

Legislative Exactions after *Koontz v. St. Johns River Management District*

LUKE A. WAKE* AND JAROD M. BONA**

TABLE OF CONTENTS

I.	Introduction	540
II.	The Police Power and Common Law Limitations on Property Rights as Background Principles	542
	A. The Nuisance Doctrine as the Historical Limitation on Private Land Use	543
	B. The Historical Limits of the Police Power	544
	C. Expansion of the Police Power and the Birth of Modern Land Use Planning	546
	D. The Interplay Between Common Law Principles and the Takings Clause	549
III.	Dedication Requirement Limitations: <i>Nollan</i> , <i>Dolan</i> , and <i>Koontz</i>	552
	A. <i>Nollan v. California Coastal Commission</i> : The Nexus Test	552
	B. <i>Dolan v. City of Tigard</i> : The Rough Proportionality Test	554
	C. Open Questions in the Wake of <i>Nollan</i> and <i>Dolan</i>	555
	1. Should <i>Nollan</i> and <i>Dolan</i> Apply to Legislative and Monetary Exactions?	555
	2. Implied Limited Application of <i>Nollan</i> and <i>Dolan</i> : <i>Lingle v. Chevron U.S.A.</i>	557
	D. <i>Koontz v. St. Johns River Management District</i>	559
	1. Facts and Procedural History	559
	2. The Nexus Test Applies to Monetary Exactions	560
	3. The Nexus Test Applies to Extortionate Denials	562
	E. Still Unanswered Questions and Scholarly Reactions to <i>Koontz</i>	563
	1. <i>Koontz</i> 's Harshest Critic	563
	2. Other Commentators Support the Court's Decision in <i>Koontz</i>	565
IV.	Underlying Implications and Theoretical Foundations of <i>Koontz</i>	568
	A. Recent Cases Affirm that <i>Per Se</i> Defenses Are Highly Questionable	568

* Luke A. Wake is a senior staff attorney with the National Federation of Independent Business Small Business Legal Center.

** Jarod M. Bona, of Bona Law PC, focuses his practice on antitrust, real estate and business litigation, appeals, and challenges to government conduct. The views expressed herein are the authors' and do not necessarily reflect those of their employers. © 2015, Jarod M. Bona and Luke A. Wake.

B.	<i>Koontz</i> Suggests that Courts Should Reject Any Categorical Rule that Might Allow Systematic Circumvention of <i>Nollan</i> and <i>Dolan</i>	569
C.	Elucidation of the Unconstitutional Conditions Doctrine in <i>Koontz</i> Gives a Doctrinal Basis for Rejecting the Legislative Exception . . .	570
D.	The Rationale in <i>Koontz</i> May Apply in Non-Land Use Permit Cases	571
V.	Applying the Unconstitutional Conditions Doctrine and Dedication Requirements after <i>Koontz</i>	572
A.	Should Legislatively Imposed Exactions be Reviewed Under <i>Nollan</i> , <i>Dolan</i> , and <i>Koontz</i> ?	572
1.	Mixed Signals From <i>Lingle</i>	573
2.	<i>Frost Truck Co. v. California</i> and <i>44 Liquormart, Inc. v. Rhode Island</i> Suggest that There is No Doctrinal Basis for Excluding Legislative Conditions.	573
3.	Signs the Judicial Tides May be Turning on the Issue of Legislative Exactions.	574
B.	Applying <i>Koontz</i> to Legislatively Imposed Open Space and Aviation Dedication Requirements	576
1.	A Threshold Question: Is Anything Actually Taken With Aviation and Open Space Easement Dedication Requirements?	576
2.	Narrowly Tailored Aviation Easements	577
3.	Reviewing Open Space Easements	578
C.	Applying <i>Koontz</i> to Legislatively Imposed Affordable Housing Linkage Fees	579
1.	The Nexus Test Requires Evidence the Fee is Necessary.	580
2.	The Rough Proportionality Test Requires Greater Empirical Justification	581
VI.	Conclusion	581

I. INTRODUCTION

The U.S. Supreme Court's decision in *Koontz v. St. Johns River Management District*¹ is, in many ways, a natural outgrowth² of the Court's prior regulatory takings decisions in *Nollan v. California Coastal Commission*³ and *Dolan v. City of Tigard*.⁴ But it is also a philosophical departure from the many lower court decisions that sought to limit *Nollan* and *Dolan*'s scope over the last twenty-five

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

2. Christina M. Martin, *Nollan and Dolan and Koontz—Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Products, But No More*, 32 (Pac. Legal Found., Working Paper No. 13-512, 2013), available at <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2013/11/SSRN-id2348844.pdf> (“*Koontz* is completely consistent with *Nollan* and *Dolan* and the unconstitutional conditions doctrine.”).

