KOONTZ: THE VERY WORST TAKINGS DECISION EVER?

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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 COURT HISTORY 99 (2006) ("[Justice O'Connor's] lucid and honest opinion in

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 have negative practical effects on local governments and developers seeking to obtain development approvals. The decision

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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.

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*, *City of Monterey v. Del Monte Dunes at Monterey*,[12] and *Lingle v. Chevron USA, Inc.*,[13] to provide necessary background for a

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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).

[12] 526 U.S. 687 (1999).

[13] 544 U.S. 528 (2005).

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 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-

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[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).

[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").

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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[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 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.").

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 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

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[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.

[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

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, 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

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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 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.,

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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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); 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)

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

(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 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:

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]

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

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"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).

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*.

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 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

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[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.*

[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).

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]

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

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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).

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 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]

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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).

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

67 *Id.*

68 *Id.* at 2592–93.

69 *Id.* at 2593.

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]

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

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[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 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.

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 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

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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.

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).

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 "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

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[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 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.").

> 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 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

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96 *Id.* at 2596.

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

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

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.

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 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

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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).

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

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 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

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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.*

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).

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 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

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117 *See supra* note 32.

118 *See supra* note 39.

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.

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 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]

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120 *See supra* note 27.

121 *See supra* note 26.

122 *Id*.

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.

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 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

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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.

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 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

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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 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.

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 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*

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

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).

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 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

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[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.

[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

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 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

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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.").

[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*

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 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

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Takings Clause, *Symposium on the 2012–13 Supreme Court Term*, CATO SUP. CT. REV. 215 (2012–13).

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

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)).

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 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

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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).

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.

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 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

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[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 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.").

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 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

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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).

160 *See supra* note 77 and accompanying text.

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

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

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 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

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

justice majority in *Koontz* probably would not have agreed that the Due Process Clause can properly be applied in this type of case. 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

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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.

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.

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* 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

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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.

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 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—

174 *See supra* text accompanying note 27.
175 *See id.*

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.

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

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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.

plaintiff had no viable takings claim because "[t]he 'private property' upon which the [Takings] Clause traditionally has 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]

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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.

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

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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.").

Enterprises a financial assessment subtracting from a firm's wealth 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 independently, would have constituted *per se* takings demonstrates

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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.

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 opinion in *Eastern Enterprises*, that applying *Nollan* and *Dolan* to a takings claim based on monetary exactions "does not implicate

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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").

'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 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

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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.*

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 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

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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.*

(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 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,

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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).

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

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 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.

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219 *Id.* at 2610.

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] 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

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

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 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

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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).

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

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 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

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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.

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

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 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

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[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)).

[238] 260 U.S. 393 (1922).

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 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

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[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).

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

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 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

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[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 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."

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.

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

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

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

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 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

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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).

[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").

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 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

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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).

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

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

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 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

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[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).

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

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.