.Y.S.2d 86 (2008); Twin Lakes Dev. Corp. v. Town of Monroe, 300 A.D.2d 573, 752 N.Y.S.2d 546 (2002); Matter of Grogan v. Zoning Bd. of Appeals of E. Hampton, 221 A.D.2d 441, 633 N.Y.S.2d 809 (1995); Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 89 Ohio St. 3d 121, 729 N.E.2d 349 (2000); Hallmark Inns & Resorts, Inc. v. City of Lake Oswego, 193 Or. App. 24, 88 P.3d 284 (2004); B.A.M. Dev., L.L.C. v. Salt Lake Cnty., 282 P.3d 41 (2012); Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 160 Wash. App. 250, 255 P.3d 696 (2011); Sparks v. Douglas Cnty., 127 Wash. 2d 901, 904 P.2d 738 (1995); Trimen Dev. Co. v. King Cnty., 124 Wash. 2d 261, 877 P.2d 187 (1994). For cases in which the government flunked the rough proportionality test, see Goss v. City of Little Rock, 151 F.3d 861 (1998); Ehrlich v. City of Culver City, 12 Cal. 4th 854, 911 P.2d 429, 50 Cal. Rptr. 2d 242 (1996); Amoco Oil Co. v. Village of Schaumburg, 277 Ill. App. 3d 926, 661 N.E.2d 380, 214 Ill. Dec. 526 (1996); Pulte Homes of N.Y., LLC v. Town of Carmel Planning Bd., 84 A.D.3d 819, 921 N.Y.S.2d 867 (2011); McClure v. City of Springfield, 175 Or. App. 425, 28 P.3d 1222 (2001); Art Piculell Grp. v. Clackamas Cnty., 142 Or. App. 327, 922 P.2d 1227 (1996); Clark v. City of Albany, 137 Or. App. 293, 904 P.2d 185 (1995); J.C. Reeves Corp. v. Clackamas Cnty., 131 Or. App. 615, 887 P.2d 360 (1994);

represented important new protections for the interests of property owners under the Takings Clause.[39] Small wonder that Coy

Schultz v. City of Grants Pass, 131 Or. App. 220, 884 P.2d 569 (1994); City of Carrollton v. RIHR Inc., 308 S.W.3d 444 (2010); Town of Flower Mound v. Stafford Estates Ltd., 135 S.W.3d 620 (2004); Mira Mar Dev. Corp. v. City of Coppell, 364 S.W.3d 366 (2012); City of Olympia v. Drebick, 119 Wash. App. 774, 83 P.3d 443 (2004); Benchmark Land Co. v. City of Battle Ground, 94 Wash. App. 537, 972 P.2d 944 (1999); Burton v. Clark Cnty., 91 Wash. App. 505, 958 P.2d 343 (1998). These cases were collected in the summer of 2013.

[38] These data suggest that the rough proportionality test, in operation, is only somewhat less demanding than the strict scrutiny test applied in other contexts. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (concluding, based on a detailed empirical analysis, that 30 percent of all applications of strict scrutiny result in the challenged law being upheld).

[39] While there is some conflict and uncertainty about the issue, it appears that the appropriate remedy for a successful *Nollan/Dolan* claim is an award of just compensation for either a temporary taking or, if the government continues to enforce the exaction following an adverse decision, a permanent taking. This conclusion follows from the fact that *Nollan* and *Dolan* both involve application of the Takings Clause, *see supra* note 32; the default remedy under the Takings Clause is an award of compensation rather than an injunction, *see* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for just compensation can be brought against the sovereign subsequent to the taking."); and there are no special features of *Nollan/Dolan* cases that warrant a departure from the general rule favoring the compensation remedy. *Cf.* Horne v. Dep't of Agric., 133 S. Ct. 2053, 2063 (2013) (suit for equitable relief against government officials under the Takings Clause is appropriate when jurisdiction to award just compensation pursuant to the Tucker Act has been withdrawn). *Nollan* and *Dolan* themselves created unfortunate confusion about the remedy issue because in both cases the plaintiffs sought equitable relief and the Court decided the cases without explicitly commenting on remedies. Also, *Nollan* was decided later in the same month that the Court issued its seminal decision on remedies in takings cases, First English Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304 (1987), but the Court's opinion in *Nollan* does not even cite *First English*. Subsequent Court decisions offer little additional guidance on the issue. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, at 546–47 (2005) ("The question [in both *Nollan* and *Dolan*] was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny."); Wilkie v. Robbins, 551 U.S. 537, 583–84 (2007) (Ginsburg, J., concurring in part, dissenting in part) (stating that *Nollan* and *Dolan* "invalidat[ed]" permit conditions "that would have constituted a taking"). Thus, it is hardly surprising that the lower federal and state courts are all over the map as to whether the appropriate remedy in *Nollan/Dolan* cases is an award of just compensation, equitable relief, or both. *See* Scott Woodward, *The Remedy for a Nollan/Dolan Unconstitutional Conditions Violation*, VT. L. REV. (forthcoming 2014) (collecting cases). In accord with its characterization of *Nollan* and *Dolan* as unconstitutional conditions cases, the Court's opinion in *Koontz* hints that

Koontz Jr. celebrated his victory in the Supreme Court by asserting that the expanded application of *Nollan* and *Dolan* will mean that developers have a "bigger stick" to wield in their dealings with local governments.[40]

Two other preliminary observations about the Supreme Court's takings jurisprudence prior to *Koontz* are in order to set the stage for discussion of this case. First, in 1999, in *City of Monterey v. Del Monte Dunes at Monterey*,[41] decided a few years after the decision in *Dolan*, the Court addressed whether a property owner could invoke the *Dolan* rough proportionality test to challenge the denial of a land use permit. The Ninth Circuit had affirmed a jury verdict for the plaintiff in part on the ground that the city's denial of a land use permit failed the *Dolan* rough proportionality test.[42] The Supreme Court granted the city's petition for *certiorari* to address, among other issues, "whether the Court of Appeals erred in concluding that the rough-proportionality standard of *Dolan*" applies in the context of a permit denial.[43] Justice Kennedy, speaking for a unanimous Court on this point, stated that the Ninth Circuit had erred:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. *It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development*.[44]

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equitable relief might be appropriate in *Nollan/Dolan* cases. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (characterizing *Nollan* and *Dolan* "as *forbidding* the government from engaging in "out-and-out . . . extortion") (emphasis added).

[40] Jeremy P. Jacobs, *Takings Decision Confounds Experts, Spurs Accusations of Judicial Activism*, E&E PUBLISHING, LLC (June 26, 2013), http://www.eenews.net/stories/1059983522 (quoting Coy Koontz Jr. as stating: "For the folks in this country and Florida . . . it will give them a bigger stick to take into court in the future to fight these types of cases.").

[41] 526 U.S. 687 (1999).

[42] *See* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1430, 1432 (9th Cir. 1996).

[43] *City of Monterey,* 526 U.S. at 702.

[44] *Id*. at 703–04 (emphasis added).

Ultimately, the Court concluded that the Ninth Circuit's error in interpreting *Dolan* was beside the point because the jury instructions did not actually authorize the jury to find for the plaintiff based on the *Dolan* standard.[45] Regardless of whether Justice Kennedy's statement was strictly necessary to the decision, it is hard to imagine a clearer statement (from a unanimous Court, no less) that the *Dolan* rough proportionality test does *not* govern a takings claim arising from a permit denial.

Second, in 2005, in *Lingle v. Chevron USA, Inc.,* the Court, again in a unanimous ruling, resolved the long-festering debate about the validity of the so-called "substantially advance" takings test.[46] The Court ruled that this ostensible takings test, which numerous prior Supreme Court decisions had seemingly endorsed,[47] actually involves a potential due process claim, because it was derived from due process precedents and requires a means-ends inquiry that logically fits under the Due Process Clause, not the Takings Clause.[48] Apart from concluding that this putative takings test was "doctrinally untenable," the Court observed that it created "serious practical difficulties" because it "can be read to demand heightened means-ends review of virtually any regulation of private property."[49] This heightened standard

> would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.[50]

The Court concluded: "The reasons for deference to legislative judgments about the need for, and likely effectiveness

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[45] *Id.* at 703. The Court also observed that it was "unnecessary for the Court of Appeals to discuss rough proportionality," *id.*, because the Ninth Circuit also ruled that the jury could properly conclude "that the City's denial of Del Monte's application lacked a sufficient nexus with its stated objectives." *Id.* (quoting 95 F.3d at 1431–32). As the Ninth Circuit decision makes clear, *see* 95 F.3d at 1430, the "essential nexus" test which the Court assumed could apply to a permit denial was simply a reformulation of the "substantially advances" takings test which a unanimous Court repudiated six years later in *Lingle*.

[46] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005).

[47] *See, e.g.*, Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 485–92 (1987); Agins v. City of Tiburon, 447 U.S. 255, 261–62 (1980).

[48] *Lingle*, 544 U.S. at 540–43.

[49] *Id.* at 544.

[50] *Id.*

of regulatory actions are by now well established and we think they are no less applicable here."[51] Because the Court made this statement in the context of explaining why it was rejecting the substantially advances *takings* test, while invoking *due process* precedents to make the case for deferential judicial review of government regulation,[52] this statement is properly read as condemning heightened scrutiny under either the Due Process Clause or the Takings Clause. As noted above, Justice John Paul Stevens praised Justice O'Connor's "lucid and honest opinion" in *Lingle*, stating that it was, "if not the very best," then "surely one of the best opinions announced" in the 2004–2005 term.[53]

The Court in *Lingle* recognized the tension between its call for judicial restraint and the relatively heightened standard of judicial review established for exactions in *Nollan* and *Dolan*. It resolved this tension by concluding that the "substantially advances" test is "entirely distinct" from the standards established in *Nollan* and *Dolan*.[54] The substantially advances test, the Court said, is "unconcerned with the degree or type of burden" that a regulation places on private property.[55] By contrast, *Nollan* and *Dolan* "involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* takings."[56] The Court also observed that the substantially advances test asks whether a government regulation "advance[s] *some* legitimate state interest."[57] By contrast, the *Nollan* and *Dolan* standards ask whether a citizen can be required to give up the right to be compensated for an exaction because it serves the *same* public purpose as the permitting program.[58] Despite the obvious relevance of the *Lingle* decision to the issues addressed in *Koontz*, Justice Alito cited *Lingle* only once, in incidental fashion, in his opinion for the Court.[59]

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[51] *Id.* at 545.

[52] *Id.* at 545 (citing Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978)); Ferguson v. Skrupa, 372 U.S. 726 (1963).

[53] *See* Stevens, *supra* note 3.

[54] *Lingle*, 544 U.S. at 547.

[55] *Id.*

[56] *Id.*

[57] *Id.* (emphasis added).

[58] *Id.*

[59] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013).

The *Lingle* decision is important because it created a new, unifying coherence for takings law as a whole. Removing the ill-fitting substantially advances test allowed the Court, for the first time in its history, to offer something like a unified field theory of takings law that made sense of most of the Court's prior rulings. The Court stated:

> Although our regulatory takings jurisprudence cannot be characterized as unified, [the major regulatory takings tests] share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[60]

The fact that *Lingle* was issued by a unanimous Court[61] provided additional reason to hope that the Court had settled on a more coherent and predictable law of takings. Sadly, those hopes have been dashed by *Koontz*, though how badly remains to be seen.

II. THE *KOONTZ* CASE

In 1972, Coy Koontz Sr. purchased a 14.9-acre parcel of land east of Orlando, Florida for approximately $95,000.[62] The land abutted Florida State Road 50, near the intersection with Florida State Road 408.[63] Like a large part of Florida, most of the land consisted of wetlands.[64] In 1987, the transportation agency responsible for State Road 50 acquired 0.7 acres of Koontz's parcel through eminent domain, paying $402,000 in compensation for the area seized as well as "severance" damages.[65] Although the record is not clear on this point, the severance damages may have been awarded to reflect the fact that the seized land was mostly

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60 *Lingle*, 544 U.S. at 561.

61 *See id. But cf. id.* at 548 (Kennedy, J., concurring) ("[T]oday's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process").

62 *See* Proposed Final Judgment for Defendant at 45, Koontz v. St. Johns Water Mgmt. Dist., 2002 WL 34724739 (Fla. Cir. Ct. 2002) (No. CIO 94-5673).

63 *Koontz*, 133 S. Ct. at 2592.

64 *Id.*

65 Stipulated Final Judgment at 1, Orlando/Orange Cnty. Expressway Auth. v. Koontz, No. CI 87-9182 (Fla. Cir. Ct., Mar. 24, 1989).

upland, leaving Koontz with mostly hard-to-develop wetlands. In 1994, Koontz filed an application with the St Johns River Water Management District for permits to dredge and fill 3.4 acres of wetlands for commercial development.[66] This application triggered the District's requirement—the validity of which was not contested in this litigation—that a landowner seeking permission to develop wetlands "offset" the environmental damage.[67] To address this requirement, Koontz proposed to place a conservation easement on the remaining 11 acres of his land (consisting almost entirely of wetlands) he did not plan to develop.[68]

The District responded that Koontz's offer was inadequate.[69] Under District policy, developers seeking to mitigate wetlands destruction by placing an easement on other wetlands were generally required to preserve at least 10 acres of wetlands for each wetland acre destroyed, a standard Koontz's offer did not satisfy.[70] The District suggested several alternatives that would allow Koontz to obtain a permit. First, the District proposed that Koontz consider reducing the project site to one acre, in which case the easement proposed by Koontz would provide adequate mitigation.[71] Second, the District suggested that Koontz proceed with the larger project but agree, in addition to restricting the 11 acres, to finance wetland restoration work on District-owned lands elsewhere within the watershed.[72] In addition, the District said it was willing to consider other mitigation measures Koontz might propose.[73] However, Koontz refused to go beyond his original offer.[74] As a result, the District issued an order denying the applications, reciting in detail its prior discussions with Koontz about potential mitigation measures and ultimately concluding that, without further mitigation, Koontz failed to meet the standards for project approval.[75]

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66 *Koontz*, 133 S. Ct. at 2592.

67 *Id.*

68 *Id.* at 2592–93.

69 *Id.* at 2593.

70 *See* Brief for Respondent at 12, Koontz v. St. Johns Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447).

71 *Koontz*, 133 S. Ct. at 2593.

72 *Id.*

73 *Id.*

74 St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1224 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013).

75 Final Order, *In re* Coy Koontz, St. Johns River Water Mgmt. Dist. (June

In 1994, Koontz filed suit in Florida Circuit Court alleging that the permit denial constituted a taking of his private property.[76] Koontz asserted that the District's denial of the permits constituted a taking because the decision failed to "substantially advance" a legitimate government interest and because it deprived him of the "economically viable use" of his property.[77] During the course of the litigation, the U.S. Supreme Court issued its decision in *Lingle v. Chevron USA, Inc.*,[78] repudiating the "substantially advance" takings theory.[79] Accordingly, this theory of liability quietly fell out of the case, along with the claim of denial of all economically viable use.[80] After considerable preliminary litigation over the issue of ripeness,[81] Koontz proceeded with his case on a third theory: that the permit denial failed the "essential nexus" and "rough proportionality" tests established in *Nollan v. California Coastal Commission*[82] and *Dolan v. City of Tigard*.[83] In 2002, the Circuit Court ruled that the permit denials constituted a taking under *Nollan* and *Dolan*.[84] In response to this order, the District issued Koontz the permits he requested, subject to the deed restrictions he originally proposed.[85] With the regulatory approval in hand, Koontz sold the property to Floridel, LLC for $1,200,000.[86] Floridel never developed the property and in 2013

9, 1994).

[76] *Koontz*, 133 S. Ct. at 2593. Coy Koontz, Sr. died in 2000, and his son, Coy Koontz, Jr., carried on the litigation from that point forward as executor of his father's estate.

[77] Amended Complaint at 19, Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673 (Fla. Cir. Ct. Jun. 9, 1994). Koontz initially asserted a takings claim under the Florida Constitution alone, but the Florida Supreme Court treated the case as presenting (substantively identical) questions under both Florida and U.S. constitutional law. *See* St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1222 (Fla. 2011). Accordingly, the U.S. Supreme Court viewed the case as presenting federal constitutional questions.

[78] 544 U.S. 528 (2005).

[79] *Id.* at 540.

[80] *See infra* note 119.

[81] *See* Koontz v. St. Johns River Water Mgmt. Dist., 720 So. 2d 560, 562 (Fla. Dist. Ct. App. 1998) (reversing dismissal of suit for lack of a ripe claim).

[82] 483 U.S. 825, 837 (1987).

[83] 512 U.S. 374, 375 (1994).

[84] Final Judgment, Koontz v. St. Johns River Water Mgmt. Dist., 2002 WL 34724740 (Fla. Cir. Ct. 2002) (No. CI-94-5673).

[85] Final Judgment, Koontz v. St. Johns River Water Mgmt. Dist., 2004 WL 6072846 (Fla. Cir. Ct. 2004) (No. CI-94-5673).

[86] Parcel Report for 312223000000046.

filed a Chapter 11 bankruptcy petition.[87]

The case continued on the issue of whether Koontz was entitled to just compensation for a "temporary" regulatory taking of the property. The Circuit Court ultimately awarded Koontz $376,154 in compensation.[88] On appeal, the Florida District Court of Appeals, in a 2 to 1 decision, affirmed the finding of a taking.[89] Exercising its discretionary authority to review the case, the Florida Supreme Court granted review to address two questions: whether *Nollan* and *Dolan* apply (1) "where there is no compelled dedication of any interest in real property to the public" or (2) when "the alleged exaction is a non-land use monetary condition for permit approval."[90] The Florida Supreme Court answered both of these questions in the negative and reversed.[91] Two members of the Court concurred in the result, contending that Koontz was required to exhaust available administrative remedies before prosecuting a regulatory takings suit, and had failed to satisfy this requirement.[92]

In a decision issued on June 25, 2013, the U.S. Supreme Court reversed on both issues.[93] Justice Samuel Alito wrote the opinion for the Court, joined by four other justices. Justice Elena Kagan filed a dissenting opinion that was joined by three other justices. On the first issue, the Court ruled that the standards established in *Nollan* and *Dolan* for evaluating whether permit "exactions" constitute takings also apply in challenges to permit denials following an owner's rejection of a government "demand" that an owner accede to an exaction.[94] The Court conceded that no

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87 *See Floridel, LLC*, BUSBK.COM, http://business-bankruptcies.com/cases/floridel-llc (last visited May 1, 2014).

88 *See* St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1225 (Fla. 2011).

89 St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8 (Fla. Dist. Ct. App. 2009).

90 *See Koontz*, 77 So. 3d at 1222.

91 *Id.* at 1230.

92 *Id.* at 1230–31.

93 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

94 *Id.* at 2595. Counsel for the United States, as *amicus curiae*, conceded that a permit denial based on the owner's refusal to accept a condition demanded by the government should be evaluated in the same fashion as an exaction attached to an issued permit. Transcript of Oral Argument at 51–52, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447). Counsel for the District arguably did as well. *See id.* at 33–34; *see also Koontz* 133 S. Ct. at 2597 (asserting that "respondent conceded [at oral argument] that the denial of a

"taking" of any property occurs when a permit is denied and no condition is imposed.[95] But it ruled that, under the doctrine of unconstitutional conditions, *Koontz* was nonetheless entitled to challenge the permit denials based on the *Nollan* and *Dolan* standards:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.[96]

Justice Kagan, in dissent, conceded that the *Nollan* and *Dolan* tests should apply when the government has denied a permit because an owner has refused to accede to an exaction demand.[97] However, she did not join in Justice Alito's unconstitutional conditions rationale and offered no alternative explanation for her agreement with the majority's ruling. She ultimately concluded that the claim should fail on the merits because the District had made no "demand" for an exaction but merely offered various "suggestions" for mitigation and ultimately denied the applications because they failed to meet "the relevant permitting criteria."[98]

On the second issue the majority ruled that the *Nollan* and *Dolan* standards apply not only to exactions requiring dedications of interests in land to the public, but also to permit conditions requiring applicants to spend money for public benefit or pay

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permit could give rise to a valid claim under *Nollan* and *Dolan*"). *But see* Brief for the Nat'l Governors Ass'n et al. as Amicus Curiae Supporting Respondent at 3, Koontz v. St Johns Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447) (arguing that *Nollan* and *Dolan* do not apply when the government denies a permit rather than granting a permit with exactions).

[95] *Koontz*, 133 S. Ct. at 2597 ("Where the permit is denied and the condition is never imposed, nothing has been taken."); *see also id*. at 2603 (Kagan, J., dissenting) ("When the government grants a permit subject to the relinquishment of real property, and that condition does not satisfy *Nollan* and *Dolan,* then the government has taken the property and must pay just compensation under the Fifth Amendment. But when the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken.").

[96] *Id.* at 2596.

[97] *Id*. at 2603 (Kagan, J., dissenting).

[98] *Id.* at 2609–11 (Kagan, J., dissenting).

money to the government.[99] Justice Alito stated, "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."[100] But the Court concluded that since monetary exactions are "functionally equivalent to other types of land use exactions," they should be subject to the same *Nollan/Dolan* standards as other exactions.[101] Justice Alito also did not dispute the general understanding, based on prior Court precedent,[102] that government mandates imposing generalized financial liabilities on private parties do not constitute takings of private property.[103] He nonetheless ruled that a monetary exaction in the land use permitting context can give rise to a takings claim because the requirement to pay money is "linked to a specific, identifiable property interest such as a. . . parcel of real property."[104]

Justice Kagan dissented on the ground that this outcome was inconsistent with the framework established by *Nollan* and *Dolan*.[105] She also objected that expanding the scope of *Nollan* and *Dolan*'s heightened scrutiny "threatens the heartland of local land-use regulation and service delivery,"[106] and that it would create serious practical challenges for courts seeking to distinguish between property taxes (which are not takings, apparently) and monetary exactions (which commonly may be takings after *Koontz*).[107] Challenges to monetary exactions, she concluded, should be evaluated under regulatory takings doctrine or under some other provision of the Constitution, such as the Due Process Clause.[108]

Having determined that the Florida Supreme Court erred in its legal analysis, the Court remanded the case to the Florida Supreme

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99 *Id.* at 2599.

100 *Id.* at 2595 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

101 *Id.* at 2599.

102 *See infra* text accompanying notes 188–196 (discussing E. Enters. v. Apfel, 524 U.S. 498 (1998), in detail).

103 *See Koontz*, 133 S. Ct. at 2599.

104 *Id.* at 2600.

105 *Id.* at 2604–07 (Kagan, J., dissenting).

106 *Id.* at 2609 (Kagan, J., dissenting).

107 *Id.* at 2607–08 (Kagan, J., dissenting).

108 *Id.* at 2609 (Kagan, J., dissenting).

Court to reexamine the merits of Koontz's case.[109]

The Court said little about the appropriate remedies for a successful claim under either of the Court's two rulings. Because the District had already issued a permit to *Koontz* with conditions acceptable to him, the Court had no reason to decide whether a plaintiff who established what the Court termed a "*Nollan/Dolan* unconstitutional conditions violation"[110] would be entitled to equitable relief, though language in the opinion appears to suggest that equitable relief might be appropriate.[111] With respect to monetary relief, all of the justices agreed that since there was no taking of property as a result of the permit denial, an award of "just compensation" under the Takings Clause was not possible.[112] The Court said that monetary damages might be available based on the Florida statute under which the suit was brought, but left the issue for resolution by the Florida courts.[113] With respect to monetary exactions, again the Court did not address the remedy issue explicitly. However, it appears likely the Court will conclude that an injunction is the appropriate remedy for this type of *Koontz* claim.[114]

III. APPLYING EXACTIONS DOCTRINE TO PERMIT DENIALS

This section discusses the doctrinal failings of the Court's ruling that the *Nollan* and *Dolan* standards apply to government

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109 *Id.* at 2603.

110 *Id.* at 2597.

111 *See id.* at 2596 (referring to a permit denial in violation of the *Nollan/Dolan* standards in a *Koontz*-type case as "impermissibl[e]").

112 *See id.* at 2597; *id*. at 2603 (Kagan, J., dissenting).

113 *See id.* at 2597 (referring to FLA. STAT. § 373.617 (2013)). *But see id.* at 2612 (Kagan, J., dissenting) (arguing that even under the majority's theory of the case Koontz would not be entitled to damages because the Florida statute only authorizes an award of compensation for a "taking," which all the justices agreed did not occur in this case). The Court's comments on remedy leave open the question of whether 42 U.S.C. § 1983 (1996) might support an award of monetary damages in this type of case.

114 *See* E. Enters. v. Apfel, 524 U.S. 498, 521 (1998) (plurality opinion) ("The presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds mandated by the Government.") (internal quotations omitted). If an injunction were not available, the Takings Clause would have the "utterly pointless" effect of requiring claimants to demand financial compensation from the government for monetary payments they are required to make to the government. *Id.*

decisions to deny a permit because the property owner has refused to accede to an exaction demand. The following section discusses the doctrinal failings of the Court's extension of *Nollan* and *Dolan* to permit conditions requiring the payment of fees or imposing other monetary obligations.

The novelty of the ruling that *Nolan* and *Dolan* should govern challenges to permit denials is highlighted by the direct conflict between this ruling and Justice Kennedy's statement for a unanimous Court in *City of Monterey v. Del Monte Dunes at Monterey* that the *Dolan* rough proportionality test "was not designed to address, and is not readily applicable to, the much different questions arising where . . . the landowner's challenge is based not on excessive exactions but on denial of development."[115] Despite the fact that the Florida Supreme Court relied heavily on the Court's statement in *City of Monterey* that *Dolan* (and by implication *Nollan*) do not apply to permit denials to support its rejection of Koontz' claim,[116] Justice Alito's opinion in *Koontz* does not even cite *City of Monterey*. In my view, Justice Kennedy got it right in *City of Monterey* and Justice Alito got it wrong in *Koontz*. One of the mysteries of *Koontz* is why, assuming Justice Kennedy actually focused on the issue, he decided to abandon his prior position in *City of Monterey* and support the opposite stance in *Koontz*. The Court had an obligation, at a minimum, to attempt to reconcile its ruling in *Koontz* with its prior inconsistent statement in *City of Monterey*.