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

4. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

years.⁵ With *Koontz*, the Supreme Court signaled—with a bullhorn—that the unconstitutional conditions doctrine is alive and well in takings cases.

Koontz addressed whether certain development permit conditions were constitutional, and specifically, whether conditions requiring permit applicants to dedicate money to a public program could pass scrutiny. Writing for a deeply divided court, Justice Alito explained that courts must review these “monetary exactions” under *Nollan* and *Dolan*—as unconstitutional conditions rather than under the wildly permissive balancing test set forth in *Penn Central Transportation Co. v. New York*.⁶ The unconstitutional conditions doctrine—which is applied to takings through *Nollan* and *Dolan*—imposes heightened burdens on government to justify regulatory conditions that require forfeiture of an individual’s constitutional rights (i.e., the right to receive just compensation for a taking of property). By contrast, the *Penn Central* balancing test is much more deferential to land use authorities—usually rejecting claims seeking compensation for regulatory restrictions on property rights after considering: (1) the economic impact of the contested restrictions; (2) the owner’s investment-backed expectations; and (3) the character of government’s actions.

Besides its significant “monetary exactions” ruling, the *Koontz* Court held that the *Nollan* and *Dolan* framework applies to denied permits just the same as conditions attached to a granted permit, which matters because landowners often face the threat of a permit denial if they refuse to accede to an extortionate condition.⁷ Yet *Koontz* left open several crucial issues that lower courts must resolve. The most significant question is whether legislative exactions must also satisfy the *Nollan* and *Dolan* standards. In this article, we examine the state of takings law in the wake of *Koontz* and answer yes.

In Section I, we explore the common law backdrop for land use regulation and identify the fundamental principles that informed *Nollan*’s nexus test and *Dolan*’s rough proportionality test. In Section II, we describe the Court’s *Koontz* decision within the historical context of takings law—with an in-depth discussion of the *Nollan* and *Dolan* decisions and the Supreme Court’s subsequent elucidation of the unconstitutional conditions doctrine. We also discuss post-*Koontz* scholarship. In Section III, we examine the theoretical foundations for *Nollan*, *Dolan*, and *Koontz* and address unresolved doctrinal questions. Finally, in Section IV, we explain the implications of *Koontz* and consider its application with respect to three recurring issues in exactions law: (1) legislatively imposed exactions; (b)

5. Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1572 (2006) (“Perhaps in recognition that municipalities are faced with increasingly dwindling funds, a number of courts have created bright-line distinctions in order to shelter various municipal decisions from a heightened scrutiny analysis.”).

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

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

open-space and aviation dedication requirements; and (c) controversial affordable-housing linkage fees.

II. THE POLICE POWER AND COMMON LAW LIMITATIONS ON PROPERTY RIGHTS AS BACKGROUND PRINCIPLES

Under modern precedent, due process challenges to land use restrictions rarely succeed. Still, our takings jurisprudence holds that such restrictions might still raise a constitutional problem under the Takings Clause.⁸ But for regulatory restrictions, the Supreme Court has set an exceedingly difficult standard to establish a taking.⁹ In *Pennsylvania Coal v. Mahon*, Justice Holmes posited, for example, that a regulatory restriction amounts to a taking if it “goes too far.”¹⁰ Decades later, the Court boiled this tautology down to the multifactor *Penn Central* balancing test, which considers (1) the economic impact of the regulations, (2) the owner’s investment-backed expectations, and (3) the character of government’s actions.

Today, virtually all takings claims are reviewed under this *Penn Central* balancing test.¹¹ The only exceptions are when (1) government has physically invaded private property, (2) development restrictions prohibit all economically beneficial uses of the land, or (3) a permit is conditioned on the requirement to dedicate property to the public.¹² Of course, common law principles inform the courts’ takings analysis under any test because judges must look to background principles of property law to determine whether a contested restriction has so severely impaired property rights as to warrant an award of just compensation.¹³

Common law principles are especially relevant when assessing the propriety of conditions imposed on a development permit—at least when the contested condition requires the owner to dedicate property to the public. This is because

8. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (recounting that since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), “the Court [has] recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.”); cf. *id.* at 542 (distinguishing between due process and takings claims—explaining that the regulatory takings analysis must look to “the magnitude or character of the burden a particular regulation imposes upon private property rights.”).

9. See R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 *ECOLOGY L.Q.* 731, 737–38 (2011) (fleshing out the *Penn Central* balancing test under which most takings claims are reviewed—and the doctrinal problems facing landowners in an inverse condemnation case).

10. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

11. Radford & Wake, *supra* note 9, at 735 (observing that *Mahon* offered no meaningful insight into the theoretical underpinnings of the Takings Clause, and that since then the Court has offered no “guidance beyond the *ad hoc*, standardless, situational relativism of *Penn Central* . . .”).

12. *Lingle*, 544 U.S. at 538–39 (specifically explaining that the nexus and rough proportionality tests are takings claims rooted in the unconstitutional conditions doctrine); see also *id.* at 545–47.

13. *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl. Prot.*, 560 U.S. 702, 726–27 (2010) (reiterating that courts must look to the “background principles of the State’s law of property and nuisance” when assessing the viability of a takings claim) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)).

the analysis requires courts to distinguish “between an appropriate exercise of the police power and an improper exercise of eminent domain”¹⁴ Accordingly, most states have developed a doctrine, rooted in both the Takings Clause and common law principles, to review conditions imposed on permit applications.¹⁵ For this reason, any thorough examination of exactions law must begin with a review of common law principles, which serve both as the historical and theoretical backdrop for the Supreme Court’s exactions jurisprudence.

A. THE NUISANCE DOCTRINE AS THE HISTORICAL LIMITATION ON PRIVATE LAND USE

At English common law there were no building codes to worry about, nor zoning boards to appease.¹⁶ If a landowner wanted to build a barn or house, he was free to do so.¹⁷ This was because ownership of title entailed the right to make any reasonable use of the land.¹⁸

This did not, however, allow the owner complete liberty to use his property in any conceivable manner. Owners were subject to the nuisance doctrine, which was predicated upon a tenet of natural law theory—the idea that no man has the right to inflict affirmative harm upon another.¹⁹ Thus, the landowner could not use his property in a manner that injured his neighbor.²⁰ The corollary principle at common law is the individual duty to conduct activity with reasonable care to avoid injuring others.²¹

14. *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1987) (quoting *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)).

15. *Dolan*, 512 U.S. at 389-91 (surveying the development of exactions law in the various states).

16. In a state of nature there are no positive laws. See Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV., 362 (1997) (noting that since Roman times theorists have distinguished between natural and positive law, on the understanding that principles of natural justice antecede the enactment of positive law by the state).

17. William Blackstone, Ehrlich’s *Blackstone* 51 (1959) (explaining that the right of property is an “absolute right, inherent in every Englishman . . . which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land.”); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513 (1977) (Stevens J., concurring) (“Long before the original States adopted the Constitution, the common law protected an owner’s right to decide how best to use his own property.”).

18. See Edward Coke, *The Institutes of Laws of England* ch. 1 sec. 1 (1st Am. Ed. 1812) (1797) (“What is the land but the profit thereof?”); see also *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229, 231 (N.Y. App. Div. 1932) (“As a general rule, an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute.”).

19. See STEVEN J. EAGLE, *REGULATORY TAKINGS* § 2-1 (3d ed. 2005).

20. See *State v. Schweda*, 736 N.W.2d 49, 56 (Wis. 2007) (noting that “modern environmental law finds its roots in common law nuisance”).

21. See Natalia M. Bartels & M. Stuart Madden, *A Comparative Analysis of United States and Colombian Tort Law: Duty, Breach, and Damages*, PACE INT’L L. REV. 59, 63 (2001) (quoting Justice Holmes’s summation of “the general purpose of the law of torts as . . . secur[ing] a man indemnity against certain forms of harm to a person, reputation, or estate, at the hands of his neighbors”) (quoting Oliver Wendell Holmes, *The Common Law* 115 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881); HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 370 (1866)).