Nonetheless, Koontz's position that he was entitled to claim an impairment of *some* constitutional right as a result of the denial of his permit application in the circumstances of this case has intuitive appeal. If the District had imposed the exaction to which he objected, and assuming the exaction was within the scope of the *Nollan/Dolan* framework, he could have sought compensation on the theory that the government had taken the exacted interest.[117] If the exaction failed either the essential nexus test or rough proportionality test, he would have been entitled to relief.[118] It would admittedly be anomalous if: (1) Koontz refused to accept an

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115 526 U.S. 687, 703 (1999).

116 *See* St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1228–30 (Fla. 2011).

117 *See supra* note 32.

118 *See supra* note 39.

exaction demanded by the government on the ground that it would trigger the Takings Clause, (2) the District then responded by rejecting his development application altogether, and (3) Koontz ended up without any constitutional basis to complain about losing the opportunity to develop property he otherwise could have but for his refusal to accept an exaction that would have resulted in a taking. But Koontz was not without a constitutional remedy. He could have challenged the permit denial as a violation of the Due Process Clause on the theory that the permit denial was arbitrary and unreasonable in these circumstances. Or he could have asserted a straightforward regulatory taking claim based on the restriction on the use of the land due to the permit denial.[119] Instead, the Court wrongly concluded that Koontz was entitled to challenge the permit denial by invoking the *Nollan* and *Dolan* takings tests.

The Court correctly did not suggest that the rulings and reasoning of *Nollan* and *Dolan* themselves supported the position that Koontz could challenge the permit denial based on the *Nollan*/*Dolan* standards. As discussed, the Court said in *Nollan* and *Dolan* that the exactions at issue in those cases, if imposed outside the regulatory process, would have constituted *per se* takings.[120] At the same time, the Court said in those cases that if the government addressed its concerns about the project impacts by rejecting the development application outright, any resulting takings claim would have to be analyzed under traditional regulatory takings standards.[121] Because the regulatory takings tests are more deferential than the *Nollan/Dolan* tests, the Court assumed in both *Nollan* and *Dolan* that the potential alternative regulatory takings claims would have failed.[122] The Court pointed to and relied on these premises to explain and justify its adoption

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[119] Although Koontz initially asserted that he had been denied all economically viable use of the property, *see supra* note 77, he subsequently abandoned the argument that the regulatory restrictions on use of the land rose to the level of a taking. *See* Brief for Respondent at 33, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1147) ("[P]etitioner specifically admitted that he was 'not proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property.'"). Koontz apparently never advanced the claim that the permit denial violated the Due Process Clause.

[120] *See supra* note 27.

[121] *See supra* note 26.

[122] *Id*.

of the unique essential nexus and rough proportionality tests.[123] As Justice Scalia put it in *Nollan*, the California Coastal Commission "argue[d] that a permit condition that serves the *same* legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[124] His response was "[w]e agree,"[125] and from that starting point he proceeded to articulate and define the essential nexus test for determining whether a permit condition actually serves the same purpose that would be served by a permit denial.[126]

Given this analysis justifying and explaining the *Nollan*/*Dolan* standards, if the government actually denies a development permit, instead of imposing an exaction, the only logical option available to an owner challenging such a decision under the Takings Clause is to assert a regulatory takings claim. Since the government has not imposed an exaction, the legal tests for evaluating whether an exaction constitutes a taking simply do not apply. The government has restricted the permitted uses of the property and, therefore, the regulatory takings standards apply. Within the *Nollan* and *Dolan* framework, it is beside the point whether government regulators decided to reject the development proposal from the outset or, as in *Koontz*, after contemplating the option of imposing an exaction.

This position is supported by the fact that a permit denial and a permit grant subject to an exaction affect different property

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123 *See supra* text accompanying notes 24–31.

124 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

125 *Id.*; *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) ("On the other side of the ledger [from *per se* takings], the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge as long ago as our decision in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)."). Justice Alito acknowledged that there would be no justification for applying the *Nollan/Dolan* standards to evaluate the constitutionality of a permit denial "for some other reason" than the reason that would have been advanced to justify an exaction. *See* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596 (2013). That position is surely correct, but the fact that a permit denial may serve the *same* purposes that would be served by imposing an exaction does not make the denial any more problematic under the *Nollan/Dolan* framework. As discussed, the assumed power of the government to deny a development permit to serve the same purposes that would be served by an exaction (subject only to a possible regulatory takings claim) is a basic premise of the *Nollan/Dolan* doctrine.

126 *Nollan*, 483 U.S. at 836–37.

interests in different ways. If the government imposes an exaction by establishing an easement, there is a taking of the exacted interest if the easement does not satisfy the essential nexus or rough proportionality tests. On the other hand, if, as in *Koontz*, an exaction is not imposed, then, as the Supreme Court put it, "nothing has been taken,"[127] at least within the meaning of *Nollan* and *Dolan*. There is a potential alternative takings claim, but it involves the alleged taking of the land due to the regulatory constraints on its use due to the permit denial. Based on settled takings principles, the alleged taking of the land must be evaluated using regulatory takings standards, not the *Nollan/Dolan* standards.[128] Examined through the lens of *Nollan* and *Dolan*, the notion that a permit denial should be evaluated using the *Nollan/Dolan* standards simply makes no sense, and the Court did not suggest otherwise.

Instead, the Court sought to justify the ruling that the *Nollan/Dolan* standards should govern a challenge to a permit denial by invoking the unconstitutional conditions doctrine.[129] In simple terms, this doctrine refers to a framework of analysis that applies when the government offers to provide a benefit to which a citizen has no entitlement on the condition that the citizen waive or accept the impairment of a constitutional right.[130] A prototypical unconstitutional conditions case involves a public employee, who has no right to continued public employment, but is nonetheless permitted to challenge a dismissal from his job because of his insistence on exercising his rights under the First Amendment.[131] The unconstitutional conditions doctrine has been accurately described as "an intellectual and doctrinal swamp,"[132] and it is

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[127] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2597 (2013).

[128] *See supra* text accompanying notes 19–23.

[129] *See Koontz*, 133 S. Ct. at 2596–97.

[130] *See generally* Mitchell Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

[131] *See* Perry v. Sindermann, 408 U.S. 593 (1972).

[132] *See* Daniel Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 914 (2006); *see also* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 755 (2007) (criticizing the Court in *Dolan* for referring to the "well-settled" doctrine of unconstitutional conditions doctrine "when constitutional scholars agree only

beyond the scope of this article to plumb the complexities of this doctrine. Nonetheless, it seems apparent that the Court erred in relying on this doctrine to justify the conclusion that the *Nollan/Dolan* standards should apply to a permit denial.

First, the Court overlooked the fact that it has already recognized a "special" link between unconstitutional conditions doctrine and *Nollan* and *Dolan* and that the specialness of this link supports the inference that *Nollan* and *Dolan* cannot be extended to permit denials. In *Lingle*, the Court stated that the law governing land use exactions represents a "special application of the unconstitutional conditions doctrine."[133] In *Koontz*, the Court acknowledged that it had previously said that *Nollan* and *Dolan* involved a "special" application of the doctrine, but it did not focus on the word special or attempt to explain what might be special about the unconstitutional conditions doctrine in this context.[134] Upon reflection, the Court's meaning in using this word seems readily apparent. *Nollan* and *Dolan* represent an application of some variant of unconstitutional conditions doctrine for the obvious reason that they supply tests for deciding whether certain conditions violate the Constitution. They are special applications of the doctrine because a land use exaction becomes a taking only if it fails the unique essential nexus and rough proportionality tests the Court has developed for this special category of cases. In addition, and more importantly for present purposes, they are special applications of the doctrine because they are built on the premise that a denial of a permit (the permit being the "benefit," in unconstitutional conditions doctrine terminology) does not warrant the same level of constitutional scrutiny as the imposition of an exaction (the "condition"), even though both actions are designed to advance the same regulatory interest in controlling the negative external effects of development.[135] In sum, the Court, prior to *Koontz*, had already situated the *Nollan/Dolan* tests within the framework of unconstitutional conditions doctrine and reached the conclusion that regulatory takings standards, rather than the stricter *Nollan*/*Dolan* standards, apply to permit denials. In arriving at the opposite conclusion in *Koontz*, the Court ignored what, to use the

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that it is as much of a mess as the regulatory takings doctrine").

133 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005).

134 *Koontz*, 133 S. Ct. at 2594.

135 *See supra* text accompanying notes 24–27.

Court's own word, is "special" about the unconstitutional conditions doctrine in the *Nollan/Dolan* context.

Second, the Court's invocation of the unconstitutional conditions doctrine does not solve the problem that, if the permit has been denied, nothing has been exacted and therefore nothing has been taken within the meaning of *Nollan* and *Dolan*. In general, application of the unconstitutional conditions doctrine requires identification of some provision of the constitution that has been violated by the condition, regardless of whether the condition is attached to the grant of a benefit or a benefit is denied because the condition has been rejected.[136] In *Koontz*, however, no property (or at least no exacted interest) could conceivably be alleged to have been taken as a result of the permit denials and, therefore, Koontz has no viable takings claim under *Nollan* and *Dolan*. Absent some basis for asserting that there has been a taking within the meaning of *Nollan* and *Dolan*, Koontz cannot rely on the unconstitutional conditions doctrine to manufacture a viable *Nollan/Dolan* claim.

Justice Alito went awry by not focusing on the logic of *Nollan* and *Dolan* and instead assuming that some unified, overarching theory of unconstitutional conditions could resolve the issue presented in *Koontz*.[137] The *Koontz* case, he asserted, fits the pattern of unconstitutional conditions cases "in which someone refuses to cede a constitutional right in the face of coercive pressure," and "the impermissible denial of a government benefit is a constitutional injury."[138] But, as Mitchell Berman has observed, and as the Court's varied unconstitutional conditions cases suggest, application of this doctrine "is contingent upon the judiciary's substantive interpretations of specific constitutional

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[136] *See, e.g.*, Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc., 133 S. Ct. 2321 (2013) (holding that condition imposed on the receipt of federal funds violates the unconstitutional conditions doctrine because the condition infringes upon freedom of speech protected by the First Amendment); Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47 (2006) (holding that condition placed on the receipt of federal funding does not violate the unconstitutional conditions doctrine because the condition does not violate the First Amendment).

[137] *Koontz*, 133 S. Ct. at 2594 ("[T]he unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.").

[138] *Id.* at 2596.

provisions."[139] In the First Amendment context, for example, it is consistent to view a termination of employment because an employee insists on exercising First Amendment rights as substantively indistinguishable from enforcing compliance with such a restraint directly on the employee.[140] But the same equivalence does not apply in the land-use-permitting context; a permit denial operates on a different property interest in a significantly different way than an exaction attached to an issued permit. Justice Alito was wrong to think that all allegedly unconstitutional conditions are the same.

The Takings Clause is distinctive in another way that makes it problematic to attempt to apply the unconstitutional conditions doctrine in mechanical fashion in this special context. It is well settled that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . ."[141] As the Court has stated, "[t]his basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of . . . a taking."[142] It follows from these principles that there is nothing unconstitutional about a taking of private property—so long as the opportunity to sue for compensation is available.[143] Applied in the context of land use exactions, this understanding suggests that there is nothing illegitimate, much less unconstitutional, about exactions, including those that fail the *Nollan* and *Dolan* tests, so long as the developer can pursue just compensation for the alleged taking. If the landowner successfully sues for compensation, the constitutional objection is fully resolved. Given this understanding, a demand for an exaction (which, if it is actually imposed and ruled to be a taking, will support an award of just compensation) does not "coerce" a property owner to give up any constitutional

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139 Berman, *supra* note 130, at 111.

140 *See* Perry v. Sindermann, 408 U.S. 593 (1972).

141 First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 315 (1987).

142 *Id.* (emphasis in original).

143 *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 n.40 (1981) ("[A]n alleged taking is not unconstitutional unless just compensation is unavailable."); Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 94 n.39 (1978) ("[I]f the Tucker Act remedy would be available in disaster, then [the] constitutional challenge to the Price-Andersen Act under the Just Compensation Clause must fail.").

right. In this respect, the Takings Clause is distinguishable from the First Amendment; unlike a taking, which never violates the Constitution so long as the just compensation remedy is available after the fact, a demand that an employee accept a restraint on speech in violation of the First Amendment violates the Constitution from the moment it is made.

Lacking an actual constitutional violation to which he can point, Justice Alito has implicitly adopted the novel, indeed bizarre position that the unconstitutional conditions doctrine should apply even in the absence of government action that violates the Constitution. He concedes that rejection of Koontz's permit applications did not violate the Takings Clause, but he asserts that this decision nonetheless "burden[ed]" Koontz's right to seek compensation for a taking.[144] Presumably, what he means is that the permit denial was, in a sense, the "price" Koontz had to pay for refusing to accept an exaction (for which, by hypothesis, he would have been entitled to compensation). But he is not suggesting that the permit denial itself was a taking.

This theory has no place in the unconstitutional conditions doctrine as it has traditionally been understood.[145] As Professor Kathleen Sullivan explains, the doctrine "cannot define the content of constitutional liberties, rank their importance, or set the level of state justification demanded for their infringement."[146] Rather, starting from the premise that the Constitution already protects certain liberties, and that "burdens on those liberties require especially strong justification," the doctrine simply "identifies *a characteristic technique* by which government appears not to, but in fact does burden those liberties, triggering a demand for

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[144] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2597 (2013).

[145] While libertarian commentators have applauded the Court's invocation of the unconstitutional conditions doctrine, they have not made a convincing case for how the Court's ruling makes any sense in light of prior legal doctrine. *See, e.g.*, Christina M. Martin, *Nollan and Dolan and Koontz—Oh My, The Exactions Trilogy Requires Developers to Cover the Full Costs of Their Projects, But No More*, (Pac. Legal Found. Program for Judicial Awareness, Working Paper Series, No. 13-512, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348844; Ilya Somin, *Two Steps Forward for the 'Poor Relation' of Constitutional Law:* Koontz*,* Arkansas Game & Fish*, and The Future of the Takings Clause*, *Symposium on the 2012–13 Supreme Court Term*, CATO SUP. CT. REV. 215 (2012–13).

[146] Sullivan, *supra* note 130, at 1419.

especially strong justification by the state."[147] The majority in *Koontz* departs from this understanding of the doctrine, as well as its application in past cases, by presuming that the doctrine creates substantive constitutional protections above and beyond those created by specific constitutional provisions. Justice Alito appears to be suggesting that the unconstitutional conditions doctrine creates a kind of penumbral aura surrounding the Takings Clause,[148] and that courts can invoke the doctrine to protect against "burdens" on property even in the absence of actual takings. Under this view, the District can be held to have "run afoul" of the Takings Clause by virtue of the unconstitutional conditions doctrine even in the absence of an actual taking. This is a dramatic and deeply unsettling legal innovation because it portends potentially unlimited expansion of the unconstitutional conditions doctrine.

Justice Alito cites several decisions in an attempt to justify his expansive unconstitutional conditions theory, but they merely serve to confirm that it lacks support. He points to cases in which the Court ruled that a denial of benefits based on an exercise of the right to free speech violated the First Amendment, even though the claimant had no entitlement to receive the benefits.[149] The Court reasoned in these cases that the denial of the benefits in violation of the First Amendment was equivalent, for constitutional purposes, to enforcing a requirement that directly infringes on First Amendment rights.[150] These rulings are surely in the mainstream, but they do not support the idea that one can manufacture a viable claim using the unconstitutional conditions doctrine in the absence of a constitutional violation. Justice Alito also cites *Memorial Hospital v. Maricopa County*[151] to support the proposition that the "unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding

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147 *Id.* (emphasis added).

148 *Cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1963) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

149 *Koontz*, 133 S. Ct. at 2594 (citing Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47 (2006); Rutan v. Republican Party of Ill., 497 U.S. 62 (1990); Perry v. Sindermann, 408 U.S. 593 (1972)).

150 *See, e.g.*, *Perry*, 408 U.S. at 597 (government cannot indirectly produce a result it cannot command directly).

151 415 U.S. 250 (1974).

benefits from those who exercise them."[152] That case involved a challenge to an Arizona statute requiring an indigent seeking medical care at a county hospital to demonstrate a year's residence in the county in order to receive care at public expense.[153] However, in that case the Court ruled that the statute violated the Equal Protection Clause because it created a classification impinging on the right of interstate travel.[154] Thus, this decision also does not support the notion that a "burdening" of a constitutional right, absent some actual violation, can be unconstitutional under the unconstitutional conditions doctrine.

The foregoing critique of the Court's ruling in *Koontz*—on the issue of what standard should govern constitutional challenges to permit denials—rests in part on the tension between what the Court has said before and what it is saying in *Koontz*. More specifically, it rests on the notion, which has broad support in modern Court precedent, that takings analysis properly draws a distinction between regulatory restrictions on the use of land and actual exactions involving otherwise *per se* physical takings.[155] It is possible that Justice Alito is implicitly disputing that premise, in which case this critique of his analysis may miss the mark. But in that event, the *Koontz* decision raises very different, far more serious questions about the direction of the Court's takings jurisprudence.

For example, the Court's opinion hints at another theory for why the denial of Koontz's application constituted a taking, a theory which is at least as problematic as the unconstitutional conditions theory, but for different reasons. This theory is that Koontz can claim a taking on the ground that the permit denial arbitrarily or unreasonably interfered with his interest in developing his land. At one point, the Court states that "the 'evident constitutional propriety' of prohibiting a land use 'disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.'"[156] At another point, the Court restates the same

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152 *Koontz*, 133 S. Ct. at 2595.

153 *Mem'l Hospital*, 415 U.S. at 251–53.

154 *Id.* at 269.

155 *See supra* notes 24–31 and accompanying text.

156 *Koontz*, 133 S. Ct. at 2597 (quoting and purportedly relying on Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836–37 (1987)). This language in the Court's opinion misrepresents the language from *Nollan*, which reads, "[t]he

theory in asserting that "the central concern" of *Nollan* and *Dolan* is

> the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.[157]

While the Court does not spell out how this alternative theory might have been applied in *Koontz*, the analysis would presumably be that the permit denial "took" Koontz's land because the District denied the permit when Koontz refused to accept an exaction that would have violated *Nollan/Dolan* standards.

The problem with this alternative theory is that it simply restates, using new and different language, the "substantially advances" theory of takings liability that the Supreme Court unanimously repudiated in its 2005 decision, *Lingle v. Chevron USA*.[158] The claim that a permit denial is a taking because it was motivated by the government's inability to obtain agreement to an exaction that would have failed either or both of the essential nexus and rough proportionality tests represents a particular application of the more general notion that a government action should be regarded as a taking if it fails to substantially advance a legitimate state interest.[159] It would hardly be surprising if Justice

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evident constitutional propriety disappears, however, if *the condition* substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Nollan*, 483 U.S. at 837 (emphasis added). Justice Alito's misrepresentation of *Nollan* suggests that *Nollan* addressed the standards that should govern challenges to permit denials whereas, in fact, the Court in *Nollan* was addressing the standards that should govern challenges to permit conditions. This misstatement is self-evidently significant given that the issue the Court was addressing in *Koontz* was whether the standards that had been developed for review of certain permit *conditions* should be *extended* to permit *denials*.

[157] *Koontz*, 133 S. Ct. at 2600.

[158] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005) ("[Although the 'substantially advances' formula] has some logic in the context of a due process challenge, . . . such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment.").

[159] *Cf.* Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Demands*, 78 NEB. L. REV. 348 (1999) (arguing, pre-*Lingle*, that *Nollan* and *Dolan* would rest on a sounder doctrinal footing, and that the extension of *Nollan* and *Dolan* to permit denials and monetary fees could be more easily defended, if the Supreme Court were to recognize that *Nollan* and *Dolan* involved application of the "substantially advances" takings theory).

Alito were in fact tempted to see the *Koontz* case through the lens of the substantially advances inquiry; as discussed, Koontz himself had the same thought, initially asserting a substantially advances claim before abandoning it once the Supreme Court issued its decision in *Lingle*.[160] But it would be remarkable to read *Koontz* as implicitly applying a legal theory that Koontz initially raised but then abandoned in the face of an intervening, unanimous Supreme Court decision repudiating the theory.[161] While the hints in *Koontz* of a revival of the substantially advances test are tantalizing, it would be too much to conclude, given the clarity of the relatively recent holding in *Lingle*, and the cryptic nature of the statements in *Koontz*, that Justice Alito is actually seeking to revive the substantially advances theory and repudiate *Lingle*.

However, the Court's language is still troubling because it will likely create confusion about the purpose of the *Nollan* and *Dolan* tests and how these tests should be applied in the future. In *Lingle*, the Court carefully explained that, contrary to the suggestion in *Koontz*, *Nollan* and *Dolan* do not support or apply the substantially advances test:

> Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, Nollan and Dolan both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings. In neither case did the Court question whether the exaction would substantially advance some legitimate state interest. . . . Rather, the issue was whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether.[162]

By failing to endorse and reaffirm this understanding of *Nollan* and *Dolan*, the Court appears, at a minimum, to encourage more aggressive applications of these precedents in the future.

The only theory that could plausibly support *Koontz's* claim that he suffered a constitutional violation as a result of the permit denials is that he suffered a deprivation of property under the Due Process Clause of the Fourteenth Amendment.[163] The substantive

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160 *See supra* note 77 and accompanying text.

161 *Koontz*, 133 S. Ct. at 2600.

162 *Lingle*, 544 U.S. at 547.

163 *See* Mark Fenster, *Substantive Due Process by Another Name:* Koontz*, Exactions, and the Regulatory Takings Doctrine*, 30 TOURO L. REV. 403, 415

branch of due process analysis proscribes arbitrary and irrational government deprivations of interests in private property.[164] In *Koontz*, the District's denials of the permits arguably would have supported a due process claim on the theory that the denials were arbitrary and unreasonable because the decision to deny the permits was itself motivated by the District's insistence that it would only issue permits if it could impose arbitrary and unreasonable permit conditions. The claim would have been weak, but at least it would have been doctrinally coherent (unlike the unconstitutional conditions claim) and precedent would not have precluded it (unlike the substantially advances claim). However, a due process claim would have faced many other obstacles in this litigation. Koontz never presented a due process claim based on the permit denial and therefore the claim was waived.[165] In addition, under traditional due process review, a governmental action will be upheld so long as it rationally relates to a conceivable public purpose.[166] Koontz almost certainly could not have carried the burden of demonstrating an unconstitutional deprivation of his property under that standard. [167] Finally, the five justice majority in *Koontz* probably would not have agreed that the Due Process Clause can properly be applied in this type of case.

(2014) (suggesting that a *Nollan/Dolan* unconstitutional conditions violation should be viewed as involving a substantive due process issue); Lee Anne Fennell & Eduardo Penalver, *Exactions Creep*, SUP. CT. REV. (forthcoming 2014) ("Relying on due process review to police improper bargains would fit better with the Court's prior pronouncements about the division of labor between the Takings Clause and the Due Process Clauses.").

[164] *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

[165] During the oral argument Justice Kennedy asked, "[a]ssume that, when we look at this record, assume we think there is a due process violation, not a taking violation. That is not before us here, is it?" Counsel for petitioner responded, "no." Transcript of Oral Argument, *supra* note 94, at 27.

[166] *See Cnty. of Sacramento*, 523 U.S. at 846 (noting that in evaluations of "abusive executive action," the Supreme Court has held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'" (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)).

[167] *Cf.* United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 324 F.3d 133 (3d Cir. 2003) (rejecting due process challenge to denial of regulatory approval following property owner's refusal to accede to exactions on facts far more egregious than those in Koontz). Justice Alito authored the opinion in *United Artists* prior to his appointment to the Supreme Court while serving as a judge on the U.S. Court of Appeals for the Third Circuit.

Justice Kennedy has expressed the view that the Due Process Clause does provide an appropriate avenue for challenging arbitrary social and economic regulation.[168] By contrast, Justice Scalia has adopted a narrow view of substantive due process, taking the position that the Due Process Clause is not an appropriate vehicle for challenging government regulation as arbitrary.[169] Thus, the potential due process claim was, for many reasons, a non-starter in the *Koontz* case. However, over the long term, if there is any hope of making sense of a *Koontz*-type claim, it lies in applying the Due Process Clause.

As Justice Alito's opinion in *Koontz* made clear, he was motivated to push the limits of current doctrine out of concern that not applying *Nollan* and *Dolan* to permit denials would permit governmental officials to evade the strictures of *Nollan* and *Dolan*. "A contrary rule would be especially untenable in this case," he said, "because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by rephrasing its demands for property as conditions precedent."[170] To allow that outcome, he asserted, "would effectively render *Nollan* and *Dolan* a dead letter."[171] These assertions are overblown, especially in light of the relevant legal principles.

It is entirely plausible that local government officials could "threaten" to deny a development application if a developer were unwilling to agree to exactions proposed by the community. (Or to make the point in more neutral terms, government officials might express their intention to address the negative externalities associated with a proposed development by denying a permit if they cannot obtain the owner's agreement to address the externalities through permit conditions.) Faced with this situation, a developer might choose to receive the permit along with the conditions. In that event, if the conditions trigger *Nollan/Dolan*

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168 *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005) (Kennedy, J., concurring) (noting "that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.").

169 *See* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 200 (2003) (Scalia, J., concurring, joined by Thomas, J.) (arguing that the Due Process Clause does not provide substantive protection against "arbitrary deprivations of nonfundamental liberty interests," and that the Takings Clause does not involve "a fundamental liberty interest").

170 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013).

171 *Id.* at 2596.

scrutiny, the developer can challenge the conditions under those standards and, if successful, obtain just compensation or possibly get the conditions lifted. The type of "coercion" that occurs in this scenario can be viewed as objectionable within the *Nollan/Dolan* framework only if the developer were held to have waived the right to challenge the conditions by receiving the permit. But there is no just basis for finding a waiver in these circumstances, precisely because it would authorize the kind of cost-free coercion Justice Alito fears. Thus, the right of a developer to challenge an exaction in these circumstances should be preserved.[172] So long as the right to challenge an exaction under *Nollan* and *Dolan* is preserved, the owner will not be "coerced" into giving up any unconstitutional right by receiving a permit subject to an exaction.

On the other hand, if the developer refuses to accept the condition proposed by government officials and they reject the development proposal, no exaction has been imposed that warrants application of the *Nollan*/*Dolan* standards. Instead of imposing an exaction, the government has simply restricted the permitted uses of the property. It is an established tenet of takings doctrine and, as discussed, a basic premise of the *Nollan/Dolan* framework itself that takings claims based on such restrictions should be evaluated under the relatively deferential regulatory takings standard.[173] There is no reason why application of that standard should vary depending on whether local officials rejected the proposal at the beginning of the review process or only after considering the option of approving the project subject to conditions. The fact that local officials considered the option of approving the project subject to conditions does not change the fundamental nature of the decision to reject the development proposal or its impact on the property owner from the standpoint of the Takings Clause.

It is certainly true that when a permit denial follows on the heels of a government effort to impose permit conditions the

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[172] It is arguably a separate question whether a developer should be able to avoid a waiver of the ability to challenge conditions and at the same time proceed with construction of the project. If the conditions turn out to be a taking, government officials might prefer to reject the development altogether, approve a different version of the project, or formulate different permit conditions. That opportunity could be foreclosed if a developer were permitted to commence construction but simultaneously challenge conditions that government regulators believe are necessary to address the impacts of the project as approved.

[173] *See supra* notes 19–31 and accompanying text.

owner views as unreasonable, the developer is entitled to argue not only that he has suffered an economic loss as a result of the permit denial (and possibly suffered a taking of his land as a regulatory taking), but that he has also been the victim of arbitrary or unreasonable government decision-making and possibly suffered a taking of his land under regulatory takings theory. The *reasons* for the permit denial potentially raise an additional constitutional issue that is separate from the potential regulatory takings claim based on the economic burden imposed by the denial. But since the government has not imposed an exaction that, viewed independently, would constitute a *per se* taking, there is no warrant for applying the stringent *Nollan/Dolan* framework designed to evaluate whether an exaction constitutes a taking. Instead, the proper avenue for challenging the government's allegedly arbitrary reasons for denying the permit is the Due Process Clause.

IV. EXTENDING *NOLLAN* AND *DOLAN* TO PERMIT CONDITIONS INVOLVING MONEY

The second doctrinal innovation in *Koontz* is the expansion of *Nollan/Dolan* to encompass monetary exactions. Justice Alito used convoluted, illogical thinking to support this second innovation as well. The Court was so sharply divided on this issue, and the majority's reasoning is so problematic, that it is appropriate to ask whether this ruling will long survive.

As discussed, the *Nollan* and *Dolan* cases involved exactions that would have constituted *per se* takings of private property if they had been imposed directly and not as conditions of permit approvals.[174] These exactions—the lateral public access along the beach in *Nollan*, and the public bike path and greenway in *Dolan*—would have constituted *per se* takings because they involved government mandates to allow permanent (or at least indefinite) public access to plaintiffs' lands.[175] Based on those decisions, the second issue presented in *Koontz*—whether the *Nollan* and *Dolan* standards apply to monetary exactions—appeared to turn on the relatively straightforward issue of whether a government requirement that a citizen pay money (or expend money) also qualifies as a *per se* taking under the Takings Clause.

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174 *See supra* text accompanying note 27.

175 *See id.*

In 1998, in *Eastern Enterprises v. Apfel*, a majority of the justices reached the conclusion that a government mandate to pay money cannot constitute a taking at all.[176] The case involved due process and takings challenges to federal legislation imposing a retroactive obligation on companies formerly engaged in coal mining to pay the healthcare costs of their former employees.[177] There was no majority opinion for the Court, but a majority of the justices struck down the legislation, with four justices concluding there was a taking[178] and Justice Kennedy, in a concurring opinion, concluding that the legislation violated the Due Process Clause.[179] A different majority of the justices (Justice Kennedy and the four dissenters) agreed that the Takings Clause does not apply to mandates to pay out money.[180]

"[O]ne constant limitation" of the Court's takings jurisprudence, Justice Kennedy stated, "has been that in all of the cases where the regulatory takings analysis has been employed, a specific property right or interest has been at stake."[181] Therefore, he concluded, the challenged legislation could not give rise to a viable takings claim:

> The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.[182]

Justice Stephen Breyer, writing for the four justices dissenting from the Court's judgment, agreed with Justice Kennedy that the plaintiff had no viable takings claim because "[t]he 'private property' upon which the [Takings] Clause traditionally has

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176 524 U.S. 498 (1998).
177 *Id*. at 517.
178 *Id*. at 538.
179 *Id.* at 550 (Kennedy, J., concurring).
180 *Compare id*. at 540–47 (Kennedy, J., concurring), *with id.* at 554–58 (Breyer, J., dissenting).
181 *Id.* at 541.
182 *Id.* at 540.

focused is a specific interest in physical or intellectual property."[183] In contrast, he said, "[t]his case involves not an interest in physical or intellectual property, but an ordinary liability to pay money."[184]

Accepting the understanding of the majority in *Eastern Enterprises* that mandates to pay money do not constitute takings, takings claims based on permit conditions involving requirements to pay money cannot properly be evaluated under the stringent *Nollan/Dolan* standards. The applicability of *Nollan* and *Dolan* rests on the premise that the permit condition, considered independently, would constitute a *per se* taking. But a monetary condition, considered independently, far from constituting a *per se* taking, is not even subject to challenge as a potential taking under the Takings Clause. It follows that a monetary condition attached to a permit cannot properly be subjected to the kind of stringent review appropriate for exactions that do fit within the scope of *Nollan* and *Dolan*.

Nevertheless, in *Koontz* the Court ruled 5 to 4 that *Nollan* and *Dolan* do apply to monetary exactions.[185] Remarkably, the Court reached this result while purporting to respect the analytic framework adopted in *Nollan* and *Dolan* as well as the conclusion and reasoning of the five-justice majority in *Eastern Enterprises*. Justice Alito conceded that "both *Nollan* and *Dolan* [began] by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a per se taking."[186] He also acknowledged and did not dispute the conclusion by the five justices in *Eastern Enterprises* that a government mandate to spend or pay money is outside the scope of the Takings Clause.[187] Yet he still managed to skirt around *Nollan*, *Dolan*, and *Eastern Enterprises*. Justice Elena Kagan, joined by three other dissenters, vigorously objected to this unprincipled ruling.[188]

Justice Alito's "initial" and apparently most important justification for extending *Nollan* and *Dolan* to monetary exactions

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183 *Id.* at 554 (Breyer, J., dissenting).

184 *Id.*

185 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599 (2013).

186 *Id.* at 2598–99.

187 *Id*. at 2599.

188 *See id.* at 2603–12.

was his view that if the Court rejected the plaintiff's argument "it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."[189] He observed that monetary exactions are "commonplace" and are "functionally equivalent to other types of land use exactions."[190] Furthermore, he said: "Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[191]

This argument is plainly incoherent. A permit condition requiring the expenditure of funds can be described as "functionally equivalent" to an exaction involving tangible property in the sense that they both may be designed to mitigate the adverse effects of development, and the economic burden on the property owner resulting from the condition may be similar in each case. But those are not the pertinent issues for the purpose of takings analysis. The relatively stringent *Nollan/Dolan* standards are justified by the fact that the exaction, viewed independently of the regulatory process, is a *per se* taking. If that precondition is not met, according to the reasoning of *Nollan* and *Dolan*, there is no argument for applying the *Nollan*/*Dolan* standards. Because the majority in *Koontz* did not dispute that the majority in *Eastern Enterprises* was correct that a mandate to pay money does not trigger the Takings Clause, Justice Alito and his supporters should have rejected Koontz's proposal to expand the scope of *Nollan* and *Dolan*.

It is undeniable that there is a superficial appeal to the argument that permit conditions requiring property owners to pay money to the government should be evaluated in the same way as permit conditions requiring property owners to grant the public an interest in their property. But the Court's takings jurisprudence does not protect wealth. It protects property,[192] and under *Eastern Enterprises* a financial assessment subtracting from a firm's wealth

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189 *Id.* at 2599.
190 *Id.*
191 *Id.*
192 *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

does not affect its property within the meaning of the Takings Clause. Traditionally, and apparently even after *Koontz*, the Court's takings jurisprudence addresses takings of tangible property interests, not impositions of generalized financial liabilities.[193] Given this understanding of the scope of "property" for the purposes of the Takings Clause, a condition requiring the payment of money cannot properly be regarded as "functionally equivalent" to a condition exacting an interest in land.[194]

In addition, the prospect that government regulators might offer developers the choice of simply paying money as a condition of receiving a permit or accepting a physical occupation subject to the *Nollan* and *Dolan* standards creates no legitimate cause for alarm. If a permit requirement to pay money is not subject to *Nollan*, and the "government need only provide a permit applicant with one alternative that satisfies"—or avoids, presumably—"the nexus and rough proportionality standard," offering a developer choices that include the option to make a monetary payment avoids *Nollan/Dolan* concerns.[195] By expressing alarm about developers potentially being put to this choice, Justice Alito simply begged the question whether monetary conditions should be subject to *Nollan/Dolan* on the same basis as other exactions.[196]

Justice Alito sought to distinguish *Eastern Enterprises* on the ground that, unlike the financial obligation at issue in that case, the demand for money in *Koontz* "did 'operate upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment."[197] In contrast with *Eastern Enterprises*, where the government placed a financial

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[193] *See generally* Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

[194] *Koontz*, 133 S. Ct. at 2599; *see also id*. at 2608 (Kagan, J., dissenting) ("No one has presented evidence that in the many States declining to apply heightened scrutiny to permitting fees, local officials routinely short-circuit *Nollan* and *Dolan* to extort the surrender of real property interests having no relation to a development's costs.").

[195] *Id*. at 2599.

[196] As Justice Kagan observed, these two options could be regarded as equivalent if the government, in lieu of exacting an interest in real property from a landowner, exacted money and then turned around and used the money to obtain a real property interest from the owner through eminent domain. However, as she also explained, such "a contrivance" could be dealt with directly without ruling that all monetary exactions are *per se* takings. *See id.* at 2608–09 (citing Norwood v. Baker*,* 172 U.S. 269 (1898)).

[197] *Id*. at 2599.

liability on the companies, Justice Alito stated, "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."[198] He continued:

> Because of that direct link, this case implicates the central concern of Nollan and Dolan:the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.[199]

Finally, again focusing on the "direct link" between the mandate to pay money and "a specific, identifiable property interest . . . such as a parcel of real property," Justice Alito concluded that the alleged taking of money should, in this context, be treated as a *per se* taking.[200]

Again, this analysis is plainly mistaken.[201] The link between a monetary condition and the real property subject to the condition cannot, by itself, justify applying *Nollan* and *Dolan* to the monetary condition, according to the logic of those decisions. Both *Nollan* and *Dolan* involved applications for permits to use real property.[202] If a "direct link" between a condition and the use of real property justified subjecting the condition to heightened review, the Court would have concluded that the conditions in those cases warranted review under the essential nexus and rough proportionality tests simply because the conditions were attached to the use of real property. The Court would have had no need to consider whether the conditions would have constituted *per se* takings if they had been imposed independently from the regulatory process. The fact that the Court believed it was essential to its analysis in *Nollan* and *Dolan* that the conditions, considered

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198 *Id.* at 2600.

199 *Id.*

200 *Id.*

201 Even Ilya Somin sees a "genuine difficulty" with Justice Alito's reasoning and says the only way to "completely avoid" the difficulty is to either abandon the ruling that *Nollan/Dolan* applies to monetary fees or embrace Professor Richard Epstein's idea that all taxes should be treated as takings, which Somin considers a "radical" alternative. *See* Somin, *supra* note 145, at 239. He also suggests that the difficulty could be alleviated by confining *Koontz* to "narrowly targeted" exactions, as opposed to "broad-based" measures, presumably including most taxes. *Id.*

202 *See supra* text accompanying notes 24–25.

independently, would have constituted *per se* takings demonstrates that the link between a condition and a permit to use real property is, by itself, insufficient to support applying *Nollan/Dolan*.[203]

The Court in Koontz also erred in saying that the that the link between a monetary condition and real property means the condition constitutes a *per se* taking, satisfying the precondition for applying *Nollan* and *Dolan* that the condition, apart from the regulatory process, constitute a *per se* taking.[204] This leap, which the majority did not attempt to explain or justify, turns the argument for applying *Nollan/Dolan* analysis to monetary conditions into nonsense. If the link between a monetary condition and the real property makes the condition a *per se* taking, that is the end of the takings inquiry, and there is no need to evaluate whether a monetary condition does or does not satisfy the *Nollan/Dolan* standards. Every monetary condition has now been declared to be a *per se* taking as a result of the Court's *ipse dixit.* Justice Alito's reasoning takes the Court, in Thelma and Louise-like fashion, straight over a cliff, past the notion that monetary conditions should be subject to review under the *Nollan*/*Dolan* standards, directly to the conclusion that *all* monetary conditions attached to land use permits are *per se* takings. Clearly, this is not the result the Court intends, because it merely rules that monetary exactions should be subject to the same *Nollan/Dolan* scrutiny as other exactions.[205] But this is the logical outcome of the Court's reasoning that a monetary condition should be treated as a *per se* taking *because* it is linked to the land being developed under the permit.[206]

Finally, in what can only be characterized as a disingenuous statement, Justice Alito asserted, quoting Justice Kennedy's

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[203] *Koontz*, 133 S. Ct. at 2606 (Kagan, J., dissenting) ("[U]nder the analytic framework that *Nollan* and *Dolan* established, that connection alone is insufficient to trigger heightened scrutiny."); *see also id*. ("[T]he heightened standard of *Nollan* and *Dolan* is not a freestanding protection for land-use permit applicants. . . .").

[204] *Id.* at 2600 (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003)).

[205] *Id.* at 2603.

[206] *See* Fennell & Penalver, *supra* note 163 (observing that if a "link" to real property is the test for determining whether a permit condition is subject to *Nollan*/*Dolan* review, many "in-kind regulatory conditions" will now be subject to these tests, including "set-back requirements, parking and landscaping requirements, limits on hours of operation, and many more").

opinion in *Eastern Enterprises*, that applying *Nollan* and *Dolan* to a takings claim based on monetary exactions "does not implicate 'normative considerations about the wisdom of government decisions.'"[207] Of course it does. Empowering the courts to conduct intrusive review of whether government has demonstrated that a condition meets the essential nexus and rough proportionality tests obviously leads the courts into making normative judgments about the wisdom of government regulatory decisions.[208] For better or worse, *Nollan* and *Dolan*, prior to *Koontz*, authorized courts to make essentially normative judgments within a relatively narrowly defined sphere of exactions. By expanding *Nollan*/*Dolan* to encompass fees, *Koontz* authorizes the courts to make normative judgments in a broader set of cases. Justice Alito's quotation from Justice Kennedy's concurring opinion in *Eastern Enterprises* is painfully ironic because Justice Kennedy made this statement to scold the plurality in that case for suggesting that its invocation of the Takings Clause, in lieu of the Due Process Clause, somehow avoided a normative inquiry.[209] As he stated, "[i]f the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events."[210] Like the plurality in *Eastern Enterprises*, the majority in *Koontz* is inviting—indeed, embracing—more normative decision-making by the courts.

V. PRACTICAL OBJECTIONS TO *KOONTZ*

Apart from their doctrinal incoherence, both of the Court's rulings in *Koontz* will have negative practical implications for the land use permitting process, to the detriment of developers and local communities alike.

A. Permit Denials

Koontz's ruling that the *Nollan/Dolan* standards apply to

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[207] *Koontz*, 133 S. Ct. at 2600 (quoting *E. Enters.v Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring)).

[208] *Cf.* Dolan v. City of Tigard, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) ("The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan.").

[209] *E. Enters.*, 524 U.S. at 544 (Kennedy, J., concurring).

[210] *Id.*

permit denials based on an owner's refusal to accede to a demand for an exaction may prove difficult if not impossible for courts to implement. It is already a relatively challenging task for courts to determine whether a particular exaction that has been memorialized and imposed violates the *Nollan*/*Dolan* standards.[211] But when no exaction has been imposed, the challenge for the courts will become more difficult. There may be little or no documentation of an exaction that was merely demanded but not imposed; memories may differ on what was discussed; a wide range of options for exactions may have been considered; and some or all of the exactions that were discussed may never have been defined with precision. For all of these reasons, it will be difficult to determine whether exactions that a community considered imposing but ultimately did not impose satisfied both the essential nexus and rough proportionality tests such that a court can determine that a permit denial does or does not violate *Nollan* or *Dolan*. If the community bears the ultimate burden of proof in a case involving an alleged *Nollan/Dolan* unconstitutional conditions violation (as in an ordinary *Nollan/Dolan* case), the fog of uncertainty enveloping the relevant facts will work to the significant (and unfair) disadvantage of government defendants.

The Circuit Court Order in *Koontz* supports the view that the *Nollan/Dolan* standards cannot be sensibly applied in the context of a permit denial. The Court, relying heavily on the premise that the District bore the burden of proof and had failed to carry its burden,[212] ruled in conclusory fashion that the District's "required conditions of unspecified but substantial off-site mitigation resulted in a . . . taking."[213] Thus, the Court ruled that the "unspecified" conditions violated *Nollan* and *Dolan* without attempting to actually apply the essential nexus and rough proportionality tests in a meaningful way. If this application of *Nollan* and *Dolan* represents a model for other courts to follow, local communities may win few if any lawsuits in which landowners claim that permit denials based on their refusal to

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[211] *See Dolan*, 512 U.S. at 391 ("[T]o justify the conditions imposed on Dolan's permit . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

[212] Final Judgment, Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673 (Fla. Cir. Ct., Oct. 30, 2002).

[213] *Id.*

accede to a demand for an exaction violated *Nollan* or *Dolan*.

The ruling that *Nollan/Dolan* standards apply to permit denials will also impose onerous administrative burdens on local officials. They will be required to justify a decision they did make (reject an application) by making the counter-factual case for the validity of a decision they did not make (approve an application subject to one or more exactions). Local officials, who are often part-time volunteers, have a hard enough time explaining and documenting the decisions they make. It will strain common sense and local boards' patience to have to justify options they considered but did not select. *Nollan* and *Dolan*, as expanded by *Koontz*, evidently have an appealing logic to some justices (and their law clerks) with an academic bent.[214] From the standpoint of local land use officials operating in a less rarified atmosphere, judicial review of local land use decisions after *Koontz* will be like something out of Alice in Wonderland. The complexities of the analysis mandated by the Court's decision reflect a woeful ignorance on the part of the justices about the practical realities of the local land use regulatory process in this country.

The ruling that *Nollan* and *Dolan* apply to permit denials will also probably lead local officials to be less communicative with developers about the options they might pursue to obtain project approval. As discussed, the majority adopted the Florida courts' premise that the district had made "a demand" for an exaction from Koontz.[215] But the majority did not resolve, as a general matter, "how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*."[216] Justice Kagan agreed that *Nollan* and *Dolan* can apply when an exaction has been demanded, but argued that the demand for an exaction must be "unequivocal."[217] In her view, there had been no unequivocal demand in *Koontz* and therefore the Supreme Court should have

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[214] The counterfactual analysis mandated by *Koontz* was, in a modest way, prefigured by *Nollan*, which requires local officials to demonstrate that a condition attached to a permit serves "the same legitimate police-power purpose" that would have been served by a denial. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

[215] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2598 (2013).

[216] *Id.* at 2598.

[217] *Id.* at 2610 (Kagan, J., dissenting).

affirmed the Florida Supreme Court.[218]

While the impact of the Court's ruling will depend on how the term "demand" is defined in future decisions, the likely adverse effects are readily foreseeable. Even if only a specific, unequivocal demand will trigger *Nollan* and *Dolan*, as Justice Kagan hopes, prudent local officials will need to embrace vagueness and indirection in their conversations with developers to avoid making a "demand." If a "demand" is defined loosely, prudent local officials will need to avoid even making suggestions or expressing ideas. As Justice Kagan put it, "if something less than a clear condition . . . triggered *Nollan/Dolan* scrutiny" then "no local official with a decent lawyer would have a conversation with a developer," because "the lawyer can give but one recommendation: Deny the permits."[219] At most, local officials might be willing to describe general concerns about the potential effects of a project, indicate that they may reject the project based on these concerns, and express a willingness to consider mitigation measures the developer might wish to present in order to secure project approval. Local officials would need to be careful not to respond to any specific proposal by a developer in a fashion that could be construed as entering into negotiations; rather, they would have to maintain a purely passive posture, at least until a developer has made a firm commitment to mitigation measures that meet the community's requirements. The vagueness and ambiguities inherent in the post-*Koontz* land use regulatory process will necessarily lead to project denials that could have been avoided if communities and developers could engage in more explicit and straightforward negotiations.

Finally, the ruling in *Koontz* extending the *Nollan/Dolan* standards to exactions that were proposed but never adopted is likely to make the land use regulatory review process more cumbersome, expensive, and time-consuming. Local officials will presumably be required as a result of *Koontz* to apply more care in the formulation of potential exactions in the course of the development review process. This could yield benefits for developers if the conditions were ultimately imposed, although *Nollan* and *Dolan* already apply to these conditions, so there would be no actual net gain for developers. However, if the

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218 *Id.* at 2611 (Kagan, J., dissenting).
219 *Id.* at 2610.

exactions are not imposed, this extra effort and care will yield no benefit for developers in the form of more favorable or more carefully considered exactions. Yet, to forestall potential challenges under *Koontz*, local officials will need to invest time and effort to assure themselves that exactions they have merely considered imposing are defensible under *Nollan* and *Dolan*. This expenditure of time and effort will serve no useful social purpose.

Some of these additional costs will ultimately be borne by taxpayers. But some communities will try to force developers to help cover these additional costs, and since these costs are directly attributable to the filing of development applications, local officials will likely succeed in this effort in many cases. In the clear light of hindsight, it is hard to see what developer groups filing *amicus* briefs in support of Koontz thought they would accomplish by extending *Nollan*/*Dolan* to permit denials.[220]

B. Fees and Other Monetary Requirements

The ruling that *Nollan* and *Dolan* apply to "monetary exactions" will also lead to more intrusive judicial scrutiny of local land use regulation and make the review process more cumbersome. As Justice Kagan correctly observes, because local governments "impose many kinds of permitting fees every day," the ruling injects the Takings Clause "into the very heart of local land use regulation and service delivery."[221] As she says, the ruling "threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny;"[222] permit conditions requiring investments in wetlands mitigation banks and inclusionary housing requirements will likely be prime targets for developer lawsuits.[223]

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220 *See, e.g.*, Brief for Amicus Curiae of Owners' Counsel of America in Support of the Petitioner, Koontz v. St. Johns Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1147). Tellingly, Justice Alito offers no response to the objection that extending *Nollan/Dolan* to permit denials will generate serious practical problems.

221 *Koontz*, 133 S. Ct. at 2607 (Kagan, J., dissenting).

222 *Id.* at 2604.

223 *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, Cal., No. 04-1508 (Cal. 2014) (pending case in the California Supreme Court that may address the constitutionality of inclusionary housing requirements in light of *Koontz*); Lee Logan, *Experts Fear Takings Ruling Creates Uncertainty for Wetlands Mitigation*, INSIDEEPA.COM (Oct. 24, 2013), http://insideepa.com/Inside-Cal/EPA/Inside-Cal/EPA-10/25/2013/experts-fear-takings-ruling-creates-uncertainty-

Equipped with this new, robust legal claim, developers will now be more likely to initiate lawsuits seeking to invalidate development fees. Successful litigation, or the mere threat of litigation, will mean that fees will be imposed less frequently and in smaller amounts, with the ultimate result that the social and environmental costs of development covered by development fees will either be shifted to taxpayers or left unaddressed and imposed on the community as a whole. The concern that developers will file *Nollan/Dolan* claims based on monetary exactions, or even mere discussion of monetary exactions, will lead communities to reject development proposals more frequently. More generally, the ruling will limit local government authority to address the various public concerns raised by development proposals.

Justice Alito attempted to rebut these criticisms by pointing out that some state courts already apply "*Nollan* and *Dolan* or something like it" to monetary exactions.[224] He also observed that some state statutes already "normally provide[] an independent check on excessive land use permitting fees."[225] Under these laws, he argued, "the 'significant practical harm' the dissent predicts has not come to pass."[226] By implication, applying heightened scrutiny to monetary exactions nationwide will not produce significant harm in the future, either. One can hope that Justice Alito will prove correct, but he offered no evidence to support his factual assertion. His prediction about how his new doctrine will work out in practice represents precisely the kind of "predictive judgment[]" about the efficacy of different public policies that, according to the 2005 *Lingle* decision, should be left to "elected legislatures and expert agencies."[227]

The problems created by the Court's ruling on monetary exactions are compounded by the practical difficulty of differentiating between monetary assessments subject to *Nollan/Dolan* and taxes that, according to the majority, are not

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for-wetlands-mitigation/menu-id-1097.html.