Accordingly, even without a zoning regime, a landowner cannot substantially interfere with another's use and enjoyment of his property.²² This standard assumes that each landowner can put his property to any economically beneficial use, or to whatever purpose serves the owner's individual conception of happiness—provided that he or she is not invading the right of another to do the same.²³ While modern zoning regimes greatly constrain the landowner's common law liberties, the nuisance doctrine remains a background property law principle today.²⁴

B. THE HISTORICAL LIMITS OF THE POLICE POWER

The common law has always understood the sovereign to maintain the inherent power to create positive law.²⁵ Yet this was not an open-ended power to enact any conceivable restraint on human behavior.²⁶ English common law recognized that natural law principles constrain the powers of the sovereign in a way that continental monarchies did not.²⁷ Thus, whereas the nuisance doctrine recognized a rule of reasonableness that prevents a landowner from invading the rights

22. See *City of Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304, 314 (1981) (holding that amendments to the Clean Water Act displaced the nuisance claim recognized in *Milwaukee I*); *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537, 2540 (2011) (holding that a nuisance action predicated in federal common law may be preempted by a federal statutory regime, but may not necessarily displace nuisance claims under state law; preemption only occurs if Congress intended to occupy the field).

23. Although the common law will not allow a landowner to engage in conduct that causes a nuisance to his neighbors or the public, a prohibition on such noxious uses in no way undermines the right of the owner to make reasonable uses. See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (prohibition on use of property to manufacture intoxicating beverages “does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests.”); *Hadacheck v. Sebastian*, 239 U.S. 394, 412 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced).

24. William H. Rodgers, Jr., *Handbook on Environmental Law* § 2.1, at 100 (1977) (“The deepest doctrinal roots of modern environmental law are found in principles of nuisance Nuisance theory and case law is the common law backbone of modern environmental and energy law.”).

25. See Kevin Ryan, Esq., *Lex et Ratio Coke, the Rule of Law, and Executive Power*, 31 Vt. B.J., 9, 10 (2005) (summarizing Lord Coke's views on the common law: “In Coke's view the common law assigns powers to the king, grants its proper jurisdiction to each of the courts of the realm, and recognizes the rights and privileges entailed by the station of every Englishman.”); see also Blackstone, *supra* note 17.

26. See *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (stating that “the prevention of a legal and essential use [or property]” is “an attribute of its ownership, [and] one which goes to make up its essence and value.” And opining that, “[t]o take . . . away [such use] is practically to take [the] property away; and to do that is beyond the power even of sovereignty, except by proper proceedings to that end [i.e., a proceeding in eminent domain].”).

27. See Mark Carter, “Blackstoned” Again: *Common Law Liberties, the Canadian Constitution, and the Principles of Fundamental Justice*, 13 TEX. WESLEYAN L. REV. 343, 348-49 (2007) (“Common law theory rejects the ability of rulers to be the source of law, asserting instead that monarchs, Parliament, and judges merely express a deeper legal reality that is ‘historically evidenced [by] national custom.’”) (quoting GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 3 (1986)); Ryan, 31 Vt. B.J. at 12 (quoting Lord Coke: “[T]he king cannot create any offense by his prohibition or proclamation, which was not an offense before”) (quoting 12 Coke's Reports 75).

of another, the police power—authorizing the enactment of positive law—was governed by the same essential principle: i.e., the notion that the purpose of the law is simply to do justice by preventing individuals from invading others' rights.²⁸

The very term “police power” speaks to the original conception of the sovereign’s powers as limited to the purpose of *policing*, which was understood to mean merely the authority to “keep order” or to *enforce* the law.²⁹ Of course the power to enforce law assumes the existence of background legal principles, separate from positive enactments. Thus, the common law nuisance doctrine and its foundational principles also served as the basis for assuming the sovereign’s power to enact positive laws. As other commentators explain, “[t]he police power in Anglo-American law can be traced back to Glanville’s admonition in 1187 that a person may not use his property to the detriment of another.”³⁰

Accordingly, the State had always possessed the power to impose laws that proscriptively restrict what may be done with one’s land; but an exercise of police power—abridging common law property rights—could only be justified to the extent it was reasonably crafted to prevent a landowner from invading the rights, or prerogatives, of another.³¹ The modern conception of the police power, however, is much more expansive.³² Today, courts view most land use restrictions as legitimate exercises of police power, so long as the enactments advance

28. Ryan, *supra* note 25, at 10 (explaining that the common law was rooted in natural law principles, and that “[t]he core of natural law theory is the notion that law is a rule of reason, meant to dominate and control those under the influence of wayward and shifting passions [i.e., the sovereign and subject/citizen alike].”).