224 *Koontz*, 133 S. Ct. at 2602.

225 *Id.* (alteration added).

226 *Id.* Developers' demonstrated ability to obtain statutory protections against what they regard as excessive regulation through the political process could be interpreted to mean that developers are not among those groups that particularly need the help and support of the independent judiciary.

227 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 544 (2005) (alteration added).

takings.[228] On the one hand, the Court said that a mandate to expend money on environmental mitigation, such as the exaction at issue in *Koontz*, constitutes a *per se* taking.[229] On the other hand, the Court said, though in somewhat less than categorical fashion, taxes and user fees are not takings.[230] Justice Alito blithely asserts that "teasing out the difference between taxes and takings is more difficult in theory than in practice."[231] But he offers no persuasive reasons supporting this optimism.

In fact, differentiating between monetary exactions and taxes will likely prove a vexing task. As discussed, the Court said that monetary exactions should be subjected to *Nollan/Dolan* because they are "linked" to real property.[232] But property taxes and a host of other taxes and user fees are linked to real estate in the same fashion as monetary exactions, making it extremely difficult to distinguish between the two.[233] Justice Kagan properly criticized the majority for not saying "even a word about how to make the distinction that will now determine whether a given fee is subject to heightened scrutiny."[234] As she also points out, the long-term

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[228] *Koontz*, 133 S. Ct. at 2600–01 ("[I]t is beyond dispute that '[t]axes and user fees . . . are not takings.'") (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting)).

[229] 133 S. Ct. at 2600.

[230] *See* 133 S. Ct. at 2602 ("We need not decide at precisely what point a land-use permitting charge denominated by the government as a 'tax' becomes 'so arbitrary . . . that it was not the exertion of taxation but a confiscation of property.'" (quoting Brushahber v. Union Pacific R.R., 240 U.S. 1, 24–25 (1916)).

[231] 133 S.Ct. at 2601. Justice Alito's discussion implies that the issue of whether the government is imposing a tax that is not a taking or imposing a monetary payment obligation that constitutes a taking can generally be resolved by determining whether the government agency in question has been granted the legal authority to impose a tax. *See id.* at 2601–02. This suggestion is no help whatsoever. A governmental entity's lack of authority to impose a tax, which by hypothesis is not a taking, does not make it any more or less appropriate to treat other types of monetary assessments as takings. Moreover, when a government agency has both the power to tax and the power to impose other monetary assessments, the courts will still need to resolve whether there has been a taking, not based on the scope of the agency's statutory taxing authority, but as a matter of federal constitutional law.

[232] 133 S. Ct. at 2600.

[233] *Cf.* E. Enters. v. Apfel, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting) ("If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.,* when it assesses a tax?").

[234] 133 S. Ct. at 2608.

significance of this issue will depend on whether the *Nollan/Dolan* standards are confined to *ad hoc* monetary assessments, as many lower courts have ruled, or whether they also apply to generally applicable fees.[235] The majority in *Koontz* was conspicuously silent on this important question.

In the end, the *Koontz* decision will matter in the real world, and the nature of the consequences can be identified fairly easily, but the magnitude of the changes brought about by the ruling is difficult to predict. Justice Kagan predicted that the Court's decision, particularly its ruling on fees, will inflict "significant practical harm."[236] Justice Alito, on the other hand, foresaw little real change as a result of the ruling extending *Nollan* and *Dolan* to monetary fees.[237] This difference of opinion rested in part on divergent assessments of the character of the pre-existing legal regime and whether *Koontz* breaks significant new ground. It also reflected a profound philosophical split about the relative importance of safeguarding property interests from government interference, differing views on the frequency with which local governments treat landowners unfairly, and conflicts over the value of preserving space in which local governments can operate without the threat of expensive constitutional litigation. As evidenced by its willingness to redefine the constitutional rules governing the local land use system, the Court majority has abandoned, at least for the time being, any pretense of deferring on these issues to the judgments of the other branches of government at the state and local levels.

VI. WHERE ARE WE NOW AND WHERE ARE WE GOING?

With its severe doctrinal failings and negative practical implications, the *Koontz* decision is surely one of the worst, if not the worst, of the Supreme Court's modern takings decisions. As discussed above, it is impossible to justify either of the Court's major rulings in light of established takings principles and precedent. Thus, the majority opinion contradicts, ignores, and misrepresents previously established law. The majority may

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235 *Id.* at 2608 (Kagan, J., dissenting).

236 *Id.* at 2607 (Kagan, J., dissenting).

237 *Id.* at 2602 (disagreeing "with the dissent's forecast that [the majority] decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees" (alteration added)).

believe that its rulings will logically fit within some new version of takings doctrine yet to be developed. If so, the Court has not described this new doctrine or offered any justification for rejecting the established reading of the Takings Clause, painfully pieced together over the course of nearly a century since the Court first recognized the doctrine of regulatory takings in *Pennsylvania Coal Co. v. Mahon*.[238]

The decision marks a further rightward swing in the Supreme Court's position on takings issues. Justice Samuel Alito, the author of the *Koontz* opinion, succeeded Justice Sandra Day O'Connor upon her retirement from the Court in 2006. It is difficult to imagine the author of the *Lingle* decision, with its sweeping pronouncements about the importance of judicial deference to legislative and executive branch actors on matters relating to economic regulation, joining in the *Koontz* decision. Moreover, *Koontz* was one of three takings cases decided by the Supreme Court last term, all of which were decided in favor of the property owner petitioners.[239] While the rulings in the other two cases are neither particularly surprising nor significant,[240] this consistent string of victories for property rights advocates certainly reflects the values and priorities of the Court today.

It is difficult to predict where the Court may go on the takings issue following *Koontz*. While the decision is an important one, especially for local land use regulators, it is also a relatively narrow decision focused on two confined issues. The rulings in *Koontz* do not obviously set the stage for consideration of other, potentially more important legal innovations. The decision is so poorly reasoned that it is difficult to imagine that the Court will rely on this opinion frequently in future takings cases. But the decision certainly creates new uncertainties and confusion in this

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238 260 U.S. 393 (1922).

239 *See* Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013); Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012).

240 *See* John Echeverria, *Horne v. Department of Agriculture: An Invitation to Reexamine 'Ripeness' Doctrine in Takings Litigation*, ENVTL. L. REP. NEWS & ANALYSIS (Sept. 2013) (explaining that *Horne* is a narrow decision that comports with prior precedent). The ruling in *Ark. Game & Fish Comm'n*, 133 S. Ct. at 515, that temporary physical inundations can potentially give rise to viable takings claims hardly expanded the scope of takings doctrine at all. *See* John Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 188 (2005) (suggesting that takings claims based on temporary physical occupations should be evaluated using the three-factor Penn Central framework).

notoriously recondite area of law. It is not beyond the realm of possibility that one or more justices in the majority will have second thoughts about the opinion and seek in the future to limit or possibly jettison one or both rulings. Because the Court was so sharply divided in *Koontz*, a very modest change in the composition of the Court could spell the death knell for *Koontz*. There is precedent based on the decision in *Lingle v. Chevron U.S.A.* for the Court reversing course on important takings questions.[241]

Going forward, it will be interesting to watch how the Court resolves the conflicting views on the relationship between the courts and the other branches of government reflected in the *Lingle* and *Koontz* cases. *Lingle* stands for a restrained judicial role in reviewing legislative and executive branch action and endorses the need for deference to legislators and regulators on complex policy and technical issues.[242] By contrast, *Koontz* reflects fierce suspicion about the motivations of local government officials[243] and expresses no concern about the potential adverse effects of judicial second-guessing of legislative and administrative decisions.[244] Koontz's expansion of *Nollan/Dolan* obviously infringes on the domain of *Lingle* and effectively limits, to a degree, the scope of that decision.[245] It is difficult to understand

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[241] *See supra* text accompanying notes 46–61.

[242] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 544 (2005) (repudiating the "substantially advance" takings test in part because it would "empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies").

[243] *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013) (referring to "the special vulnerability of land use permit applicants to extortionate demands for money" by local government officials); *id.* at 2603 (referring to the Court being "[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money . . .").

[244] The majority opinion in *Koontz* also stands in striking contrast to Justice Kennedy's statement in his concurring opinion in *Eastern Enterprises* criticizing the plurality opinion for "throw[ing] one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts." E. Enters. v. Apfel, 524 U.S. 498, 542 (1998).

[245] One of the painful ironies of the *Koontz* decision is that it calls for just the kind of judicial refereeing of battles of experts that the Court eschewed in *Lingle*. *See Lingle*, 544 U.S. at 544–45 ("To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded

how several of the justices who joined in the unanimous *Lingle* decision could reconcile themselves to joining in Justice Alito's opinion in *Koontz*.

An important question for courts applying *Koontz* will be how to interpret and apply the Court's decision in light of its fundamental doctrinal defects. For the reasons discussed above, the only plausible doctrinal basis for a *Koontz*-type challenge to a permit denial is the Due Process Clause. The majority offers no reasoned basis for disputing this conclusion. The minority agreed that *Nollan/Dolan* should apply to a permit denial but did not attempt to articulate a theory to support this conclusion. Perhaps a majority of the justices would be open to viewing a *Koontz*-type claim through the lens of due process. At oral argument, Justice Kennedy, who joined Justice Alito's majority opinion, explicitly raised the question of whether the case raised a due process issue rather than a takings issue.[246] In light of these problems and uncertainties, government defendants might plausibly take the position that a *Koontz*-type challenge to a permit denial actually involves a due process issue and lower courts could responsibly resolve *Koontz* claims on that basis.

Such an approach would not be inconsistent with the Court's basic ruling that the *Nollan/Dolan* standards supply the appropriate framework for analyzing a government denial of a permit because the owner has refused to accede to a condition. In evaluating a claim that the government's denial of a permit violates due process, the question whether the exaction would have violated the *Nollan/Dolan* standards should arguably be relevant. If a condition demanded by the government would have met *Nollan/Dolan* standards, a court should be more inclined to reject a claim that the permit denial violated due process. If the condition would have violated these standards, the court should be more inclined to uphold the due process claim.

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that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. . . . We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."). After *Koontz*, to determine whether traffic or sewer impact fees have been set at appropriate levels, for example, the developer and the local community will each have to hire experts to testify on their behalf and the courts will have to decide the case by determining which expert is "more persuasive."

[246] *See* Koontz v. St. Johns Water Mgmt. Dist., No 11-1447, Oral Argument Transcript, at 27 (Jan. 15, 2013).

Repositioning this claim where it belongs, under the Due Process Clause, raises other issues. In a due process case the plaintiff bears the burden of proof,[247] whereas under *Nollan* and *Dolan* the government bears the burden of proof.[248] If a *Koontz*-type case is viewed as involving a due process issue, should the burden of proof rest on the plaintiff, even if the *Nollan/Dolan* framework guides resolution of the due process inquiry? In addition, in a due process case, the courts are required to accord considerable deference to the judgments of government defendants.[249] If a *Koontz*-type case is viewed as a due process case, should the courts apply the same level of deference that would ordinarily apply in a due process case? While the majority's opinion in *Koontz* certainly says that the *Nollan* and *Dolan* essential nexus and rough proportionality tests apply to permit denials,[250] the majority is conspicuously silent on the issues of the burden of proof and the proper level of deference in this type of case. This silence can fairly be read as an invitation to attempt to avoid some of the damage that would be done by electing to read *Koontz* more expansively.

Another important question is whether a government defendant, even after rejecting a permit application because the owner has refused to accede to an exaction, can avoid the strictures of *Nollan* and *Dolan* by showing that the likely negative effects of the development on the community provide an independent justification for the government's regulatory decision. It will no doubt be contended that if the government demanded an exaction at any point in the regulatory review process it can never reject the development application without facing a challenge under *Koontz*. However, in classic unconstitutional condition cases the Supreme Court has recognized that the denial of a benefit should not be struck down based on the unconstitutional conditions doctrine if the government has a distinct, constitutionally valid basis for

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247 *See supra* notes 34–35.

248 *See* Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994).

249 *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978) (state legislation may not be struck down based on substantive due process so long as the government action "bears a reasonable relation" to a "legitimate" state purpose).

250 Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013).

denying the benefit.[251] It would appear to follow *a fortiori* in a *Koontz*-type case that if the government has a valid basis for denying a permit application based on the predicted project impacts, *Nollan* and *Dolan* should not apply, even if the government decision was also motivated in part by the owner's refusal to accede to a demand for an exaction.[252] Justice Alito stated that "[e]ven if respondent *would have been* entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights."[253] This statement does not preclude the idea that *Nollan* and *Dolan* should not apply when there is an actual alternative explanation for the government's land use decision.

With respect to monetary fees, one issue that will preoccupy the lower courts in the years ahead is whether the *Koontz* ruling that monetary fees are subject to *Nollan/Dolan* applies to fees calculated and imposed, not in *ad hoc* proceedings, but through general legislation.[254] Many lower courts have read *Nollan* and *Dolan* to apply only to conditions imposed in *ad hoc* administrative proceedings and not to conditions imposed through general legislation,[255] and the lower courts have been especially reluctant to apply *Nollan* and *Dolan* to legislatively imposed fees.[256] The majority opinion in *Koontz* is pointedly silent on

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[251] *See* Perry v. Sinderman, 408 U.S. 593, 598 (1972) (remanding claim that teacher was denied contract renewal in violation of the First Amendment to determine whether there was some independent, constitutional basis for the school not to grant the plaintiff a contract renewal).

[252] *See* Goss v. City of Little Rock, 151 F.3d 861, 864 (8th Cir. 1998) (holding that city's refusal to rezone plaintiff's property because plaintiff refused to agree to dedicate a portion of his property to the public was a taking, but declining to order the city to rezone the land without the condition, reasoning that the city "has a legitimate interest in declining to rezone . . . [the] property, and the city may pursue that interest by denying . . . [the] rezoning application outright, as opposed to denying it because of . . . [the owner's] refusal to agree to an unconstitutional condition, as the city did here").

[253] *Koontz*, 133 S. Ct. at 2596 (emphasis added).

[254] *See* Justin R. Pidot, *Fees, Expenditures and the Takings Clause*, 41 Ecology L.Q. (forthcoming April 2014) (suggesting that direct payments to the government might be subject to more stringent review than requirements to spend money).

[255] *See, e.g.*, Parking Ass'n of Ga. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994); Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998).

[256] *See, e.g.*, Rogers Mach., Inc. v. Washington Cnty., 45 P.3d 966 (Or. Ct. App. 2002); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995).

whether the ruling applies only to *ad hoc* fees or applies to fees imposed through general rules as well. In her dissent, Justice Kagan highlighted this possible method for limiting the effect of *Koontz*: "Maybe today's majority opinion accepts that distinction; or then again, maybe not."[257] The issue is plainly teed up for future consideration.

There is language in Supreme Court decisions suggesting that *Nollan* and *Dolan* (and hence *Koontz*) should be limited to *ad hoc* fees. *Dolan* suggests such a limitation by emphasizing that "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel" rather than impose an "essentially legislative determination[] classifying entire areas of the city."[258] Likewise, the decision in *Lingle* states that *Nollan* and *Dolan* "involved Fifth Amendment takings challenges to *adjudicative* land-use exactions."[259] At a minimum, the Court's language in these cases indicates that the Court has, for the present, reserved the question of whether *Nollan* and *Dolan* can or should extend beyond ad hoc exactions.

It is difficult to predict how the Court, in the aftermath of *Koontz*, will ultimately resolve this issue. On the one hand, legislative fees can be viewed as leveraging the government's regulatory authority in a fashion similar to *ad hoc* fees because the fees are only imposed on those seeking regulatory approval to develop land. On the other hand, legislative enactments are generally the product of more carefully considered, transparent decision making by more senior government officers than permitting decisions arrived at in *ad hoc* administrative proceedings. *Nollan* and *Dolan* are arguably rooted in the Court's particular suspicions about the negotiations that occur in the course of *ad hoc* proceedings. Thus, a majority of the Court may reject extension of *Nollan* and *Dolan* to legislative fees. Moreover, in *Dolan*, the Court said that the "rough proportionality" test requires a local government to "make some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact of the proposed development."[260] Because

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[257] *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

[258] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

[259] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005) (emphasis added).

[260] *Dolan*, 512 U.S. at 391 (emphasis added).

legislative measures do not, by their nature, involve individualized determinations, this description of the rough proportionality analysis suggests that it cannot apply to general legislation. Finally, any argument to extend *Nollan/Dolan* to legislatively imposed fees will have to confront *Lingle* and its declaration that "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."[261]

CONCLUSION

Cynics argue that courts decide cases by the seat of their pants based on political predilections and then write up a legal analysis to support the result. Others contend that judges are like baseball umpires and decide cases as best they can by applying strict legal rules. *Koontz* provides support to the cynics—or perhaps "realists" would be the happier term. It is hard to avoid the conclusion that the majority in *Koontz* settled upon the results it preferred and assigned Justice Alito the unenviable task of trying to justify them. That task was made enormously challenging by the fact that when no exaction is imposed, nothing is taken. In addition, Justice Kennedy and other justices were probably unwilling to abandon the five-justice majority ruling in *Eastern Enterprises* on monetary liabilities. Faced with these analytic obstacles, and unwilling to embrace a broader reconsideration of takings doctrine, the majority had no clear, logical path that could get it to the desired outcomes. The result is an extraordinary hash of an opinion that undermines faith in the rule of law, grants intrusive new powers to federal courts to review local land use decisions, and sows considerable uncertainty and confusion about the current status and future direction of takings doctrine.

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261 *Lingle*, 544 S. Ct. at 545.

CAN ERRONEOUS PERMITTING DELAYS BE TEMPORARY TAKINGS?

DANIEL L. SIEGEL*

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INTRODUCTION

This Article explores the following question: When a governmental entity denies a property owner's request for a permit, and a court then determines that controlling law required the entity to grant the permit, can the entity be liable for a temporary taking?[1]

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[1] The Takings Clause in the Fifth Amendment of the U.S. Constitution states: "nor shall private property be taken for public use, without just

Governments at all levels make an enormous number of permitting decisions. Tens of thousands of local governments, along with regional, state, and federal entities, issue untold numbers of permits allowing property owners to develop land, discharge pollutants into waterways and the air, fill wetlands, take protected species, and engage in many other activities.[2] Given such a large volume, governments will inevitably make mistakes. And many property owners have sued for temporary taking damages.[3] One current example involves federal and state regulatory takings claims based on the allegation that a North Carolina town unlawfully denied owners a permit to repair their beachfront

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compensation." U.S. CONST. amend. V. Although the classic taking involves the government acquiring property, the courts have held that a regulatory restriction can amount to a taking if it is "so onerous that its effect is tantamount to a direct appropriation or ouster." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005).

[2] *See, e.g.*, Craig Anthony Arnold, *Clean-Water Land Use: Connecting Scale and Function*, 23 PACE ENVTL. L. REV. 291, 302–03 (2006) (explaining that land-use decisions are made by approximately 39,000 local units of government). These governmental units issue large numbers of permits. For example, on average, governments issue permits to build over one million housing units per year. *See* U.S. CENSUS BUREAU, NEW PRIVATELY OWNED HOUSING UNITS AUTHORIZED UNADJUSTED DATA FOR UNITED STATES (Aug. 2013), *available at* http://www.census.gov/construction/bps/uspermits.html. Just one federal agency alone, the Army Corps of Engineers, issues over 6,000 individual permits per year and authorizes approximately 74,000 activities per year through its general permits. CLAUDIA COPELAND, CONG. RESEARCH SERV., RL97-223, THE ARMY CORPS OF ENGINEERS' NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS 2, 14 (2012). Moreover, permits cover a wide range of activities. *See*, *e.g.*, N.C. GEN. STAT. ANN. § 113A-118 (West 2010) (coastal development); CAL. GOV'T CODE §§ 66410–66499.38 (West 2009) (subdivisions); OR. REV. STAT. §§ 92.010–92.179 (2013) (subdivisions); CAL. PUB. RES. CODE § 25500 (West 2007) (power plants); ME. REV. STAT. ANN. tit. 38, § 490-PP (2013) (effective June 1, 2014) (mining); CAL. FISH & GAME CODE § 1602 (West 2013) (lake and streambed alteration); MICH. COMP. LAWS ANN. § 324.30102 (West 2013) (lake and streambed alteration); CAL. WATER CODE § 8710 (West 1992) (encroachment on waterways and levees); CONN. GEN. STAT. ANN. § 22a-342 (West 2006) (encroachment on waterways and levees); CAL. FISH & GAME CODE § 2080 (West 2013) (incidental taking of endangered species); ME. REV. STAT. ANN. tit. 12, § 12808 (2005) (incidental taking of endangered species); CAL. HEALTH & SAFETY CODE § 25200 (West 2006) (hazardous waste facilities); N.Y. ENVTL. CONSERV. LAW §§ 270101, 27-0707 (McKinney 2007) (hazardous waste facilities); Clean Water Act § 402, 33 U.S.C. § 1342(b) (2006) (activities that potentially pollute waters).

[3] *See, e.g.*, Town of Nags Head v. Toloczko, 728 F.3d 391, 398–99 (4th Cir. 2013); Lockaway Storage v. Cnty. of Alameda, 156 Cal. Rptr. 3d 607, 611 (Cal. Ct. App. 2013).

cottage.[4] The town asserted that the cottage could not be rebuilt because it was on public land under the public trust doctrine, but the Fourth Circuit determined that only the State could enforce North Carolina's public trust doctrine, and it remanded the case to the district court to address the merits of the takings claims.[5] In another recent case, a California county, acting on incorrect advice from its county counsel, determined that a voter-approved growth control measure prevented a developer from building a recreational vehicle storage facility on a particular parcel.[6] The developer sued, a court reversed the county's decision, and the state appellate court ultimately upheld a "temporary taking" award of almost $1 million in damages, plus nearly $750 thousand in attorneys fees, for a thirty-month delay in development.[7]

This Article reviews the different analyses that can be applied to these temporary takings claims. It shows why taken together, the analyses should preclude takings for erroneous permitting delays. In essence, when government in good faith misinterprets controlling law, the resulting delay is a normal permitting delay and therefore not a temporary taking. However, if the delay is made by the permitting authority in bad faith, it is implicitly unauthorized by the legislature as beyond the scope of the governing statute and therefore cannot be a taking. And in either case, if controlling law required government to issue a permit, then its temporary refusal to do so was not for a "public use" and therefore cannot be a taking, which by its terms requires a public use. Finally, this Article concludes that, while the Takings Clause is not designed to address these delays, property owners may obtain relief through other constitutional, statutory, and common law provisions.

I. AFTER *LINGLE* AN ERRONEOUS PERMITTING DELAY, WITHOUT MORE, CANNOT ESTABLISH A TAKING

Before discussing whether governments are shielded from takings liability for their erroneous permitting delays, we need to address the other side of the coin: judicial suggestions that such delays might be used as per se swords automatically establishing

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4 *Town of Nags Head*, 728 F.3d 391.
5 *Id.* at 398–99.
6 *Lockaway Storage*, 156 Cal. Rptr. 3d 607.
7 *Id.* at 611.

takings. Prior to the United States Supreme Court's decision in *Lingle v. Chevron U.S.A., Inc*.,[8] a number of lower court decisions included language that might be interpreted as suggesting that a delay could in and of itself amount to a taking simply because the delay was not normal. The Federal Circuit's decision in *Wyatt v. United States*,[9] for example, includes the following statement: "[W]e hold that any delay in processing the permit application was not sufficiently 'extraordinary' to constitute a taking."[10] The court's use of the phrase "constitute a taking" seems to indicate that extraordinary delay would be a taking, although the court did not discuss or analyze this issue.[11] The California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*[12] similarly contains language arguably suggesting that a delay could be a temporary taking. *Landgate* held that a court's erroneous delay determination looks at "whether the [mistaken] development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit."[13]

Lingle, however, undercut the suggestion that a permitting delay could amount to a per se taking. *Lingle* explained that courts are to analyze claims that governmental regulatory actions impose takings by using one of four tests.[14] Most actions are "governed by the standards set forth in *Penn Central Transp. Co. v. New York City*."[15] Those standards primarily focus on the regulation's economic impact on the owner and require a very large impact to suggest a taking. Others come within the "two relatively narrow

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[8] 544 U.S. 528 (2005).

[9] 271 F.3d 1090 (Fed. Cir. 2001).

[10] *Id.* at 1097.

[11] Rather, the court's discussion of delay focused on the elements needed to establish that a delay was not normal and why the plaintiff failed to make its case. *Id.* at 1097–1100. The court was even more ambiguous three years later in *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360 (Fed. Cir. 2004). Like *Wyatt*, *Bass Enterprises*' extraordinary-delay discussion almost exclusively addressed the elements of such a delay and why the plaintiff did not make its case. *Id.* at 1366–68. The court did, however, include one sentence indicating that an extraordinary delay "may result" in a taking. *Id.* at 1366. On the other hand, the court seemed to suggest that even if an extraordinary delay exists, *Penn Central* factors must still be satisfied. *Id.* at 1366 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[12] 953 P.2d 1188, 1190 (Cal. 1998).

[13] *Id.* at 1198.

[14] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539–42 (2005).

[15] *Id.* at 538 (citing *Penn Cent.*, 438 U.S. at 124).

categories" exemplified by *Loretto v. Teleprompter Manhattan CATV Corp.*[16] (regulation requires a permanent physical occupation) and *Lucas v. South Carolina Coastal Council*[17] (regulation denies owner's property of all economic value). Finally, there is "the special context of land-use exactions."[18] Exactions "condition approval of a permit on the dedication of property to the public."[19]

Prior to *Lingle*, the Court also endorsed a fifth takings formula under which "government regulation of private property 'effects a taking if [such regulation] does not substantially advance legitimate state interests.'"[20] *Lingle* repudiated that formula. It explained that whether a regulation amounts to a taking turns on whether it is "so onerous that its effect is tantamount to a direct appropriation or ouster."[21] Regulatory takings tests thus attempt to identify restrictions "that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[22] *Lingle* discarded the "substantially advances" formula because it did not "help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property."[23]

If an extraordinary delay only caused a minor economic impact, however, it should not meet those requirements. Extraordinary delay itself, therefore, should not constitute a per se taking. Thus cases such as *Landgate* cannot be interpreted as holding that erroneous governmental decisions are takings if they fail to substantially advance a legitimate public purpose. But what about the converse: are governments shielded from takings liability where they initially denied a permit, but subsequently issued a permit pursuant to a court order?

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[16] *Lingle*, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[17] *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

[18] *Id.*

[19] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013).

[20] *Lingle*, 544 U.S. at 531 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

[21] *Id.* at 537.

[22] *Id.* at 539.

[23] *Id.* at 542.

II. CAN ERRONEOUS PERMITTING DELAYS SHIELD GOVERNMENT FROM TAKINGS LIABILITY?

Courts and commentators have generally identified three broad bases for shielding erroneous permitting delays from takings claims. The first is that these delays are part of the normal permitting process and, as such, cannot impose a taking. The second is that, where an agency or official makes a mistake in applying legislation, the mistake is not authorized and therefore cannot impose liability on the government. The third is that erroneous delays by their nature do not meet the Taking Clause's "public use" requirement and therefore cannot be takings. This Article will now explore each theory.

A. *Normal Delay*

1. *Creation of the Normal Delay Rule*

Until 1987, the Supreme Court had not resolved whether a regulation limiting a property's uses could impose a temporary taking.[24] Some state courts, such as those in California, New York, and Pennsylvania, had interpreted federal and state constitutions as not requiring compensation when a regulation amounted to a taking; the only remedy was injunctive-type relief.[25] Compensation was only available where, after a court determined that the regulation was excessive, the government nevertheless decided to maintain the regulation.[26]

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[24] First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 310 (1987) ("Appellant asks us to hold that the California Supreme Court erred in *Agins v. Tiburon* in determining that the Fifth Amendment . . . does not require compensation as a remedy for 'temporary' regulatory takings . . . . Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the *Agins* rule.").

[25] *See* Agins v. City of Tiburon, 598 P.2d 25, 32 (Cal. 1979) (holding that inverse condemnation is inappropriate for a landowner challenging a zoning ordinance), *aff'd on other grounds*, 447 U.S. 255 (1980); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381, 386 (N.Y. 1976); Kraiser v. Horsham Twp., 455 A.2d 782, 784 (Pa. Commw. Ct. 1983). *See also* Robert I. McMurry, Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. REV. 711, 711 (1982) ("Courts disagree about whether to invalidate the government action as unconstitutional or to invalidate it by ordering requisite compensation.").

[26] *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 312 (1987) (explaining that California decisions did not allow a plaintiff to recover damages for a temporary regulatory taking).

In 1987, the United States Supreme Court resolved this issue in *First English Evangelical Lutheran Church v. County of Los Angeles*, holding that property owners had the right to be compensated for temporary regulatory takings.[27] The Court subsequently described *First English* as endorsing the following rule: "[O]nce a court finds that a police power regulation has effected a taking, the government entity must pay just compensation for the period commencing on the date the regulation first effected the taking, and ending on the date the government entity chooses to rescind or otherwise amend the regulation."[28]

Although *First English* affirmed the right to compensation for a temporary regulatory taking, it left open the question of how to identify such a taking.[29] The Court did, however, go out of its way to explain that its temporary takings decision does not apply to the time that property owners spend seeking permits. It therefore distinguished the facts before it—under which government allegedly adopted an ordinance that temporarily prohibited all use of the owner's property—from "the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."[30] This "normal delay" principle is consistent with the Court's prior statements to the effect that permitting systems and similar governmental decision-making in and of itself does not impose a taking.[31]

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[27] *Id.* at 321.

[28] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 328 (2002) (Brennan, J., dissenting) (quoting San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658 (1981)) (internal quotation marks omitted).

[29] *Id.* at 328 (explaining that *First English* only decided the remedy question).

[30] *First English*, 482 U.S. at 321.

[31] For example, in *United States v. Riverside Bayview Homes, Inc.,* the Court explained:

> The mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking . . . . A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

474 U.S. 121, 126–27 (1985) (internal citation omitted). More generally, in

The Court subsequently reinforced the normal delay principle in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[32] *Tahoe-Sierra* held that a building moratorium could not impose a per se taking under *Lucas* for its denial of a parcel's economically viable use because the parcel retained value due to its potential use after the moratorium.[33] As part of its reasoning, the six-justice *Tahoe-Sierra* majority explained that *First English* "implicitly rejected" a rule that a normal delay "temporarily denying an owner all use of her property" might be a taking.[34] Similarly, while Chief Justice Rehnquist's dissent, joined by Justices Scalia and Thomas, concluded that the moratorium in question did amount to a taking, it notably agreed with the majority that "normal delays" do not impose takings.[35] The dissent explained that "background principles of state property law" preclude takings because "the short-term delays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations."[36]

2. *Application of the Normal Delay Rule to Legal Errors*

A number of courts have applied the "normal delay" concept to the subject of this Article: permitting delays that are due, in part, to government's erroneous interpretation of applicable law. The leading case is *Landgate, Inc. v. California Coastal Commission*,[37] where California's Supreme Court held that a two-year delay caused by a commission's "mistaken assertion of jurisdiction" that was corrected on appeal is "in the nature of a 'normal delay' that

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Agins v. City of Tiburon, the Court rejected the property owners' claim that the city's precondemnation activities constituted a taking, explaining in a footnote that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered a taking in the constitutional sense." 447 U.S. 255, 263 n.9 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)).

[32] 535 U.S. 302 (2002).

[33] *Id*. at 332.

[34] *Id.* at 329. The Court did, however, suggest that extraordinary delays could help support a taking, explaining that the length and justification of a delay could be considered in a *Penn Central* analysis. *Id*. at 342.

[35] *Id.* at 352 (Rehnquist, C.J., dissenting) (quoting First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987)).

[36] *Id.* at 351–52 (Rehnquist, C.J., dissenting).

[37] 953 P.2d 1188 (Cal. 1998).

does not constitute a taking."[38] The court indicated, however, that a different case would be presented if the Commission's "position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it."[39]

Landgate is consistent with the Federal Circuit's "extraordinary delay" jurisprudence. Although most of those decisions do not involve delays due to legal errors, they do more generally provide that a takings claim based on a permit delay is not ripe unless and until the delay is extraordinary.[40] Moreover, they almost never find extraordinary delay unless the agency-caused delay was both unreasonable and the result of bad faith.[41] Further, a few of those cases did involve delays due to agency positions that courts later held were erroneous and reversed. The most notable such case is *Tabb Lakes, Ltd. v. United States*,[42] which was also the first Federal Circuit decision to address the concept of extraordinary delay.

In *Tabb Lakes*, the United States Army Corps of Engineers ordered the developer to cease and desist from filling its wetlands before receiving a Clean Water Act permit.[43] Three years later, the Court of Appeals for the Fourth Circuit ruled that the Corps's order was erroneous because the agency had no jurisdiction over these wetlands.[44] The developer then proceeded with its project.[45]

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[38] *Id.* at 1190.

[39] *Id.* at 1199. Subsequently, relying on *Landgate*, one California appellate court rejected a takings claim where it found that a city's action "was not objectively unreasonable because it was not taken solely to delay the proposed project." Lowenstein v. City of Lafayette, 127 Cal. Rptr. 2d 79, 87 (Cal. Ct. App. 2002). Another found a taking where it concluded that a city's permit denial was "arbitrary and unreasonable" in light of a state statute and existing case law that required the issuance of the permit. Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458, 464 (Cal. Ct. App. 1999).

[40] *See generally* Riviera Drilling & Exploration Co. v. United States, 61 Fed. Cl. 395, 405 (2004) (quoting Boise Cascade Corp. v. United States, 296 F.3d 1339, 1352 (Fed. Cir. 2002)) (finding that the facts of the case presented no extraordinary delay).

[41] Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1366–67 (Fed. Cir. 2004); *see also* Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 499 (2009) (noting the Federal Circuit's "admonition that extraordinary delay rarely travels without bad faith . . . .").

[42] 10 F.3d 796, 798 (Fed. Cir. 1993).

[43] *Id.*

[44] *Id.* at 798–99.

[45] *Id.* at 799.

It also sought compensation from the Corps, asserting that the three-year delay imposed a temporary taking.[46] The Federal Circuit rejected the claim. It explained that "only after the delay becomes unreasonable, would the taking begin," although it stated that because the developer never suggested a date after the issuance of the cease and desist order as the starting point for a taking, the court did not need to decide whether at some point the Corps's action became unreasonable.[47]

In addition, at least one other circuit court has addressed this issue, holding that delays due to litigation that overturns a permit denial are not extraordinary if government acted in good faith. In *Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach*,[48] the Fourth Circuit reviewed the property owners' temporary takings claim, which was based on the City's denial of their permit. The owners had challenged the denial in state court, which deemed the denial "arbitrary," resulting in the City's issuance of the permit.[49] The Fourth Circuit subsequently held that the delay was "a non-compensable incident of ownership."[50] Absent the City's bad faith or deliberate delay of the judicial process, "any delay was nothing more than the law's delay as lamented for some 400 years, and not an extraordinary delay that could give rise to constitutional implications."[51]

One federal court has directly endorsed California's approach. Citing *Landgate*, the district court in *North Pacifica, L.L.C. v. City of Pacifica* held that California provides an adequate remedy for temporary takings based upon allegedly improper delays in processing development applications, and consequently that remedy must be pursued prior to bringing a federal court action.[52]

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[46] *Id.*

[47] *Id.* (emphasis omitted).

[48] 420 F.3d 322, 327 (4th Cir. 2005).

[49] *Id.* at 326.

[50] *Id.* at 330 (citing Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)).

[51] *Id.*

[52] N. Pacifica, Ltd. Liab. Co. v. City of Pacifica, 234 F. Supp. 2d 1053, 1064–65 (N.D. Cal. 2002). Under *Williamson County Regional Planning Commission v. Hamilton Bank*, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. 172, 195 (1985).

3. *The Normal Delay Rule Questioned*

In 1999 the Wisconsin Supreme Court rejected California's *Landgate* approach.[53] In *Eberle v. Dane County Board of Adjustment*, property owners alleged that a county improperly denied a permit for a driveway needed to access their property.[54] A trial court subsequently ordered the county to issue the permit.[55] Over the strong dissent of its chief justice, Wisconsin's high court held that these facts stated a temporary taking claim under the Wisconsin Constitution.[56] In doing so, the majority expressly rejected *Landgate's* reasoning.[57] It pointed to the statement in *First English* that where an "ordinance . . . had deprived the landowner of all use of its property for a 'considerable number of years . . . invalidation of the ordinance without payment of fair value'" is an inadequate remedy.[58] The Court did not, however, address *First English's* "normal delay" language. Further, after the state court decided *Eberle*, the United States Supreme Court emphasized in *Tahoe-Sierra* that *First English* only addressed the remedy for a temporary taking (compensation); it did not determine the merits. In other words, the Court did not determine what constitutes a temporary taking.[59]

More recently, a number of California lower courts have questioned whether *Landgate* is still good law, given its use of the "substantially advance legitimate governmental interest" formula

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[53] Eberle v. Dane Cnty. Bd. of Adjustment, 595 N.W.2d 730, 742 n.25 (Wis. 1999).

[54] *Id.* at 734.

[55] *Id.* at 735.

[56] *Id.* at 739. The Chief Justice asserted that where an administrative body refuses to allow a particular land use, and a court subsequently overturns the denial and allows the use, there is no temporary taking. *Id.* at 748–49 (Abrahamson, C.J., dissenting). In support, she cited—in addition to Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188 (Cal. 1998)—decisions from Vermont, New Hampshire, Pennsylvania, and New York. *Eberle*, 595 N.W.2d at 748.

[57] *Eberle*, 595 N.W.2d at 742 n.25.

[58] *Id.* at 743 (quoting First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 322 (1987)).

[59] *Tahoe-Sierra* affirmed the Ninth Circuit's decision, including its reasoning, that "*First English* concerned the question whether compensation is an appropriate remedy for a temporary taking and not whether or when such a taking has occurred." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 319 (2002) (characterizing the Ninth Circuit's decision); *id.* at 328–29 (adopting the Ninth Circuit's reasoning).

that the Supreme Court rejected in *Lingle*.[60] But those cases fail to recognize that there are two very different interpretations of how *Landgate* used the substantially advances concept. As outlined in Section II, above, *Landgate* and similar decisions in other jurisdictions are not valid if they are viewed as using the substantially advances formula as a "sword," that is, to establish a per se taking. In light of *Lingle*, the *Landgate* line of cases cannot provide an independent theory for finding a taking. A delay for arbitrary reasons is not a per se taking. On the other hand, *Landgate* is harmonious with *Lingle* if it is seen as a "shield"; that is, even where a delay imposes impacts that would ordinarily amount to a taking, no taking occurs for delays that are legitimate.[61] In that situation, courts are merely using a "substantially advances" concept to help determine whether a delay comes within the "normal delays" that cannot constitute temporary takings under *First English*.[62] The lower court decisions did not recognize that *Landgate* is valid when viewed as being based on the normal delay concept.

There is also one federal decision that includes some, albeit weak, support for having courts apply a takings analysis even where a permitting delay is due to the normal permitting process. In *Bass Enterprises Production Co. v. United States*,[63] the Federal Circuit applied the *Penn Central* factors to a permitting delay without having first determined whether the delay was normal and therefore shielded from takings liability irrespective of the *Penn Central* analysis. Although this seems to imply that normal delays can result in takings, the support is minimal because the court did not squarely address the issue. In addition, the government may not have raised it as a defense, and the court found no taking. *Bass Enterprises* does not, therefore, provide significant support for discarding the normal delay rule.[64]

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[60] *See, e.g.*, Lockaway Storage v. Cnty. of Alameda, 156 Cal. Rptr. 3d 607, 627–28 (Cal. Ct. App. 2013); Shaw v. County of Santa Cruz, 88 Cal. Rptr. 3d 186, 216 (Cal. Ct. App. 2008).

[61] *See* Landgate, Inc. v. California Coastal Commission, 953 P.2d 1188, 1190 (Cal. 1998).

[62] First English, 482 U.S. at 321.

[63] 381 F.3d 1360 (Fed. Cir. 2004).

[64] Bass Enters. Prod. Co., v. United States, 54 Fed. Cl. 400 (2002), *aff'd*, 381 F.3d 1360 (Fed. Cir. 2004). The lower court initially held that the government's forty-five month permitting delay imposed a temporary taking because "[t]heir loss during that period was absolute." *Bass Enters.*, 54 Fed. Cl. at 402. Following

In contrast to *Eberle, Bass Enterprises*, and the intermediate California appellate decisions, one commentator does directly address this question. He concludes that "[i]t is time to . . . jettison extraordinary delay from the takings arena once and for all . . . "[65] He suggests that, post-*Lingle*, courts should solely focus on the impacts of regulatory actions, including delays, on property owners.[66] But, as we shall see, both doctrinal and policy considerations call for maintaining the normal delay rule and applying it to erroneous delays.

4. *Basis for Maintaining the Normal Delay Rule and Applying It to Good Faith Errors*

a. *Background Principles and Investment Backed Expectations*

In *Lucas,* the Supreme Court explained that even if a regulation deprives a property owner of all economically viable use of her property, the regulation cannot be a taking if "background principles of the State's law of property and nuisance" justify the property restriction.[67] And *Penn Central* held that courts reviewing takings claims should analyze "the extent to which the regulation has interfered with distinct investment-backed expectations."[68] Both concepts provide a strong doctrinal foundation for the normal delay rule and for applying it to legal errors made in good faith.

As previously noted, Chief Justice Rehnquist pointed to those principles in his *Tahoe-Sierra* dissent. He explained that the normal delay rule is based upon "background principles of state property law," under which property owners have "reasonable investment-backed expectations" that they will face these permitting delays.[69] A California court of appeals similarly based

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the *Tahoe-Sierra* decision, however, the government moved for reconsideration on the ground that the delay should not have been considered a categorical taking under *Lucas*, but instead should have been analyzed utilizing the factors outlined in *Penn Central. Bass Enters.*, 54 Fed. Cl. at 402. The court agreed, and went on to apply those factors in rejecting the takings claim. *Id.* at 402–04. On appeal, the Federal Circuit affirmed. *Bass Enters.*, 381 F.3d at 1371.

[65] David W. Spohr, *Cleaning Up the Rest of* Agins*: Bringing Coherence to Temporary Takings Jurisprudence and Jettisoning "Extraordinary Delay,"* 41 ENVTL. L. REP. NEWS & ANALYSIS 10,435, 10,454 (2011).

[66] *Id.*

[67] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[68] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[69] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535

the normal delay rule upon expectations and gave a strong justification for applying it to good faith errors:

> A landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits. Sometimes the application process must detour to the court process to resolve a genuine disagreement. Because such delay comes within the *Landgate* category of normal delays in the development approval process, there is no taking even if the value of the subject property is diminished in some way.[70]

b. *Ripeness*

The normal delay rule, and its application to legal errors, also has a ripeness component. A court cannot determine the final use of a property, and thereby engage in an analysis of whether the regulation's economic impact and other factors amount to a taking, until it knows the permitted uses. In *United States v. Riverside Bayview Homes, Inc.*,[71] the Court's explanation of why permitting delays are not takings is thus based on a ripeness concept. (In addition, the opinion is a predicate for the position that, at least, good faith legal errors corrected by a court do not impose takings.) *Riverside Bayview Homes* explained:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.[72]

When looking at the larger question of normal delays (as opposed to our subset of legal errors), the Court of Federal Claims and the Federal Circuit also indirectly suggest that this is a ripeness issue. But those cases have focused on whether at some point a delay can be so unjustified that a property owner has a ripe

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U.S. 302, 351–52 (2002) (Rehnquist, C.J., dissenting).

[70] Loewenstein v. City of Lafayette, 127 Cal. Rptr. 2d 79, 93 (Cal. Ct. App. 2002) (citing Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1196–97 (Cal. 1998)).

[71] 474 U.S. 121 (1985).

[72] *Id.* at 127.

claim even though no final decision is reached.[73] In contrast, with legal errors, the issue is whether the legal process needs to be concluded in order to finally determine the permissible uses of property.

In *Landgate*, the California Supreme Court did look at the relationship between the finality requirement and delays due to legal errors and partially based its holding on finality:

> As the United States Supreme Court has stated, an essential prerequisite to the assertion of a takings claim is "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*MacDonald, Sommer & Frates v. Yolo County, supra,* 477 U.S. at p. 348 [106 S.Ct. at p. 2566].) If a would-be developer fails to meet legitimate conditions for obtaining a development permit, then a government agency's refusal to issue such a permit would by no means be a "final and authoritative determination of the intensity of development legally permitted on the subject property," but merely a conditional denial. And, as reviewed in the preceding part of this opinion, the imposition of a development condition is not a constitutional violation merely because that condition is subsequently shown to have been erroneously imposed.[74]

Where government denies a permit based upon its bad faith failure to properly interpret a law, the denial may be all that is

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[73] In *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1351 (Fed. Cir. 2004), for example, the Federal Circuit suggested, but did not expressly state, that this is a ripeness matter. The court explained that "[d]elay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary. If the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors." *Id.* And the Court of Federal Claims explained that:

> [a]n extraordinary delay in permit processing by an agency can give rise to a ripe takings claim notwithstanding the failure to deny the permit . . . . If the court determines that there is an extraordinary delay by the government, the question of temporary regulatory takings liability is then determined using the Supreme Court's three-part analysis in *Penn Central* . . . .

Aloisi v. United States, 85 Fed. Cl. 84, 93 (2008).

[74] *Landgate*, 953 P.2d at 1201–02. The Vermont Supreme Court has similarly indicated that the normal delay rule applies to erroneous delays at least partly due to ripeness considerations. In applying the rule to a temporary-taking claim based upon the delay caused by a city's permit denial that a court subsequently reversed, the Vermont Supreme Court thus explained that, "[p]ut another way, there can be no taking until the nature and extent of the restriction on land are finally determined." Chioffi v. City of Winooski, 676 A.2d 786, 789 (Vt. 1996).

required to ripen a claim. In that case, the government's permit denial and its defense of the denial in court is not based upon a legitimate decision-making process. Because the legitimate process has ended, a court can base its takings analysis on the available property uses without the permit. Where, however, government's interpretation is made in good faith, but a court nevertheless ultimately determines that government misinterpreted the law, the judicial decision was needed to reach a final determination of allowable property uses.

c. *Realism*

Finally, the normal delay rule reflects common sense. In creating the regulatory takings doctrine,[75] Justice Holmes famously cautioned that courts need to be pragmatic lest they undermine the government's ability to protect the public, explaining that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[76] This need for realism is particularly important in the case of cash-strapped local governments. If they are exposed to major damage claims when they make permitting mistakes in good faith, they will be deterred from protecting public values.

Local governments in particular are risk adverse, which "results in their discounting the benefits and placing a premium on the costs of their actions."[77] And takings lawsuits can be intimidating. The former chief lobbyist for the National Association of Home Builders went so far as to characterize a proposal to increase developers' ability to bring takings lawsuits in

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[75] Justice Scalia underscored the Takings Clause's judicial origins by explaining, in *Lucas v. South Carolina Coastal Council*, that "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" 505 U.S. 1003, 1014 (1992) (citing Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922)) (quoting Knox v. Lee (Legal Tender Cases), 79 U.S. 457, 551 (1871) and Transp. Co. v. Chicago, 99 U.S. 635, 642 (1879)). For a review of other Supreme Court decisions explaining that regulatory takings are a judicial creation, as well as how most, but not all, scholars agree, see Daniel L. Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 VT. L. REV. 603, 615–17 (2012).

[76] *Pennsylvania Coal*, 260 U.S. at, 413.

[77] Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1666 (2006).

federal court as "a hammer to the head" of state and local officials.[78] Moreover, a small town threatened with a takings lawsuit would not only need to assess the cost of losing, but also the cost of winning—such as having to absorb potentially crushing attorneys' fees incurred for its successful defense.[79] Shielding governments from suits seeking compensation where their delays are based upon good faith performance of their duties, while allowing various challenges of bad faith actions, promotes an appropriate balance of checking abuses while protecting public values.

B. *No Authority*

Besides the normal delay rule, another possible ground for not applying the Takings Clause to erroneous governmental permitting decisions is that those decisions are not authorized. The concept that governmental acts must be authorized before they can violate the Takings Clause goes back at least to 1910. In *Hooe v. United States*, the Court rejected a landlord's claim for additional rent for offices leased by a federal agency on the ground that Congress had not authorized the higher payment.[80] According to that decision:

> The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government.[81]

Three years later, in *Hughes v. United States*,[82] the Court affirmed the need for authorization before a governmental action can amount to a taking. In *Hughes*, a federal officer dynamited open a portion of a levee during a flood, and the plaintiff sought takings damages for the resulting harm to her property.[83] The

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[78] Timothy J. Dowling, *On History, Takings Jurisprudence, and* Palazzolo*: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 83 (2002).

[79] *See*, *e.g.*, William C. Smith, *The Brawl Over Sprawl,* A.B.A. J., Dec. 2000, at 52 (describing how Hudson, Ohio, had to spend $250,000 to successfully defeat a takings lawsuit).

[80] 218 U.S. 322, 335–36 (1910).

[81] *Id.*

[82] 230 U.S. 24 (1913).

[83] *Id.* at 35.

Court seemed to indicate that the officer's action would not be a taking if needed to address an emergency, but that the facts were "difficult to understand."[84] Nevertheless, the Court concluded that it did not need to resolve the facts. It concluded that even absent an emergency there would not be a taking, because in that case the officer's act was not authorized. The officer's "wrongful act, cannot be held to be the act of the United States, and therefore it affords no ground for holding that the United States had taken the property for public use."[85] Similarly, in *Regional Rail Reorganization Act Cases*,[86] the Court cited *Hooe* in reiterating that "[g]overnment action must be authorized."[87] And more recently, in *Arkansas Game and Fish Commission v. United States*,[88] the Court's unanimous 8-0 decision qualified the types of governmental actions that can be takings by indicating that they must be "authorized."[89]

In a long line of decisions, the Federal Circuit, which hears most takings claims against the United States,[90] has held that unauthorized governmental actions are not takings. That would appear to shield erroneous permitting delays from takings claims, as the delays would not be authorized. But the Federal Circuit has developed a nuanced—and in this author's opinion, confusing—concept of "authorized," under which illegal acts can be authorized. The Court of Federal Claims recently summarized the Circuit's approach as follows in *Starr International Co., Inc. v.*

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[84] *Id.*

[85] *Id.*

[86] 419 U.S. 102 (1974).

[87] *Id.* at 127 n.16.

[88] 133 S.Ct. 511 (2012).

[89] The Court thus stated as follows: "True, we have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking." *Id.* at 518. The Court subsequently stated that "[a]lso relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Id.* at 522. However, at least one state court has interpreted a state takings provision as applying even if an agency's actions exceed its statutory authority. *See* Harris Cnty. Flood Control Dist. v. Adam, 56 S.W.3d 665, 668–69 (Tex. Ct. App. 2001) ("[W]e interpret the Texas Constitution to protect citizens against takings by the State, whether authorized or not.").