29. J. Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 909 (2000); 4 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES 162 (St. George Tucker ed., Rothman Reprints, Inc. 1969) (1803) (describing the power of the sovereign to enact positive law as the power to prescribe “due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.”); *but see* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 491 (2004) (explaining that the term “police power” was the product of American law and was originally intended to describe the general concept of state sovereignty—as opposed to a theoretical framework for delineating legitimate regulatory functions of the state).

30. EAGLE, *supra* note 19, at § 2-1.

31. The state’s permitting power is derived from its police power, which allows government to impose restrictions in order to prevent reasonably anticipated harms to the public. *See* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987). For example, a city council might adopt zoning restrictions with an aim to ensure that a development will not adversely affect public safety. A land use authority, charged with the duty of administering and enforcing this zoning code, might legitimately impose any number of conditions on the grant of a development permit—so long as the conditions are reasonably tailored to address threats to public safety. The authorities might legitimately condition a building permit on the requirement that the proposed project be modified to prevent fires, or to minimize the risk of accidents resulting from increased traffic to and from the development site, or to avoid any other threat to public safety.

32. Barros, *supra* note 29, at 478 (“The practical scope of police regulation, however, has evolved throughout American history.”).

some legitimate public purpose.³³

C. EXPANSION OF THE POLICE POWER AND THE BIRTH OF MODERN LAND USE
PLANNING

Modern land use planning would have been crippled had the courts held onto an overly rigid view of the police power.³⁴ Whereas height and use limitations, setback restrictions, and aesthetic requirements are practically ubiquitous today, these forms of regulation were uncommon in the nineteenth century.³⁵ But in the early twentieth century, there was a growing sense in academic circles, in legislative bodies, and in the courts that the police power should be understood as more flexible and in a less dogmatic light.³⁶ The progressive movement was aggressive, and ultimately successful, in advancing the idea that the police power is a malleable tool—giving effect to the popular will of the people.³⁷

Progressivism embraced the philosophy of legal positivism, which rejects the classical theories of natural law that had previously served as the foundation of American legal theory and English common law.³⁸ Whereas natural law theory presumes an objective standard for assessing the propriety of human behavior, legal positivism holds that there is no inherent morality to the law and no objective basis for saying any action is right or wrong—except to the extent that

33. See *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 541 (2005) (“[A] municipal zoning ordinance would survive a substantive due process challenge so long as it was not ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’” (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926))).

34. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

35. Vanessa Russell-Evans, Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and Its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Build Healthier and More Active Communities*, 29 VA. ENVTL. L.J. 63, 111 (2011) (“Zoning ordinances did not exist until the 1920’s, and were adopted by most local governments in a relatively short amount of time.”).

36. Once scholars began to conceive of the police power as the residuary power to promote the public welfare, subject only to the affirmative constitutional protections for individual rights, the natural law theory of the inherent limits on state power was all but divorced from the law. Thereafter, the conception of state power being rooted in natural law could only last so long as the court construed the Constitution as broadly protecting individual liberties. Walter Wheeler Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322, 329 (1907) (defining the police power as “the unclassified, residuary power of government vested by the United States Constitution in the respective states[.]” and positing that the state retains full powers unless the power has been exclusively vested with the national government, or denied by a constitutional provision protecting “individual liberty, e.g. due process of law.”).

37. Baros, *supra* note 29, at 479 (noting that once the modern conception of the police power shifted “from the common law doctrines that represented its early practical scope,” the intellectual groundwork had been laid “for the broad regulatory scheme prevalent today”).