[90] Litigants must file actions in the Court of Federal Claims when they seek more than $10,000 from the federal government. 28 U.S.C. § 1491(a)(1) (2006) (Court of Federal Claims jurisdiction for monetary claims under federal law); 28 U.S.C. § 1346(a)(2) (2006) (concurrent jurisdiction in district court for cases not exceeding $10,000).

United States:

> Regarding the lawfulness of a governmental action in the takings context, the Federal Circuit has been careful to emphasize two related points. As an initial matter, a plaintiff is not barred from advancing a takings claim simply because it alleges that the government conduct was unlawful on other grounds. In *Del–Rio,* the Federal Circuit noted that in the takings context, courts have distinguished between unauthorized conduct and conduct that is authorized but nonetheless unlawful. The court noted that "a government official may act within his authority even if his conduct is later determined to have been contrary to law" and held that it is no barrier to a takings claim that "the government's action was legally flawed in some respect."[91]

The Federal Circuit's concept of illegal but authorized acts stems from *Portsmouth Harbor Land & Hotel Co. v. United States.*[92] In *Florida Rock Indus., Inc. v. United States*, the Circuit Court explained:

> What is meant by authority in these premises [sic] is aptly illustrated by *Portsmouth Harbor Land & Hotel Co. v. United States*, where Army ordnance officers fired heavy coast defense guns over the plaintiff's hotel land. Justice Brandeis, dissenting, denied that the officers had authority to acquire an interest in hotel land, but Holmes, for the majority, held that whether they had authority to fire the guns was the decisive authority question.[93]

In fact, however, *Portsmouth* suggested that more was needed to establish authority. *Portsmouth* reviewed a resort owner's complaint asserting that the United States repeatedly fired heavy artillery over the resort and thereby took an interest in the property. The Supreme Court held that the owner stated a takings claim. The Court indicated that, at trial, the owner would need to establish authority, and that the owner had a good chance of doing so.[94] But in making that latter point, Justice Holmes not only relied on the officers' authority to fire the guns, but more significantly on the fact that "the United States built the fort and put in the guns and

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[91] Starr Int'l Co., v. United States, 106 Fed. Cl. 50, 70 (2012) (citations omitted), *reconsideration denied,* 107 Fed. Cl. 374 (2012).

[92] 260 U.S. 327 (1922).

[93] 791 F.2d 893, 898 (Fed. Cir. 1986) (citation omitted).

[94] *See* Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 330 (1922).

the men."[95] Moreover, the Court was reviewing a demurrer to a complaint that alleged that the United States set up "heavy coast defence guns" in a manner that could only be fired over the claimant's land.[96] Thus, Justice Holmes essentially stated that the United States, at least implicitly, authorized the firing of heavy artillery over the resort property by setting up the fort, with its guns and soldiers, next to the property.

In addition to going beyond its *Portsmouth* foundation, the Federal Circuit's approach is confusing, as seen by its decision in *Cienega Gardens v. United States*.[97] In that case, officials in essence improperly refused to release owners of low-income housing projects from rent control requirements. The project owners sued for a temporary regulatory taking.[98] Although the officials were engaged in their normal activities, the court rejected the takings claim for this delay period.[99] It explained that, because Congress had repealed the law allowing the refusal, the officials were not authorized to refuse the release, and their actions therefore could not amount to a taking.[100] Yet all erroneous delay challenges involve governments or their officials failing to follow controlling law.

Cienega Gardens can be explained by the Federal Circuit's indication that government's "legally flawed" acts still need to be made in "good faith" to be authorized. *Del–Rio*, the major precedent guiding *Starr International* above, stated that acts must either be the "natural consequence of Congressionally approved measures [or] pursuant to the good faith implementation of a Congressional Act."[101] The *Del-Rio* court therefore held that the

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[95] *Portsmouth Harbor Land*, 260 U.S. at 330. Specifically, Justice Holmes stated:

> It very well may be that the claimants will be unable to establish authority on the part of those who did the acts to bind the Government by taking the land. But as the allegation is that the United States did the acts in question, we are not prepared to pronounce it impossible upon demurrer. As the United States built the fort and put in the guns and the men, there is a little natural unwillingness to find lack of authority to do the acts even if the possible legal consequences were unforeseen.

[96] *Id.* at 328–29 (citing United States v. N. Am. Transp. & Trading Co., 253 U. S. 330 (1920)).

[97] 503 F.3d 1266 (Fed. Cir. 2007).

[98] *Id*. at 1277.

[99] *Id*. at 1287 n.18.

[100] *Id*.

[101] Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1362

acts of the officials in question were authorized because they were "a good faith effort to apply the statutes and regulations as they understood them."[102] This good faith requirement is consistent with the Supreme Court's takings determination, back in the late 1800s, that an official's acts were authorized because he "honestly and reasonably exercise[ed] the discretion with which he was invested" by Congress.[103]

But the requirement that an agency's erroneous interpretation of a law can only potentially amount to a taking if the agency acted in good faith is the inverse of California's normal delay approach, under which only bad faith delays are potential takings. The conclusion of this Article will suggest a means of harmonizing these approaches.

C. *No Public Use*

A closely related reason for excluding takings claims for erroneous delays stems from the Takings Clause's public use requirement. Prior to *Lingle*, a number of scholars suggested that, where a governmental entity denies a permit because it misinterpreted controlling law, erroneous denial by its nature is not for a public use.[104] Also prior to *Lingle*, two courts mentioned this concept, although neither ended up addressing it. In *Custer County*

(Fed. Cir. 1998) (internal citations and quotation marks omitted); *see also* Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336, 343 (2001) (where the Court of Federal Claims subsequently determined that an agency's action was authorized for Takings Clause purposes, in part because there was no "reason to question the agency's good faith determination that the playa provided habitat for migratory birds, and that it, in good faith[,] interpreted its duties under the [Clean Water Act] as extending to isolated playas.").

[102] *Del-Rio Drilling*, 146 F.3d at 1363.

[103] Great Falls Mfg. Co. v. Garland, 124 U.S. 581, 597 (1888). The Court noted:

> It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the act of congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the act of congress, whether it is embraced or described in said survey or map or not.

Id.

[104] *See* John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1087 (2000); Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 260–73 (1998).

Action Association v. Garvey,[105] the Tenth Circuit called the position "intriguing," but it went on to reject the takings claim before it on other grounds.[106] The California Supreme Court also acknowledged this argument in *Landgate*, although, like the Tenth Circuit, it ruled on other grounds.[107]

Lingle, however, adds significant heft to this argument. *Lingle* indicates that no governmental misinterpretation of a law can be a taking,—even if the governmental action is "arbitrary." The Court explained that while arbitrary actions might violate the Due Process Clause, the Takings Clause only applies to takings "for public use," and arbitrary actions would not be for a public use.[108] *Lingle* emphasized that the Takings Clause "does not bar" government actions. Rather, it requires compensation "in the event of *otherwise proper interference* amounting to a taking."[109] But if the governmental action is not proper, it cannot be a taking. As the Court explained, "if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."[110]

In the North Carolina example presented in this Article's introduction, for example, assuming that the town had no right to enforce the public trust doctrine, it had no right to bar the repair of the cottage on the ground that the cottage was on public lands (and the town apparently did not cite any other ground for preventing the repair).[111] Town officials could not have stopped the project by paying compensation because they had no right to stop the project. Under *Lingle*, no amount of compensation could authorize town officials to stop a permissible project.

Since the Court decided *Lingle*, a number of courts have addressed this issue outside of the permitting context and indicated that improper governmental actions, by their nature, cannot be takings because they fail to meet that clause's public use

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105 256 F.3d 1024 (10th Cir. 2001).

106 *Id.* at 1042.

107 Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1201 n.7 (Cal. 1998).

108 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543 (2005).

109 *Id.* (citation omitted).

110 *Id.*

111 *See supra* note 3 and accompanying text.

requirement. For example, in *Miranda v. Bonner*,[112] the United States District Court for the Central District of California relied upon this reasoning in rejecting a taking claim involving City of Los Angeles police officers, where plaintiffs asserted that state law did not authorize the officers to impound their vehicles.[113] The court explained that "[e]ven if the LAPD did impound Giron's vehicle in violation of Section 14602.6, such a seizure would not constitute a public use because it would not be an 'otherwise proper interference amounting to a taking.'"[114] Other federal district courts have reached the same conclusion.[115]

At least one commentator, however, asserts that the Court's broad interpretation of the public use requirement—most recently in *Kelo v. City of New London*[116]—means that almost any

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[112] No. CV 08-03178 SJO (VBKx), 2013 WL 794059 (C.D. Cal. Mar. 4, 2013).

[113] *Id.* at *10.

[114] *Id.* (quoting *Lingle*, 544 U.S. at 543).

[115] The United States District Court for the Northern District of California, for example, relied upon this reasoning in rejecting a takings claim against a county in *Mateos-Sandoval v. County of Sonoma*, 942 F. Supp. 2d 890, 908–09 (N.D. Cal. 2013). In that case, a Sonoma County deputy sheriff had impounded a driver's vehicle pursuant to California Vehicle Code section 14602.6 on the grounds that the driver did not have a valid California driver's license. The court, however, ruled that that provision did not authorize the deputy's action, and that the action may have therefore amounted to an unlawful seizure under the Fourth Amendment of the United States Constitution. The court then turned to the taking claim. Citing *Lingle*, the court explained that an unlawful seizure could not be a taking because it would not be "for public use." *Id*. at 912. Similarly, in *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1079 (E.D. Cal. 2012), the United States District Court for the Eastern District of California reviewed takings and other claims by a homeless individual against a city after its employees seized and destroyed his property. Pointing to the Northern District's reasoning in *Mateos-Sandoval v. County. of Sonoma*, No. C11–5817 TEH, 2012 WL 6086225 (N.D. Cal. Dec. 6, 2012), *amended in other respects and superseded*, 942 F. Supp. 2d 890 (2013)), the Eastern District held that if the plaintiff prevails on any of his claims that his property was unlawfully seized and destroyed, then "he will have demonstrated that the destruction was *unlawful,* and therefore could not possibly be a taking because the conduct was not a 'proper interference' with his property rights." *Id.* at 1106. And the United States District Court for Hawaii adopted the same reasoning in rejecting protestors' takings claims based on their assertion that city personnel seized and destroyed the protesters' property. In *De-Occupy Honolulu v. City & County of Honolulu*, the court held that the protestors' complaint "fails to allege a plausible claim for failure to allege that the 'taking' was for 'public use.'" No. CIV. 12-00668 JMS, 2013 WL 2284942 at *9 (D. Haw. May 21, 2013), The court cited both *Sanchez* and *Lingle* in explaining that an "*unlawful* interference with Plaintiffs' property is not the proper subject of a Takings Clause claim." *Id.* at *10.

[116] 545 U.S. 469 (2005).

governmental action amounts to a public use, even if it is illegal.[117] As long as the use serves the public in some way it meets the constitutional requirement. But that argument is inconsistent with *Lingle's* emphasis that the Takings Clause is limited to an "*otherwise proper interference*."[118] It is also inconsistent with the Court's separation of powers approach to public use. In essence, the Court has determined that the legislature, not the judiciary, establishes public use. The judiciary should only step in where the legislative determination is extreme. The Court has therefore repeatedly emphasized the legislature's central role. For example, in *Kelo* itself, the Court explained as follows: "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[119]

Before *Kelo*, the Court was equally emphatic in stating that the legislature, not the courts, determine "public use." After reviewing a series of its prior decisions making that point, the Court in *Hawaii Housing Authority v. Midkiff*[120] thus concluded: "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[121]

Moreover, the Court has indicated that the legislature's discretion is a two-way street. It can define public use broadly. Or it can define it narrowly, and thereby bar a taking because an action is not for a public use. Thus, in *United States ex rel. Tennessee Valley Authority v. Welch*,[122] the Court explained that the judiciary can determine that an action lacks public use because the legislature did not authorize the action.[123] The Court stressed that, in that situation, the judiciary is basing its determination on

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[117] David W. Spohr, "*What Shall We Do with the Drunken Sailor?": The Intersection of the Takings Clause and the Character, Merit, or Impropriety of Regulatory Action*, 17 SOUTHEASTERN ENVTL. L.J. 1, 58–59 (2008).

[118] *Lingle*, 544 U.S. at 543 (citation omitted).

[119] Kelo v. City of New London, 545 U.S. 469, 483 (2005)..

[120] 467 U.S. 229 (1984).

[121] *Id.* at 241 (quoting United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896)).

[122] 327 U.S. 546 (1946).

[123] *Id.* at 551–52.

the legislatures' decision to limit public use.[124]

CONCLUSION: PUTTING IT ALL TOGETHER

The judicial approaches to erroneous delays and the doctrinal underpinnings of the Takings Clause both indicate that a permit denial reversed by a court cannot impose a taking. Where an agency misinterpreted the applicable law in good faith, the resulting delay is merely part of the normal permitting process and therefore cannot impose a taking. And where the agency acted in bad faith, its action cannot be a taking because it was not authorized by law. Finally, whether or not the agency acted in good faith, the legislature determines public use, and if the agency did not follow the law, then its action was not for a public use.

This result may not be satisfying, but it tracks the Takings Clause. As the California Supreme Court explained in denying takings damages where police destroyed property when they pursued a criminal hiding in a store:

> Although in many circumstances it may appear "fair" to require the government to compensate innocent persons for damage resulting, for example, from routine efforts to enforce the criminal laws, inverse condemnation is an inappropriate vehicle for achieving this goal because it was not designed for such a purpose. Thus, for example, inverse condemnation is limited to damage to property and does not apply to damage involving personal injury.[125]

While the Takings Clause's reach is limited, other constitutional, statutory, and common law provisions might provide relief where the Takings Clause does not. For example, erroneous permitting delays could violate due process protections, at least where government acts in bad faith. The federal Due

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[124] Specifically, the Court characterized its prior decision in *City of Cincinnati v. Vester*, 281 U.S. 439 (1930), as the judiciary's determination that an expropriation did not meet the public-use requirement because it was not authorized by state law:

> It is true that this Court did say in *City of Cincinnati v. Vester*, that "It is well established that, in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn "excess" property on the ground that the state law had not authorized it.

Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) (quoting *Vester*, 281 U.S. at 446).

[125] Customer Co. v. City of Sacramento, 895 P.2d 900, 913–14 (Cal. 1995).

Process Clause protects landowners from arbitrary governmental actions. As the court explained in *County of Sacramento v. Lewis*:

> We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," . . . [including] the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . . (internal citations omitted.)[126]

Lingle itself pointed out that, while illegitimate governmental actions do not give rise to takings claims, the actions can violate due process.[127] Moreover, government can violate the Equal Protection Clause if, as part of its permitting process, it singles out an individual for differential treatment without a rational basis.[128] Further, state and federal statutes give property owners the right to overturn invalid permit denials.[129] Damages may also be available under statutes or common law tort theories.[130] Thus, while the Takings Clause is not designed to provide compensation for erroneous permitting delays, landowners have various potential

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[126] 523 U.S. 833, 845–46 (1998).

[127] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540, 543 (2005). For the proposition that a permitting delay can be challenged on substantive due process grounds, *see also* North Pacifica Ltd. Liab. Co. v. City of Pacifica, 526 F.3d 478, 484–86 (9th Cir. 2008); Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st Cir. 2006).

[128] Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

[129] State laws typically allow aggrieved parties to seek judicial review of administrative actions as arbitrary and capricious. *See, e.g.*, ALA. CODE § 41-22-20 (2013); ALASKA STAT. ANN. § 44.62.570 (West 1993) ("reasonable and not arbitrary" standard); ARK. CODE ANN. § 25-15-212 (2002); CONN. GEN. STAT. ANN. § 4-183 (West 2007); DEL. CODE ANN. tit. 29, § 10142 (2003) ("substantial evidence" standard); IOWA CODE ANN. § 17A.19 (West 2011); KAN. STAT. ANN. § 77-621 (2012); KY. REV. STAT. ANN. § 13B.150 (LexisNexis 2013); LA. REV. STAT. ANN. § 49:964 (2003); MASS. GEN. LAWS ANN. ch. 30A, § 14 (West 2013); MICH. COMP. LAWS ANN. § 24.306 (West 2004); MO. ANN. STAT. § 536.140 (West 2008); NEB. REV. STAT. § 84-917 (2008); N.Y. C.P.L.R. § 7803 (McKinney 2008); OKLA. STAT. ANN. tit. 75, § 322 (West 2002); S.D. CODIFIED LAWS § 1-26-36 (2012); TENN. CODE ANN. § 4-5-322 (2011); WYO. STAT. ANN. § 16-3- 114 (2013). The federal Administrative Procedure Act allows similar review of federal agency actions. *See* 5 U.S.C. §§ 702, 706 (2006).

[130] *See, e.g.,* Maurice A. Nernberg & Assocs. v. Coyne, 920 A.2d 967, 970 (Pa. Commw. Ct. 2007) (citing a 1991 permit denial case for the proposition that "[d]amages are generally appropriate [under Pennsylvania's mandamus statute] when a defendant fails to perform a ministerial duty, even when such failure results from an erroneous legal interpretation."); Westmark Dev. Corp. v. City of Burien, 166 P.3d 813, 819 (Wash. Ct. App. 2007) (damages for permitting delay available under Washington State's statutory and common law tort provisions).

sources of relief where governments deny permits due to their erroneous interpretations of controlling law.

OF SEA LEVEL RISE AND SUPERSTORMS: THE PUBLIC HEALTH POLICE POWER AS A MEANS OF DEFENDING AGAINST "TAKINGS" CHALLENGES TO COASTAL REGULATION

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INTRODUCTION

Climate change is affecting our coasts.[1] Specifically, sea levels are rising[2]—faster in some places than others.[3] As the Intergovernmental Panel on Climate Change (IPCC) reported in the final draft of the 2014 Fifth Assessment Report, varying local factors such as subsidence or uplifting, sediment transport, and the extent of coastal development means that different coastal locations will experience potentially significantly greater or lesser sea level rise.[4] Nevertheless, "[c]oastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding and coastal erosion due to relative sea level rise (*very high confidence*). Beaches, sand dunes, and cliffs currently eroding will continue to do so under increasing sea level (*high confidence*)."[5] While the relationship between sea level rise, coastal storms, and storm surge is more complex,[6] it is clear that the interaction of coastal storms and sea level rise poses threats to coastal communities. Indeed, coastal inundation was the first "key risk" from climate change that the IPCC identified in 2014—specifically, the "[r]isk of death, injury, ill-health, or disrupted livelihoods in low-lying coastal zones and small island developing states and other small islands, due to storm surges, coastal flooding, and sea-level rise."[7]

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[1] U.S. ENVTL. PROT. AGENCY, *Climate Change Indicators in the United States: Sea Level*, http://www.epa.gov/climatechange/science/indicators/oceans/sea-level.html (last updated Sept. 13, 2013) ("Relative sea level rose along much of the U.S. coastline between 1960 and 2012, particularly the Mid-Atlantic coast and parts of the Gulf coast, where some stations registered increases of more than 8 inches.").

[2] *Id.*

[3] *Id.*

[4] Poh Poh Wong & Inigo J. Losada, *Coastal Systems and Low-Lying Areas* 3, *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FINAL DRAFT: CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY (2014), *available at* http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap5_FGDall.pdf [hereinafter 2014 IPCC Coastal Systems] (pending approval of the full IPCC).

[5] *Id.* at 2.

[6] *Id.* at 3.

[7] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY: SUMMARY FOR POLICYMAKERS 12 (2014), *available at* http://ipcc-wg2.gov/AR5/images/uploads/IPCC_WG2AR5_SPM_Approved.pdf [hereinafter 2014 IPCC SUMMARY FOR POLICYMAKERS].

The reality for law and policy in the 21st century, therefore, is that the sea is invading the land in many coastal locations—gradually at all times but also with increasing risks of catastrophic flooding, such as the flooding Hurricane Sandy caused along the northeast coast of the United States in 2012 and Hurricane Katrina caused in New Orleans in 2005. Moreover, the risks to humans from coastal inundation will probably only increase into the future: "Climate-change-related risks from extreme events, such as . . . coastal flooding, are already moderate (*high confidence*) and [will become] high with a 1°C additional warming (*medium confidence*)."[8]

Both the reality of sea level rise and the increased risk from severe storms call for new coastal management responses. To date, however, most of these responses have been framed—logically enough—as land use planning.[9] Specifically, coastal states have been experimenting with coastal retreat,[10] rolling easements,[11] building moratoria in the coastal zones,[12] perpetual easements,[13] and other land use-based approaches that both anticipate and react to coastal inundation.

While measures framed as "land use planning" might, in a vacuum, be appropriate and effective legal responses to the actuality and threat of coastal inundation, on the ground they often interfere with how owners can use coastal private property. In turn, property owners affected by coastal regulation often sue the responsible state or municipality, claiming that the government has

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[8] *Id.* at 13 Assessment Box SPM.1 (emphasis added to "coastal flooding").

[9] *See*, *e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 607 (2001) (characterizing Rhode Island's regulation of coastal wetlands as land use regulation).

[10] *See generally*, *e.g.*, Andrew C. Revkin, *Can Cities Adjust to a Retreating Coastline?,* N.Y. TIMES (Aug. 22, 2013), http://dotearth.blogs.nytimes.com/2013/08/22/can-cities-adjust-to-a-retreating-coastline (discussing the need for coastal retreat or "managed retreat" in the aftermath of Hurricane Sandy).

[11] *See*, *e.g.,* Severance v. Patterson, 370 S.W.3d 705, 721 (Tex. 2012) (describing the "rolling easement" concept in connection with Texas's Open Beaches Act).

[12] *See*, *e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007–09 (1992) (describing the coastal development restrictions in South Carolina).

[13] *See*, *e.g.*, Milgram v. Ginaldi, No. C-264-06, 2008 WL 2726727, at *1–4 (N.J. Super. Ct. App. Div. July 15, 2008) (describing the New Jersey Department of Environmental Protection's attempt to use perpetual easements to implement the New Jersey Shore Protection Project).

unconstitutionally "taken" their property in violation of the Fifth[14] and Fourteenth[15] Amendments to the U.S. Constitution and/or similar provisions in the relevant state's constitution.[16] These constitutional provisions ensure that state and local governments cannot take private property for public use without just compensation.

As perhaps best exemplified by the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*,[17] these takings claims sometimes succeed. However, even unsuccessful takings claims cost money to defend against, and the threat of takings litigation can "chill" the willingness of state and local governments to engage in innovative coastal management. While successful takings claims are to be expected when a state's coastal regulation effectuates a *physical* taking of coastal properties, the traditional purview of the Takings Clauses, the U.S. Constitution's prohibition on takings without compensation also has long incorporated a *regulatory* takings doctrine,[18] as have most state constitutions.[19] Moreover, the land use police power is no longer a defense—as it once was—to land use-based regulatory takings claims. As a result, courts can deem state coastal regulation to be a taking of private property under the regulatory takings doctrine despite significant links between coastal regulation, public safety, and the necessity of dealing with climate change.

Importantly, however, as a practical matter neither courts nor the general public treat all state exercises of the police power the same. In courts, state regulation that directly protects the public health from traditional and imminent public health concerns (disease, toxic exposures[20]) provides states—de facto if admittedly

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[14] U.S. CONST. amend. V.

[15] U.S. CONST. amend. XIV, § 2.

[16] *E.g.*, LA. CONST., art. 1, § 4(B)(1).

[17] 505 U.S. 1003 (1992).

[18] The Supreme Court's regulatory takings doctrine is usually traced to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), where the Court famously announced that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

[19] *See*, *e.g.*, Edwards Aquifer Auth. v. Bragg, No. 04-11-0018-CV, 2013 WL 5989430, at *4 (Tex. Ct. App. Nov. 13, 2013) (evaluation of a regulatory takings claim under the Texas Constitution); Lemire v. Dep't of Ecology, 309 P.3d 395, 403 (Wash. 2013) (discussing a debate among the parties and amici on regulatory takings analyses under the federal and state constitutions).

[20] As Professor Ilya Somin cogently demonstrated elsewhere during this

only rarely *de jure*—with more effective insulation from regulatory takings claims. At the same time, when states clearly regulate to protect traditional notions of threats to the public health, that regulation often enjoys more popular support than land use regulation, even among those individuals whom the regulation most impacts.

To date, however, no coastal state has seriously framed its legal measures to deal with coastal inundation as public health protection. Nevertheless, the public health threats posed by coastal inundation—both slow sea level rise and catastrophic storms—are real and numerous.

This article argues that coastal states would gain considerable advantage in responding to constitutional regulatory takings challenges if they framed legal measures to deal with coastal inundation as public health regulation. It begins by reviewing the increased inundation threats to coastal areas from climate change, coastal states' efforts to address these new issues, and the litigation track record of constitutional takings challenges opposing these states' regulatory innovations. It then reframes coastal inundation as a public health problem, examining the public health threats that sea level rise and coastal storms pose to coastal communities. Finally, it reviews the courts'—and especially the U.S. Supreme Court's—treatment of land use-based and more traditionally public health-based regulation, demonstrating that, as a practical if not always fully articulated legal matter, traditional public health regulation—even public health-based regulation that affects land use—fares better against regulatory takings challenges than land use-based regulation. As a result, regulation of coastal inundation based in traditional public health rationales—prevention of disease, reduction of toxic exposure, prevention of mass injuries and mass deaths—should also fare better than the land use-framed attempts to date, particularly if states are regulating to prevent or lessen the public health impacts of severe coastal storms.

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conference (see *supra* note *), government "public health" rationales can justify a variety of land use regulatory mechanisms, including urban renewal. My argument relies not on the government's verbal recitation of a "public health" mantra, but rather on a clear substantive connection, easily cognizable by courts, between government regulation on the coast and the traditional subjects of public health measures—the prevention of disease, the prevention of poisoning, reductions of toxic exposures, and to some extent the prevention of mass injuries or deaths from accidents.

I. THE NEED TO DEAL WITH RISING SEAS AND COASTAL STORMS VERSUS THE TRACK RECORD OF "TAKINGS" CHALLENGES TO COASTAL REGULATION

A. *Constitutional Takings Law and Coastal Takings Claims in the U.S. Supreme Court*

Coastal regulation has long and repeatedly been the subject of constitutional claims that the regulating government (almost always a coastal state) has taken private property without just compensation. At the federal level, the Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the taking of private property for public use without compensation by, respectively, the federal and state/local governments.[21] Until 1922, this prohibition on uncompensated takings of private property was limited to governments' physical takings—for example, the condemnation of private land for a public road or a government building.[22] In 1922, however, the U.S. Supreme Court decided *Pennsylvania Coal Co. v. Mahon*[23] and recognized that state and local *regulation* might also amount to an unconstitutional taking of private property. As Justice Oliver Wendell Holmes articulated in that decision, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[24]

Since *Pennsylvania Coal*, the U.S. Supreme Court has recognized three categories of constitutional takings: (1) physical takings of property, which require compensation in all circumstances;[25] (2) a small category of *per se* regulatory takings,[26] where the regulation deprives the landowner of all

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[21] U.S. CONST. amends. V, XIV, § 1. *See also* Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987) (both confirming that the taking prohibition applies to state and local governments through the Due Process Clause of the Fourteenth Amendment).

[22] ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 149 (2d ed. 2009).

[23] 260 U.S. 393 (1922).

[24] *Id.* at 415.

[25] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–41 (1982).

[26] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 325 n.19 (2002) (noting that "*Lucas* carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of

economic use of the land, which also automatically require compensation;[27] and (3) the much larger category of alleged regulatory takings that merely deprive the owner of some (but not all) uses of or value from the property.[28] For takings claims based on the Federal Constitution, courts evaluate regulatory takings claims in this last category through the three-part balancing test that the U.S. Supreme Court established in *Penn Central Transportation Co. v. City of New York*[29]: (1) "The economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."[30]

Recent coastal takings litigation that has reached the U.S. Supreme Court demonstrates the complexity of this jurisprudence. The *Lucas* Court, for example, evaluated whether South Carolina's 1988 Beachfront Management Act effected a regulatory taking of Lucas's coastal property.[31] The parties conceded (probably unwisely, as it turned out) that application of the Act essentially prohibited all development of plaintiff Lucas's beachfront property and hence destroyed all of its economic value,[32] and the Court eventually concluded that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[33] Specifically, when a state or local government enacts legislation that prohibits "all economically beneficial use of land":

> 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 law of

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a permanent deprivation of all beneficial use.").

[27] *Lucas*, 505 U.S. at 1019, 1029, 1031–32.

[28] *Tahoe-Sierra Pres. Council*, 535 U.S. at 323–24.

[29] *Id.* at 315 n.10 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)).

[30] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[31] *Lucas*, 505 U.S. at 1008–09 (quoting S.C. CODE ANN. § 48-39-280(A)(2) (Supp. 1988)).

[32] *Id.* at 1009.

[33] *Id.* at 1027. *But see Palazzolo*, 533 U.S. at 631–32 (rejecting the plaintiff's "total deprivation" takings claim in the context of coastal wetlands regulation).

> property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[34]

As a result, to have a defense against *per se* regulatory takings, the state had to identify "background principles" of property law that already prohibited Lucas's activities.[35] Besides nuisance, the *Lucas* Court explicitly identified the federal navigation servitude[36] and the doctrine of public necessity[37] as appropriate "background principles" of state property law. State public trust doctrines are another potential set of "background principles" that could insulate state coastal regulation from constitutional takings claims,[38] as are the inherent state complexities—generally denominated riparian or littoral rights—that accompany coastal properties.

Florida took full advantage of this last set of "background principles" of state coastal property law to defend its beach renourishment program from constitutional takings claims. Although both the facts and the law at issue in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[39] were complicated, essentially, Florida's 1961 Beach and Shore Preservation Act allowed the state to establish an "erosion control line" in publicly funded beach renourishment projects that appeared to change a littoral owner's common law rights to take title to beach accretions and to touch the water.[40] Specifically:

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[34] *Lucas*, 505 U.S. at 1029 (footnote omitted).

[35] *Id.* at 1031–32.

[36] *Id.* at 1028–29 (quoting Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

[37] *Id*. at 1029 n.16. For a discussion of potential public necessity defenses to coastal sea level rise "takings" liability, see Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENVTL. L. 395, 419–31 (2011).

[38] For a discussion of public trust doctrine defenses to takings claims, see Craig, *supra* note 37, at 403–19. For an interesting decision showing some of the procedural complexities that can arise in a public trust doctrine case, see Fabrikant v. Currituck Cnty., 621 S.E.2d 19, 27–28 (N.C. Ct. App. 2005).

[39] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010).

[40] *Id.* at 709.

> Once the erosion-control line is recorded, the common law ceases to increase upland property by accretion (or decrease it by erosion). [FLA. STAT.] § 161.191(2). Thus, when accretion to the shore moves the mean high-water line seaward, the property of beachfront landowners is not extended to that line (as the prior law provided), but remains bounded by the permanent erosion-control line.[41]

However, the U.S. Supreme Court reviewed the Florida Supreme Court's pronouncements on littoral property rights to conclude that no taking had occurred because Florida law treated beach renourishment as an avulsion, not an accretion,[42] leaving the property line where it had been—and where the regulatory erosion control line established it.[43] As the U.S. Supreme Court concluded, "The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established. We cannot say that the Florida Supreme Court's decision eliminated a right of accretion established under Florida law."[44]

Other state coastal management laws have not fared as well as Florida's, however. Moreover, somewhat perversely, both states' failures to act in the face of sea level rise and especially coastal storms[45] *and* their attempts to better manage the coastal zone[46] have been subjected to constitutional takings litigation. It is to these other takings claims that this article now turns.

B. *State Coastal Regulation, Physical Takings Claims, and Public Necessity*

Some state attempts to better manage the coastal zone or to rebalance public and private rights near the coastline amount to

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[41] *Id.* at 710.

[42] "Avulsion" refers to "a sudden removal of land caused by change in a river's course or by flood," whereas "accretion" is the "gradual accumulation of land by natural forces" on the bank of a river or on the seashore. BLACK'S LAW DICTIONARY 147, 22 (8th ed. 2004).

[43] *Stop the Beach Renourishment*, 560 U.S. at 729–33.

[44] *Id.* at 732.

[45] *E.g.*, Kitchen v. City of Newport News, 485 F. Supp. 2d 691, 692–94 (E.D. Va. 2007) (dismissing as unripe property owners' constitutional "takings" claims against the city based on the city's failure to maintain storm drains and pipes in the wake of Hurricane Floyd in 1999).

[46] *E.g.*, Severance v. Patterson, 370 S.W.3d 705, 722–25 (Tex. 2012) (upholding a "takings" claim against the State of Texas's assertion of a "rolling public easement" in Texas beaches damaged by hurricanes).

physical takings of private property, demanding compensation. Thus, for example, in 1999 the Supreme Court of New Hampshire held that the state legislature had effected a physical taking of coastal property rights when it extended the public trust doctrine to recognize the public's right to use the beach inland to the highest high water mark (extended from public use to the ordinary high water mark), effectively allowing the public to use property that had previously been considered entirely private.[47] Similarly, the New Jersey Superior Court found that when the New Jersey Department of Environmental Protection attempted to create, in cooperation with the U.S. Army Corps of Engineers, a perpetual easement over private property to implement the New Jersey Shore Protection Project, that attempt "amounted to a taking of private property without just compensation"[48] that required the use of eminent domain.

As suggested by the U.S. Supreme Court's tripartite scheme for constitutional takings, a public health rationale is generally irrelevant to a private property owner's claim of a physical taking.[49] Instead, in physical takings cases, usually all that matters is whether the government physically occupies,[50] takes title to,[51] or allows public invasion of the property.[52] If so, compensation is automatically required.

Nevertheless, even in the physical takings analysis, it is important to remember that an imminent and substantial threat to

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[47] Purdie v. Att'y Gen., 732 A.2d 442, 447 (N.H. 1999).

[48] Milgram v. Ginaldi, No. C-264-06, 2008 WL 2726727, at *4 (N.J. Super. Ct. App. Div. July 15, 2008). Other improvements of the coast have also been found to cause physical takings of private property, including, unusually, the U.S. Army Corp of Engineers' installation and maintenance of harbor jetties and piers along the coast of Lake Michigan, which caused erosion of adjacent landowners' beachfront properties. *See* Banks v. United States, 78 Fed. Cl. 603, 656 (2007).

[49] *See*, *e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (describing compensation as "automatic" in a physical takings case and hence indicating that the purpose of the government action is irrelevant if a physical taking occurs).

[50] "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–323 (2002) (internal citation omitted).

[51] Yee v. City of Escondido, 503 U.S. 519, 522 (1992) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 458 (1982)).

[52] McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997).

public health or public safety can give governments a public necessity defense, justifying both the destruction of private property without compensation and other invasions of private rights (such as through quarantine).[53] It remains to be seen whether and how states will evolve their common-law doctrines of public necessity in the face of coastal inundation and climate change impacts more generally. So far, however, this defense to physical takings claims remains latent and circumscribed, even when governments act in direct response to coastal storms.[54] For example, in the wakes of Hurricanes Rita and Katrina in 2005, the U.S. Army Corps of Engineers in 2006 made use of Louisiana's Homeland Security and Emergency Assistance and Disaster Act[55] and a Commandeering Order from the President of Plaquemines Parish to extract 383,871 banked cubic yards of clay from an 18.3-acre excavation site and to store and process the excavated clay on an adjacent 25.8-acre plot of land, both owned by National Food and Beverage Company,[56] for use in repairing the levees damaged by the storms. National Food subsequently won its physical takings claim against the United States and was awarded $1,251,774.75 in compensation.[57] As a matter of public policy, the result may be unobjectionable, and, indeed, in the cooperation agreements between the Army Corps and the various parishes, the Army Corps promised to provide just compensation to landowners[58]—although not necessarily as much as National Food claimed. The point here, however, is that public necessity played no part in the court's analysis, despite the extensive hurricane damage and continuing risks from the damaged levees.

For purposes of this article, the more significant importance of public necessity is that it remains a background principle of state property law that can resonate through a regulatory takings analysis. Specifically, this resonance with the public necessity doctrine can effectively (if, legally, only very obliquely) strengthen the government's position in the *Penn Central* balancing analysis

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53 *See* Craig, *supra* note 37 (discussing the public necessity defense).

54 *See id.* at 430–31 (discussing the potential use of state public necessity doctrines as defenses to takings claims).

55 LA. REV. STAT. ANN. §§ 29:721–738 (2006).

56 Nat'l Food & Beverage Co. v. United States, 105 Fed. Cl. 679, 685–86 (2012).

57 *Id.* at 704.

58 *Id.* at 685.

when the government's regulation responds to a public necessity-like awareness of significant threats to traditional public health and public safety concerns.

C. *State Coastal Regulation and Regulatory Takings Challenges*

Traditional public health rationales remain directly relevant to *Penn Central* regulatory takings analyses, and hence this article focuses on state coastal management measures that are subject to regulatory takings claims. *Lucas*'s treatment of South Carolina's Beachfront Management Act is one, albeit extreme, example.

One prior inquiry in this context is whether impacts on private property resulting from government coastal protection efforts sound as constitutional takings claims in the first place. For example, in the wake of Hurricane Katrina, a number of property owners in New Orleans brought constitutional takings claims against the United States based on the failure of the Army Corps's levees and the subsequent flooding and continuing risk of flooding to their properties.[59] However, the U.S. Court of Federal Claims concluded that the plaintiffs' allegations sounded in tort rather than in constitutional takings, because New Orleans's flood protection system did not itself cause the flooding—the hurricane did.[60] Under this analysis, somewhat perversely, injuries to private coastal properties caused by the failures of government projects designed to protect those properties are less likely to sound as constitutional takings claims than injuries to private properties caused by government projects designed to protect the coast more generally.[61] In the context of coastal inundation, this dual classification of government action along the coast in effect privileges private property interests over more general regulatory perspectives focused on a broader public benefit, strongly suggesting that coastal governments will be (or should be) looking for mechanisms to add constitutional *gravitas* to the increasing

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[59] Nicholson v. United States, 77 Fed. Cl. 605, 611 (2007).

[60] *Id.* at 617–19.

[61] *See*, *e.g.*, Borough of Harvey Cedars v. Karan, 70 A.3d 524, 526 (N.J. 2013) (conceding that just compensation was owed to coastal landowners when the Borough of Harvey Cedars exercised its power of eminent domain to build dunes along their beachfront property, even though "[t]he dunes serve as a barrier-wall, protecting the homes and businesses of Long Beach Island from the destructive fury of the ocean").

public need for more stringent and creative coastal regulation.[62]

Of course, as is true with regulatory takings claims in all contexts, most regulatory takings claims against coastal regulations fail, either because of ripeness concerns[63] or on the merits.[64] On the merits, moreover, coastal regulatory takings claims can fail for a variety of reasons, including—as in Florida[65]—the application of background principles of state property law.[66]

More interesting, however, is the recent growing recognition among the courts in coastal states that coastal properties are inherently vulnerable and that this vulnerability has bearing both on the regulatory takings analysis and the compensation owed for any kind of governmental taking of coastal properties. For example, in *Gove v. Zoning Board of Appeals of Chatham*,[67] the Massachusetts Supreme Judicial Court found that, under the *Penn Central* analysis, no regulatory taking of coastal property had

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[62] Of course, private coastal properties also tend to benefit from regulatory measures designed to protect the public more generally, and courts are beginning to recognize that these benefits need to be taken into account in the analysis of just compensation. *See*, *e.g.*, *id.* at 541–44 (requiring that the jury be allowed to hear evidence of how coastal dunes *benefitted* coastal property owners in storms such as Superstorm Sandy when determining the fair market value of the property).

[63] *See, e.g.*, Estate of Hage v. United States, 687 F.3d 1281, 1287–88, 1292 (Fed. Cir. 2012); People v. Novie, 976 N.Y.S.2d 636, 643–44 (N.Y. App. Term 2013); Bridgeview Vineyards, Inc. v. Or. State Land Bd., 309 P.3d 1103, 1114 (Or. Ct. App. 2013); Hidalgo Cnty. v. Dyer, 358 S.W.3d 698, 710, 711 (Tex. App. 2011); Charles A. Pratt Constr. Co. v. Cal. Coastal Comm'n, 76 Cal. Rptr. 3d 466, 475–77 (Cal. Ct. App. 2008) (all dismissing regulatory takings cases on ripeness grounds).

[64] *See, e.g.*, U.S. Gypsum Co. v. Exec. Office of Envtl. Affairs, 867 N.E.2d 764, 776–78 (Mass. App. Ct. 2007) (denying a landowner's taking claim in connection with a decision to continue to include certain private lands within a designated port area).

[65] See discussion of the U.S. Supreme Court's decision regarding Florida's background principles of state property law in *Stop the Beach Renourishment* decision, *supra* notes 39–44 and accompanying text.

[66] For cases in other states that have relied on background principles of state law to defeat a takings claim, *see, e.g.*, Avenal v. Louisiana, 886 So. 2d 1085, 1098–1103 (La. 2004) (applying state public trust doctrine principles to help defeat a constitutional takings claim in relation to oyster leases that were affected by the state's coastal restoration efforts); Stevens v. City of Cannon Beach, 854 P.2d 449, 454–57 (Or. 1993) (applying the state's common law doctrine of custom to defeat a takings claim by a beachfront landowner who was denied a permit to build a seawall that would have restricted the public's historical use of the dry-sand area of the beach).

[67] 831 N.E.2d 865 (Mass. 2005).

occurred when the Zoning Board of Appeals denied the property owner a building permit for an undeveloped parcel of land ("lot 93") located in a state coastal conservancy district.[68] First, the court concluded, "the evidence clearly establishes a reasonable relationship between the prohibition against residential development on lot 93 and legitimate State interests"—namely, "potential danger to rescue workers" and the concern "that in an especially severe storm, the proposed house 'could certainly be picked up off its foundation and floated' away, potentially damaging neighboring homes."[69] Second, under the *Penn Central* analysis, lot 93 retained a value of $23,000 even with the building restriction. More importantly, coastal storms had flooded the lot a number of times in the past (in 1938, 1944, 1954, and 1991), with the result that "[l]ot 93 is a highly marginal parcel of land, *exposed to the ravages of nature*, that for good reason remained undeveloped for several decades even as more habitable properties in the vicinity were put to various productive uses. *Lot 93 is now even more vulnerable than ever to coastal flooding.*"[70] Finally, with respect to "the character of the government action," the Massachusetts Supreme Judicial Court emphasized that the building restriction "is the type of limited protection against harmful private land use that routinely has withstood allegations of regulatory takings," particularly because the regulation was a reasonable means of mitigating potential harm.[71] In other words, the denial of the building permit smacked strongly of traditional government efforts to prevent or reduce the occurrence of public nuisances—nuisances that can arise specifically because of the vulnerability of developments in the coastal zone to coastal storms and inundation.

The New Jersey Supreme Court revealed a similar sensitivity to the vulnerabilities of coastal properties in 2013 when it evaluated the compensation owed to coastal landowners for an easement that the Borough of Harvey Cedars took by eminent domain in order to construct coastal dunes that would serve to protect the coastline from storm surges and erosion.[72] Specifically, the court overruled the trial court and the Appellate Division's

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68 *Id.* at 873–875.
69 *Id.* at 871, n.13.
70 *Id.* at 868, 874 (emphasis added).
71 *Id.* at 875.
72 Borough of Harvey Cedars v. Karan, 70 A.3d 524, 526–27 (N.J. 2013).

decision that the jury could not consider evidence of the dunes' *benefits* to the property in calculating damages.[73] Instead, in this partial takings case, the New Jersey Supreme Court determined that the jury *had* to consider the potential benefits—in terms of direct impacts on fair-market value—to the oceanfront property. In particular, the court emphasized that the coastal owners disproportionately benefitted from the government's action[74] and that "rational purchasers" of coastal properties would consider both the property's vulnerability and protections like dunes when deciding whether to buy.[75] Inherent in the court's decision, therefore, is an acknowledgement that both coastal governments *and* prospective property purchasers are now acutely aware that oceanfront properties are vulnerable to coastal inundation, an awareness that affects these properties' market values despite the general attractiveness of beachfront homes.[76]

Thus, at least some courts appear to be starting to evolve the application of regulatory takings law to incorporate new understandings of coastal inundation and the vulnerability of coastal properties to it. Nevertheless, coastal states with strong coastal regulatory programs continue to have to defend a considerable number of takings challenges every year, at not insignificant expense,[77] depleting resources that might more

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[73] *Id.* at 527.

[74] *Id.* at 541 ("Yet, clearly the properties most vulnerable to dramatic ocean surges and larger storms are frontline properties, such as the Karans'. Therefore, the Karans benefitted to a greater degree than their westward neighbors.").

[75] *Id.* ("A willing purchaser of beachfront property would obviously value the view and proximity to the ocean. But it is also likely that a rational purchaser would place a value on a protective barrier that shielded his property from partial or total destruction.").

[76] Other researchers have also emphasized the importance of coastal property owners' understanding of the risks of owning coastal property, especially in a climate change era, and have proposed different kinds of regulatory reforms as a result. *See*, *e.g.*, ANNE SIDERS, COLUMBIA CTR. FOR CLIMATE CHANGE LAW, MANAGED COASTAL RETREAT: A LEGAL HANDBOOK ON SHIFTING DEVELOPMENT AWAY FROM VULNERABLE AREAS iii (Michael B. Gerrard ed., 2013), http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/ManagedCoastalRetreat_FINAL_Oct%2030.pdf (recommending that "[s]ales of coastal property should include a disclosure requirement that informs prospective purchasers of the risks they face.").

[77] Calculations of the exact costs of takings litigation to state and local coastal governments are difficult to obtain. Nevertheless, in California, it has been noted that the costs of an eminent domain proceeding can often exceed the value of the underlying property. *E.g.*, Brad Kuhn, *When Projected Eminent*

productively be directed at coastal adaptation. More importantly, several of their more innovative attempts to deal with coastal inundation have been falling to regulatory takings challenges.

Most famously, perhaps, after Tropical Storm Frances hit the Texas coast in 1998 and more importantly after Hurricane Rita in 2005, the State of Texas asserted that the state owned a "rolling" easement that would allow the general public to use the dry sand beaches wherever they existed post-storm—including places where the high-tide line had avulsively jumped inland onto private property.[78] In 2012, the Texas Supreme Court denied the state and the public that attempted adaptation to severe coastal inundation, holding that:

> Texas does not recognize a "rolling" easement. Easements for public use of private dry beach property change size and shape along with the gradual and imperceptible erosion or accretion in the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, and even when boundaries seem to change suddenly.[79]

Thus, the State of Texas's attempt to deal with shifting public needs and private realities in the aftermath of severe coastal inundation failed on takings grounds.

II. SEA LEVEL RISE AND COASTAL SUPERSTORMS AS INCREASING THREATS TO PUBLIC HEALTH

One can hear in the Massachusetts Supreme Judicial Court's *Penn Central* evaluation in *Gove*, discussed above, a resonance with nuisance law: although the court does not make the equation, it clearly figures the coastal building prohibition as a reasonable

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Domain Litigation Costs Exceed the Value of the Property Acquisition, CALIFORNIA EMINENT DOMAIN REPORT, NOSSAMAN LLP (Oct. 29, 2013), http://www.californiaeminentdomainreport.com/tags/litigation-expenses/ (discussing a recent example in California where costs of eminent domain litigation have exceeded the value of the underlying property).

[78] Severance v. Patterson, 370 S.W.3d 705, 712 (Tex. 2012).

[79] *Id.* at 724–25 (footnotes omitted).

attempt to prevent lot 93 from becoming a nuisance (source of harm) to neighboring properties. Such resonances between *Penn Central* regulatory takings analyses and background prohibitions on nuisance are fairly common in regulatory takings jurisprudence.[80]

Nevertheless, into the future, having regulatory takings analyses resonate more forcefully with the traditional public health aspects of public necessity may better serve coastal governments in defending against regulatory takings claims. Coastal inundation will almost certainly require creative new regulatory strategies, including land use strategies, to facilitate effective adaptation, and these new strategies may not always resonate clearly with traditional nuisance prevention. For example, states that choose coastal retreat over seawall construction—almost certainly the better long-term adaptation strategy from a global public perspective[81]—will nevertheless face considerable difficulty in explaining how allowing the shorter-term destruction of coastal properties prevents future nuisances. However, that strategy, especially when combined with other land use requirements, can readily be explained as a means of preventing any number of public health disasters that could come with increasing coastal inundation.

Sea level rise is one of the more widely acknowledged results of climate change.[82] Indeed, as part of the Intergovernmental Panel on Climate Change's ("IPCC") 2014 Fifth Assessment Report, the Working Group on the physical science basis of climate change reported in 2013 "high confidence" that the rates of sea level rise increased in the late 19th and early 20th centuries compared to the prior two millennia.[83] Moreover, the Working Group concluded

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[80] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022 (1992) (discussing the "long line of this Court's cases" upholding states' police powers to enjoin a property owner "from activities akin to public nuisances" in the face of Due Process and Takings Clause challenges).

[81] *See, e.g.*, SIDERS, *supra* note 76, at iii–iv (advocating against sea walls as an adaptation strategy).

[82] *See* discussion *supra* notes 1–7 and accompanying text.

[83] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, WORKING GROUP I, SUMMARY FOR POLICYMAKERS, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, CONTRIBUTION OF WORKING GROUP I TO THE FIFTH ASSESSMENT REPORT, 11 (2013), *available at* http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf [hereinafter 2013 IPCC PHYSICAL SCIENCE SUMMARY].

that it was "very likely" that mean rates of global average sea level rise had increased from a rate of 1.7 millimeters (mm) per year between 1901 and 2010 to a rate of 2.0 mm per year between 1971 and 2010 to a mean rate of 3.2 mm per year between 1993 and 2010.[84] In total, sea level has risen about 0.19 meters since 1901,[85] and the Working Group projects that:

> Global mean sea level will continue to rise during the 21st century. Under all RCP scenarios, the rate of sea level rise will *very likely* exceed that observed during 1971 to 2010 due to increased ocean warming and increased loss of mass from glaciers and ice sheets.[86]

Depending on the scenario used, moreover, the Working Group projects that, on global average, sea level will rise somewhere between 0.26 and 0.98 meters by 2100.[87] Importantly, however:

> Sea level rise will not be uniform. By the end of the 21st century, it is *very likely* that sea level will rise in more than about 95% of the ocean area. About 70% of the coastlines worldwide are projected to experience sea level change within 20% of the global mean sea level change.[88]

At the same time, increases in atmospheric and ocean temperatures are changing, and will continue to change, weather patterns around the world. As a result, the Working Group projected an increase in the frequency and intensity of heavy precipitation events over most landmasses in the mid-latitude and wet tropical regions toward the end of the century, and an increase in cyclone (hurricane) activity in the North Atlantic Ocean and, especially toward the end of the century, the Western North Pacific Ocean.[89]

The combination of sea level rise, rising numbers of increasingly severe coastal storms, and existing coastal infrastructure poses significant risks to public health. Indeed, sea level rise already threatens coastal communities' drinking water supplies through saltwater intrusion,[90] and storms exacerbate the

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84 *Id.*
85 *Id.*
86 *Id.* at 25 (citation omitted).
87 *Id.*
88 *Id.* at 26.
89 *Id.* at 7 table SPM.1.
90 *See* Robin Kundis Craig, *A Public Health Perspective on Sea-Level Rise: Starting Points for Climate Change Adaptation*, 15 WIDENER L. REV. 521, 529 (2010), and sources cited therein (describing the risks of saltwater intrusion).

saltwater contamination of coastal aquifers.[91] Sea level rise (especially in combination with ocean warming) can also promote a number of human diseases, ranging from mosquito-borne diseases like malaria and dengue fever, to diseases like cholera that have a sea phase, to infection from marine organisms like *Vibrio vulnificus* and poisoning from toxic blooms of marine algae.[92]

These are significant public health risks in and of themselves, well justifying increased management of the coastal zone in the name of protecting public health. However, sea level rise can also intensify the impact of coastal storms by increasing the flooding that occurs in connection with storm surge,[93] and the immediate public health impacts of catastrophic coastal storms are more likely to motivate public demand that governments "do something" to address coastal inundation. Both Hurricane Katrina and Superstorm Sandy provide striking examples of these public health impacts.