38. See Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 216 (2004) (“The Progressives first developed the ‘living Constitution’ critique of constitutional property rights. Applying a Hegelian theory of the state to American politics, they insisted . . . ‘[t]he basis of political society was . . . [is and always has been] a historical development’” (quoting FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 3 (1911))).

positive legal enactments declare what is permissible or impermissible.³⁹ Thus, legal positivism rejects the idea of natural liberty and holds that it is for lawmakers to decide when an individual may proceed with a proposed action.⁴⁰ In this vein, legal positivism rejects the very concept of inherent rights, instead viewing “rights” as mere positive entitlements, or discretionary benefits, conferred from the sovereign.⁴¹ Thus, the paradigm shift from rigid formalism toward a more liberal conception of the police power corresponded with a change in the modern zeitgeist—toward a view of popular governance that was radically different than the Lockean conception of limited government that had predominated American legal thought through the nineteenth century.⁴²

Ultimately, this led to a series of decisions that both expanded our understanding of the police power and lowered the standard for reviewing contested land use

39. See Ofer Raban, *The Supreme Court's Endorsement of A Politicized Judiciary: A Philosophical Critique*, 8 J. L. SOC'Y 114, 121 (“The essential claim of legal positivism—the claim which gave it its name—is that it is *not* necessary to engage in any moral evaluation in order to determine what the law requires. This thesis encapsulates legal positivism’s *raison d’être*, for the theory came into being as a challenge to natural law theories—which dominated the legal mind for many centuries, and which claimed that ‘an unjust law is no law at all’ so that establishing legal requirements was a process inseparable from moral evaluation.”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1335 (3d ed. 2000) (explaining “natural law” as the “notion that governmental authority has implied limits,” regardless of the existence of a written Constitution, “which preserve private autonomy”); Joseph Raz, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORTALITY* 37, 37 (1979) (advancing the legal positivist view that “that what is law and what is not is a matter of social fact [as opposed to a moral imperative].”).

40. Raban, *supra* note 39, at 121-22.

41. Under modern jurisprudence, only specifically enumerated rights are entitled to heightened review and any abridgement of other conceivable rights will be upheld unless there is no conceivable rational basis for the restriction. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (bifurcating individual rights into fundamental and non-fundamental categories).

42. While the revolutionary generation aspired to create a republican form of government responsive to the will of the people, their notion of popular governance was always tempered by the understanding that government is without power to infringe upon the natural rights of men. See Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review of Kermit Roosevelt's the Myth of Judicial Activism*, 23 J.L. & POL. 1, 3 (2007) (explaining that the ‘republicanism’ espoused by the Founders embodied an ideal that the people should be free to choose what sort of policies their government should pursue, but that this view of republicanism was tempered by the founding generation’s predominant views on natural law and natural rights). By contrast, the modern view of popular governance—embracing the precepts of legal positivism and utilitarian thought—was inherently majoritarian. Alan B. Handler, *Judicial Jurisprudence*, 205 N.J. L. REV. 22, 23 (2000) (“Legal positivism is founded on the belief that law expresses majoritarian views and law is positive only as expressed; beyond its expression, therefore, law has no intrinsic moral or ethical content.”). This led to a marked shift in the predominant judicial philosophy at the Supreme Court—toward a view that courts should be as deferential as possible toward the democratic process. William D. Graves, *Evolution, the Supreme Court and the Destruction of Constitutional Jurisprudence*, 13 REGENT U.L. 513, 546 (2001) (explaining that New Deal era precedent was the product—to a large extent—of a shift in the judicial mindset from natural law principles toward legal positivist thought, which the author refers to as a form of Darwinism); see also Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 462-63 (2001) (noting that “[t]he New Deal justices appointed by Roosevelt brought to the Court a simple mandate—they were to put an end to the ‘tortured construction’ of the Constitution that prevented the enactment of New Deal legislation[.]” and explaining that the Court accomplished this end by “declar[ing] that judicial interference with the political process henceforth required . . . some clear textual justification.”).

restrictions.⁴³ In earlier cases, the Supreme Court demonstrated a willingness to strike down statutes that interfered with economic liberties and property rights in the absence of a compelling need to prevent affirmative harm to others.⁴⁴ Yet the Court later backed away from these decisions, holding that restrictions on economic liberties will survive unless they lack any conceivable rational basis,⁴⁵ and restrictions on property rights will be upheld if there is a substantial relation between the restriction and the public good.⁴⁶

For example, in *Village of Euclid v. Ambler Realty Co.*, the Court considered the propriety of restrictions preventing a landowner from building an industrial facility on his residentially zoned property.⁴⁷ Even though this proposal posed no harm to anyone in particular, the Court upheld the City of Euclid's zoning restrictions because the community had a general interest in controlling development.⁴⁸ Thus, *Euclid* seemingly shifted the burden to the landowner to demonstrate that the public has no conceivable interest—however vague or attenuated—in imposing a contested restriction.⁴⁹

Slightly mitigating this burden, two years later, in *Nectow v. Cambridge*, the Court applied *Euclid*'s substantial relation test to strike down a zoning ordinance prohibiting industrial uses where the restriction appeared to be arbitrarily imposed.⁵⁰ This suggests the authorities still bear at least some minimal burden to demonstrate that a restriction does something to advance the public good. But, in any event, modern courts seem to treat *Nectow* as an anomaly and typically reject

43. *Euclid*, 272 U.S. at 388 (“[I]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” (citing *Radice v. New York*, 264 U.S. 292, 294 (1924))).