As I have noted elsewhere, "[i]f Hurricane Katrina taught us anything, it's that what matters isn't just the volume and the force of the seawater itself, but also what the seawater brings with it."[94] The waters inundating New Orleans during Hurricane Katrina became a toxic soup, having washed over and flooded "[s]everal chemical plants, petroleum refining facilities, and contaminated sites, including Superfund sites, were covered by floodwaters. In addition, hundreds of commercial establishments, such as service stations, pest control businesses, and dry cleaners, may have released potentially hazardous chemicals into the floodwaters."[95] Water from the storm surge picked up toxins already contaminating the soil (like creosote and arsenic), oil and gasoline from flooded vehicles, and biological contaminants from animal feces and sewage, collectively posing significant health risks to

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[91] *NOAA's State of the Coast: Saltwater Intrusion Puts Drinking Water at Risk*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://stateofthecoast.noaa.gov/water_use/groundwater.html (last updated Mar. 1, 2013) ("Coastal aquifers are also vulnerable to saltwater flooding due to storm surge and sea level rise.").

[92] *See* Craig, *supra* note 90, at 530–34, and sources cited therein (describing the connections between changes in the ocean and these diseases).

[93] James G. Titus, *Greenhouse Effect, Sea Level Rise and Land Use*, 7 LAND USE POL'Y 138, 142–43 (1990).

[94] Craig, *supra* note 90, at 536.

[95] Danny D. Reible et al., *Toxic and Contaminant Concerns Generated by Hurricane Katrina*, 36 THE BRIDGE, Spring 2006, at 5, *available at* http://www.nae.edu/File.aspx?id=7393.

both remaining residents and emergency workers.[96] As two Tulane University sociologists summarized in 2007:

> We now know that at a minimum, the floodwaters contained a complex mixture of contaminants. Some areas of the city soaked for weeks in a bath of heavy metals such as arsenic, lead, mercury, and zinc along with *Escherichia coli* and fecal coliforms, overcoated by a thin layer of petroleum-based volatile organic compounds (VOC).[97]

New Orleans narrowly avoided a waterborne disease disaster, and toxic contaminants exacerbated by the flooding continued to plague the city long after the floodwaters had receded.[98]

Hurricane Katrina thus demonstrated that what lies in the path of a severe coastal storm can matter significantly to the immediate- and longer-term public health consequences of that storm. If anything, 2012's Superstorm Sandy—"the largest storm ever recorded in the Atlantic Ocean," "reach[ing] more than 1,000 miles in diameter and affect[ing] states from Florida to Maine"[99]—only underscored the connection between land use planning decisions regarding whether and how buildings and facilities are sited in a coastal inundation zone and the actual and potential public health consequences of coastal storms. Indeed, property damage is a prominent feature in most reports on the hurricane's impact, some of which estimate that "caused potentially $50 billion in property damage in the United States alone."[100]

In terms of inundation, "[t]he storm's arrival coincided with a high tide to push onshore a destructive surge of water 12.5 feet high at its peak."[101] Health impacts from this flooding were both physical and mental and both acute and long-term. As recent

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[96] *Id.*

[97] Scott Frickel & M. Bess Vincent, *Hurricane Katrina, Contamination, and the Unintended Organization of Ignorance*, 29 TECH. IN SOC'Y 181, 182 (2007).

[98] Craig, *supra* note 90, at 537–38 (citing LESLIE FIELDS ET AL., NATURAL RESOURCES DEFENSE COUNCIL, ARSENIC-LACED SCHOOLS AND PLAYGROUNDS PUT NEW ORLEANS CHILDREN AT RISK 4–5, 10 fig. 1 (2007), *available at* http://www.nrdc.org/health/effects/wake/wake.pdf).

[99] John Manuel, *The Long Road to Recovery: Environmental Health Impacts of Hurricane Sandy*, 121 ENVTL. HEALTH PERSPECTIVES. A152, A153 (2013) (citation omitted), *available at* http://ehp.niehs.nih.gov/wp-content/uploads/121/5/ehp.121-a152.pdf.

[100] *Id.*

[101] *Id.*

retrospective analyses of Superstorm Sandy have summarized, "at least 117 people in six states died as a direct or indirect result of Superstorm Sandy," with "[d]rowning [being] responsible for 40 fatalities (34 percent of all deaths). Other causes of death were trauma from being crushed, cut or struck (16 percent), and carbon-monoxide poisoning (7 percent)."[102] The drownings generally resulted from people's failure to comply with evacuation orders and are considered the most preventable of hurricane-related deaths.[103] Other health impacts resulted from people's displacement from their homes, injuries, and untreated conditions (new and continuing); more specifically, the Centers for Disease Control reported that "of the people relocated to New Jersey shelters after the storm, more than 5,100 reported a health care visit—52 percent for an acute illness; 32 percent for follow-up care, such as blood-glucose checks or medication refills; 13 percent for a worsening chronic illness; and 3 percent for injuries."[104] Impacts on victims' mental health remain a concern.[105]

These individual health impacts were, of course, tragic. However, according to John Manuel, "the greatest public health threat was from the loss of power. Sandy knocked out electricity for more than 8.5 million people in 21 states," resulting in loss of heat, life support, and evacuations from area hospitals.[106] The loss of power also trapped many New York City residents—including thousands of elderly residents—in high-rise apartment buildings for days and even weeks without electricity, light, functional plumbing, or medical attention.[107] Some of these residents went weeks without medication for chronic conditions such as diabetes and cancer, and some ended up literally living in their own feces.[108] The loss of electricity also induced people to fire up generators, which has been deemed the primary cause of the many instances of—including deaths from—carbon monoxide

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[102] Rachael Rettner, *Hurricane Sandy's Toll on Health*, LIVESCIENCE (Oct. 28, 2013, 4:57 PM), http://www.livescience.com/40754-hurricane-sandy-health-impact.html.

[103] *Id.*

[104] *Id.*

[105] *See id. See also* Manuel, *supra* note 99, at A159 (discussing mental health impacts from Superstorm Sandy).

[106] Manuel, *supra* note 99, at A154.

[107] *Id.*

[108] *Id.*

poisoning.[109]

Both air quality and water quality also generated public health concerns in the wake of Superstorm Sandy. Air quality concerns arose because of increased particulate matter in the air from drying mud and demolished buildings.[110] As for water, "[r]aw sewage spilled into homes in Baldwin and East Rockaway, New York, when a sewage plant flooded and could not handle the volume," and the storm knocked out approximately eighty sewage treatment plants in New Jersey, with both environmental and public health consequences.[111] For example, the Passaic Valley Sewerage Commission spilled about "2.75 billion gallons of untreated waste" that "flowed from the plant into the nearby bay during the five days the plant was out of commission."[112] As a result of such spills, "[s]hellfish waters were closed statewide. Boil-water advisories were issued for affected water supply systems."[113]

Superstorm Sandy's damage continues to create public health concerns. For example:

> Of the long-term health threats posed by Sandy, the most significant is mold growth in homes that were not properly remediated after flooding. Indoor exposure to mold has been linked to upper respiratory tract symptoms, cough, and wheeze in otherwise healthy people, and with exacerbation of symptoms in people with asthma.[114]

Some of the longer-term public health losses resulting from Superstorm Sandy are equally real but harder to assess. For example, animals used in medical research drowned by the hundreds in the flooding, representing a significant loss of future health benefits.[115]

Together, Hurricane Katrina and Superstorm Sandy provide significant support for coastal retreat and climate change adaptation policies—but they do so as much on grounds of safeguarding public health as they do on grounds of prudent land use planning. Even where coastal retreat is not a serious regulatory option, pragmatically or politically, the aftermaths of these two

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109 *Id.* at A155–56.
110 *Id.* at A156.
111 *Id.* at A156–57.
112 *Id.* at A157.
113 *Id.*
114 *Id.*
115 *Id.* at A154.

storms suggest a number of lesser management measures that coastal states may want to implement to lessen the public health consequences of coastal inundation. Such measures might include, for example: (1) substantially strengthened building codes, especially for facilities handling toxic materials or biological wastes; (2) "lockdown" requirements for certain coastal facilities, including both obvious candidates like coastal nuclear power plants and less obvious candidates like coastal sewage treatment facilities and gasoline stations; (3) significant building height restrictions in the coastal zone and requirements for stairways that can be illuminated by daylight; (4) increased protections for coastal aquifers; (5) increased protections for natural coastal buffers like wetlands, marshes, and coral reefs; (6) increased requirements for strategically placed and safer operating emergency generators; (7) prioritized cleanup of coastal Superfund and other contaminated sites, combined with increased remediation and financial responsibility requirements for many continuing coastal businesses; and (8) opportunistic removal of certain kinds of land uses from the coastal zone as specific businesses and facilities (gas stations, hazardous waste treatment facilities, landfills, sewage treatment facilities, hospitals, dry cleaners, major manufacturing facilities, chemical plants, and so on) close of their own accord, combined with more stringent zoning to restrict the introduction of new such facilities and businesses into the coastal zone.

All these proposed improvements in coastal management are, facially, land use planning requirements—but all of them, especially in the United States' recent experience with coastal inundation, can also be completely justified as measures to protect the public health in the traditional sense—that is, as measures to prevent disease and toxic poisoning, to ensure the continuing availability of clean drinking water, and to prevent mass injury and death. Framing these new regulatory measures as public health measures that invoke coastal governments' strongest police powers, moreover, would provide coastal states with increased insulation from regulatory taking claims.

III. THE PUBLIC HEALTH POLICE POWER COMPARED TO THE LAND USE POLICE POWER IN THE FACE OF CONSTITUTIONAL "TAKINGS" CHALLENGES

The police power refers to the sovereign's authority to protect

the health, safety, and welfare of the public. Importantly, this power allows the government to respond to threatened harms, rather than merely reacting to harms that have already occurred. At bottom, exercises of the police power privilege the rights and needs of the community over the rights and needs of individuals, including private property rights. At the extreme, moreover, exercises of the police power effectuate the community's right of survival, a right recognized in law in the previously-discussed doctrine of public necessity,[116] which justifies both intrusions into personal liberties such as quarantine and destruction of private property without just compensation, such as when a fire or flood rages through town.

The police power once was, but no longer is, a complete defense to constitutional takings claims. Indeed, by recognizing the possibility of a regulatory taking, *Pennsylvania Coal* effectively eliminated the originally broad police power defense. Fittingly for the subject of coastal inundation, the U.S. Supreme Court made this point clear in *Lucas*, a takings case involving South Carolina's attempt to regulate and protect its coast. The *Lucas* Court established that the relevant focus of a federal constitutional "takings" claim is state property law, and the state's general police powers to protect public health, safety, and welfare were not sufficient to insulate South Carolina's coastal legislation from a finding that a regulatory taking had occurred.[117] Notably, many states had clung to broad police power defenses to regulatory takings claims—indeed, in *Lucas* itself, South Carolina argued, and the South Carolina Supreme Court had found, that the state's Beach Management Act was a proper exercise of the state's police power, insulating the state from takings claims based on the Act's operation.[118]

The U.S. Supreme Court, however, found this blanket police

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[116] As I have recognized elsewhere, "[t]he doctrine of public necessity has long operated as a defense to takings claims because courts recognize that in times of true emergency or public necessity, private rights fall to public need. According to the U.S. Supreme Court itself, 'the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.'" Craig, *supra* note 37, at 419–20 (citing Surocco v. Geary, 3 Cal. 69, 73 (1853), and quoting United States v. Caltex, Inc., 344 U.S. 149, 154 (1952)).

[117] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007–09, 1020–22 (1992).

[118] *Id.* at 1020–22.

power defense to regulatory takings too facile and too broad. While it acknowledged that "many of our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation[,]"[119] it limited those opinions to merely affirming that regulation could result in a diminution in the value of private property without effecting an unconstitutional taking.[120] As a result, "that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation."[121]

Blanket application of the *Lucas* rule would deny *all* police power defenses to coastal regulatory takings claims. However, as the Supreme Court has now made clear, *Lucas*-type *per se* takings of coastal properties are rare. The state's proper exercise of the police power remains relevant in the *Penn Central* three-part regulatory taking analysis,[122] because "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . ."[123]

Within the *Penn Central* incorporation of the police power, a traditional public health connection may become increasingly important as coastal states try to adapt to coastal inundation. Specifically, there will likely be a period of time (probably already begun) in which state and local regulations designed to adapt to increasing coastal inundation must deal with land uses that currently "only" *increase risks* of disease, toxicity, injury, or damage. The problem for regulators is that, left unregulated, these risks almost certainly *will* manifest, but only in some relatively distant future legally (such as by 2100) or in response to a particular kind of "superstorm," like Superstorm Sandy, that is unlikely in any particular year but statistically probable in the long term.

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119 *Id.* at 1022.

120 *Id.* at 1022–23 ("The 'harmful or noxious uses' principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.").

121 *Id.* at 1026.

122 *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

123 *Lucas*, 505 U.S. at 1027.

In this period of increasing and increasingly recognizable risks, many land use practices will constitute "not-quite-nuisances" or "not-yet-nuisances" that, nevertheless, also can adequately be addressed for the future through forethought, advanced planning, and relatively immediate regulation that begins to reduce the risks that these land uses and practices increasingly pose. However, coastal regulatory programs designed to reduce risks from coastal land use practices are also with predictable certainty going to be subject to repeated regulatory takings challenges. What this article argues most strenuously is that during this interim period of risk (before the imminent threat of or actual coastal inundation), land use planning rationales for coastal regulation will pale beside public health rationales in terms of strength in both thwarting and defeating regulatory takings claims.

So let's return to the *Penn Central* analysis. As noted, the *Penn Central* regulatory takings test balances three factors: (1) the impact of the regulation on the property's value; (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations; and (3) the character of the government action.[124] While the existence of a traditional public health motive has little influence on a court's evaluation of Factor 1 (impact on property value), it can very considerably affect both the court's evaluation of and the weight it gives to Factors 2 and 3.

With regard to Factor 2, for example, a property owner's negative impact on public health directly affects the reasonableness of his or her investment-backed expectations. To put it bluntly, even when the property owner's uses of land do not (yet) amount to a public or private nuisance, few would grant private landowners a reasonable expectation of being able to significantly increase the risk of disease, poisoning, or catastrophic harm for the rest of the community. Nor would most of the relevant community, I suspect, concede that they should be legally mandated to pay the landowner to stop the risky land use.

With regard to Factor 3, the character of the government action, courts are far more solicitous of police power arguments based on the traditional kinds of public health protection than they are of states acting purely through their land use planning powers. In part, as already noted, public health-based regulation is more

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124 *See Penn Central*, 438 U.S. at 124–25.

likely than land use regulation to resonate with public nuisance or public necessity concerns. In part, however, courts—including the U.S. Supreme Court—seem simply more willing to continue to allow states to regulate relatively freely when significant public health concerns of the traditional kind are present.

A snapshot of the historical evolution of both police power rationales—land use and public health—will help to make this point. As noted, the U.S. Supreme Court recognized the regulatory takings doctrine in 1922. Nevertheless, for some time after that recognition, its treatment of the states' land use police power remained highly deferential and explicitly recognized states' needs to adjust to new realities. Consider, for example, the Supreme Court's discussion of the police power in connection with new zoning laws in its seminal 1926 case of *Village of Euclid v. Ambler Realty Co.*, a 6–3 decision upholding local governments' zoning authority:[125]

> Building zone laws are of modern origin. They began in this country about 25 years ago False Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.[126]

This view of the breadth of the land use police power, and recognition that state and local governments need flexibility to adjust to changing socio-ecological realities, stands in stark contrast to the *Lucas* Court's insistence almost seven decades later that exercises of the land use police power conform to background principles of state property law, at least when such exercises cause

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125 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395–397 (1926).

126 *Id.* at 386–87 (emphasis added).

a complete devaluation of the private property at issue. According to the *Lucas* Court, *Pennsylvania Coal* "affirm[ed] . . . limits to the noncompensable exercise of the police power,"[127] and the land use police power has become significantly less flexible and less able to respond to new circumstances as a result.

In contrast, the U.S. Supreme Court and most other courts remain remarkably solicitous of states' and local governments' exercises of their public health-related police powers, although the contexts generally do not involve regulatory takings because governments rarely insist on traditional public health rationales in land use planning. For example, in the 1905 case of *Jacobson v. Massachusetts*,[128] the Massachusetts legislature enacted a statute that allowed local governments to require vaccination and re-vaccination, with an exception for children deemed medically unfit for vaccination.[129] The City of Cambridge, Massachusetts, required vaccination, and Jacobson was criminally punished for refusing to comply. He sued, alleging a violation of his Fourteenth Amendment rights, but the U.S. Supreme Court upheld the vaccination requirement on the basis of the state's police power. Specifically, the Court emphasized that the police power often serves to balance public and private interests:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.[130]

Thus, the Court recognized that a well-ordered society occasionally requires that individual liberties yield in order to protect the greater public good. As such, the Court's 1905 vision of the public health police power was analogous to its 1926 vision of the land use planning police power: state and local governments need to be able to change the rules in order to adjust to modern realities, to promote and protect a well-ordered—safe and

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127 *Lucas*, 505 U.S. at 1026.
128 197 U.S. 11 (1905).
129 *Id.* at 12.
130 *Id.* at 26.

healthy—society.

In sharp contradistinction to the Supreme Court's evolving view of the land use planning police power, however, its view of the public health police power has remained remarkably consistent—even when governments use public health and safety rationales in ways that interfere with how property owners use their property. In its 2000 decision in *City of Erie v. Pap's A.M.*,[131] for example, the Supreme Court reviewed the constitutionality of the City of Erie, Pennsylvania's ban on public nudity.[132] The majority acknowledged the city's public health and safety rationale for the ordinance, emphasizing that "in trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood."[133] Moreover, "Erie's efforts to protect public health and safety are clearly within the city's police powers . . . .The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important."[134] Finally, analogizing to administrative law, the Court deferred to the City's determination that a problem existed, because "[t]he city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects."[135] Thus, the Court concluded, the city's exercise of its police powers to protect health and safety could limit how Pap's ran its erotic dancing club, requiring the dancers to wear at least pasties and G-strings.[136]

Agriculture and livestock quarantine and destruction cases provide ample evidence that the relative strength of the public health police power carries over into regulatory takings cases. Indeed, measures to prevent disease or reduce the risk or extent of pest invasion have long and strongly been upheld in both federal and state courts, including against constitutional takings claims. In

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131 529 U.S. 277 (2000).
132 *Id.* at 282–83.
133 *Id.* at 293.
134 *Id.* at 296.
135 *Id.* at 297–98.
136 *Id.* at 301–02.

1917, for example, the Louisiana Supreme Court denied the owner of an orange orchard a constitutional takings claim when the state ordered the destruction of canker-infested trees, concluding that "[t]he owners of the other groves are entitled to protection now before the destruction emanating from defendant's place overtakes their groves."[137] Almost ninety years later, the Washington Court of Appeals upheld the Washington Department of Agriculture against constitutional takings claims when, after five citrus longhorn beetles escaped from quarantine, the Department destroyed all trees in the vicinity that could serve as hosts to the pest.[138] The court invoked aspects of the public necessity doctrine, emphasizing that "[t]he destruction of the ornamental trees in this case is a consequence incidental to a valid regulatory measure, one taken for the purpose of defending against an impending public peril."[139] However, the Washington Court of Appeals—helpfully for lawyers interested in promoting coastal climate change adaptation measures—also invoked more basic principles that private landowners exist within a community. Specifically, it emphasized that property law

> recognizes the reciprocal obligations of property owners to each other and to the surrounding community. The power that the State has to prohibit such uses of property as may be injurious to the health, morals, or safety of the public is not, and cannot be, "'burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.'"[140]

As such, the court underscored the true power of the traditional public health-based police power in takings litigation, which is to invoke with considerable legal strength the interests of the community as a whole—including the ability of those interests to override, without compensation, the more narrow, short-term, and limited interests of individual private property owners.

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[137] La. State Bd. of Agric. & Immigration v. Tanzmann, 73 So. 854, 857 (La. 1917).

[138] 14255 53rd Ave. S. v. Wash. State Dep't of Agric., 86 P.3d 222, 223 (Wash. Ct. App. 2004).

[139] *Id.* at 227.

[140] *Id.* (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489 (1987) (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887))).

CONCLUSION

In 2014, the IPCC advocated an economics-minded, global community perspective on community adaptation to coastal inundation, concluding with high agreement that "[f]or the 21st century, the benefits of protecting against increased coastal flooding and land loss due to submergence and erosion at the global scale are larger than the social and economic costs of inaction . . . ."[141] Moreover, "protecting against flooding and erosion is considered economically rational for most developed coastlines in many countries under all socio-economic and sea level rise scenarios analyzed, including for the 21st century [global mean sea level] rise of above 1 m[eter] (*high agreement*, *low evidence*)."[142]

While some courts in the United States are beginning to identify and value the benefits to both communities and individual property owners of innovative state and local management measures to adapt to coastal inundation, that perspective is, as yet, far from universal. Nevertheless, the U.S. Supreme Court's jurisprudence has demonstrated that Court's progressively diverging support for states' and local governments' land use-based and public health-based exercises of their traditional police powers, with measures focused on traditional public health concerns being far more likely to garner the Court's endorsement. As a result, coastal states and local governments pursuing innovative measures for dealing with the twin threats of coastal inundation—sea level rise and coastal storms—should strive to frame their regulatory measures to the extent possible as measures to prevent or reduce the risk of disease, toxic exposure, or mass injury and death. The impacts and aftermaths of Hurricane Katrina and Superstorm Sandy provide ample justification for this framing, as do the more general health and disease risks that sea level rise poses. In addition, coastal governments should also frame their coastal management measures to the extent possible as measures to prevent and mitigate public and private nuisances and as public necessity measures to deal with impending emergencies.

Of course, unless a government can actually invoke public nuisance or public necessity, none of these framings will protect

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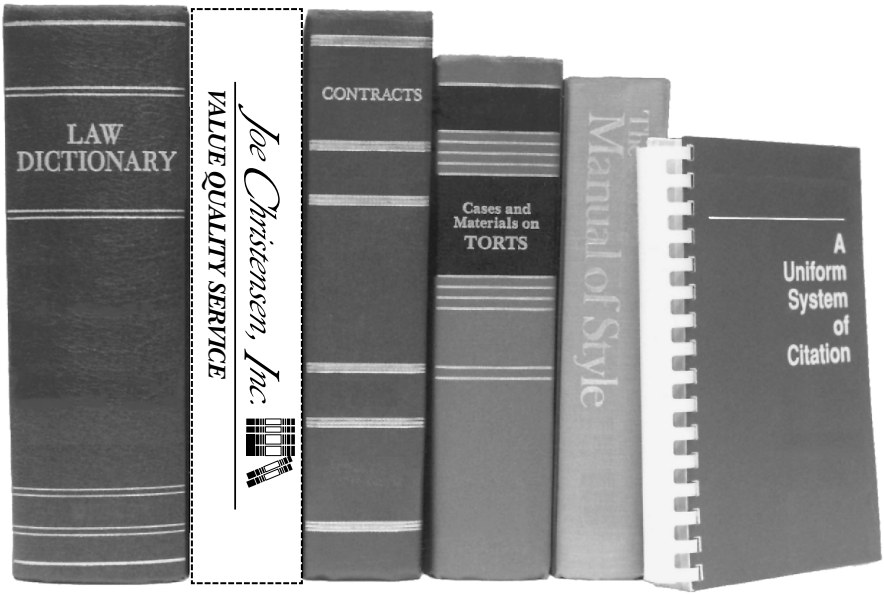
141 2014 IPCC COASTAL SYSTEMS, *supra* note 4, at 3.
142 *Id.*

coastal governments from liability for takings deemed to be physical takings of private property. As a result, and especially in light of the U.S. Supreme Court's 2013 decision in *Koontz v. St. Johns River Water Management District*,[143] states and local governments should be wary of relying on extracted easements, border shifting, and increasing public access rights in the coastal zone unless the relevant state's public trust doctrine or law of accretions and avulsions clearly supports such measures.

Conversely, invocation of nuisance and public necessity could well protect coastal states and local governments from even *Lucas*-type regulatory takings. More commonly, the combined nuisance and public necessity resonances of, and public health justifications for, evolving coastal management measures should effectively insulate states and local governments from liability for regulatory takings under the *Penn Central* analysis. To best survive judicial scrutiny, however, coastal governments should provide substantial factual analyses linking their coastal management measures to recognized public health risks from coastal inundation.

[143] Koontz v. St. Johns River Water Mgmt. Dist. 133 S. Ct. 2586, 2595–96 (2013) (holding that the U.S. Supreme Court's line of "unconstitutional conditions cases," which held that permit conditions requiring applicants to turn over property could be unconstitutional takings, also extends to pre-permitting negotiations and conditions precedent to the approval of permits, thereby potentially increasing governments' takings liability for conditions like exacted easements imposed in the coastal permitting context).



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