44. See e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923) (invalidating Kansas law that enabled a “court of industrial relations” to set the terms of employment and working conditions for various industries); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (affirming that “freedom of contract is . . . the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.”); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating law banning the teaching of German in private schools).

45. See Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 610-27 (1996) (explaining that the *Lochner* era court scrutinized all economic regulatory measures on the theory that the economic interests were protected property rights, and explaining the shift toward the modern due process doctrine).

46. *Id.* at 624 (“After 1937, the end of the *Lochner* era, federal constitutional protection of property interests nearly disappeared.”).

47. See *Euclid*, 272 U.S. at 380-82, 384.

48. *Id.* at 386-87 (“Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained . . .”).

49. See *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 540-41 (2005) (explaining that a due process challenge to a zoning restriction will fail unless the owner can demonstrate that the restriction is “clearly arbitrary and unreasonable, having no *substantial relation to public health, safety, morals or the general welfare.*”) (quoting *Euclid*, 272 U.S. at 395).

50. See *Nectow v. Cambridge*, 272 U.S. 183, 188 (1928).

due process challenges to zoning restrictions.⁵¹

D. THE INTERPLAY BETWEEN COMMON LAW PRINCIPLES AND THE TAKINGS CLAUSE

Besides imposing land use restrictions under its police power, government may also take property outright. More specifically, government may, to advance the public good, compel the transfer of private property through the power of eminent domain.⁵² That is, the State may choose to formally acquire title to certain land by initiating a condemnation petition in court or may informally exercise eminent domain powers through regulatory actions.⁵³

In the quintessential example, the State appropriates lands necessary to expand a highway by seeking title to the land and tendering an offer for its fair market value. A much more controversial example is when a city, for purposes of economic development, files a condemnation petition to take a property that it intends to hand over to a private developer.⁵⁴ In both cases, the authorities expressly invoke the eminent domain power; the typical constitutional issues are (a) whether the taking is for a “public use” and (b) whether the authorities have offered the owner “just compensation,” as required by the Takings Clause of the Fifth Amendment.⁵⁵

51. See J. Peter Bryne, *Due Process Land Use Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 477 (2007) (“[M]ost federal courts have adopted standards of review even more deferential . . . than arbitrary and unreasonable.”); Nisha Ramachandra, *Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes*, 36 *ECOLOGY L.Q.* 381, 393 (2009) (“It is unclear if the Supreme Court intended this [shock the conscience] standard [announced in *County of Sacramento v. Lewis*, 523 U.S. 833 (1989)] to apply in land use cases.”); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1998) (holding that there was no due process violation in a city’s decision to deny a permit without explanation); *Kentner v. City of Sanibel*, 750 F.3d 1274, 1277, 1280-81 (11th Cir. 2014) (upholding an assailed restriction, notwithstanding a complete absence of facts supporting the assumption that the ordinance advanced the cited public goals).

52. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (“[T]he right of eminent domain, that is, the right to take private property for public uses appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.”).

53. See *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 316 (1987) (“While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.”).

54. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

55. Because the power of eminent domain is considered an essential right of a sovereign power, there is usually little question as to whether a State may exercise eminent domain powers. See *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). But there are often restrictions on the state’s eminent domain powers in the state constitution. See, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115, 1129 (Ohio 2006). Further, there may in some cases be ground to contest an exercise of eminent domain if a condemnation proceeding is initiated by one of the state’s political subdivisions. For example, most states have enacted enabling legislation to authorize municipalities to exercise eminent domain powers; however, the statute may provide that eminent domain may only be exercised under certain specified conditions. See *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 705 P.2d 862, 865, 867 (Cal. 1985) (observing that an airport authority lacked statutory authorization to exercise eminent domain, but concluding that the airport authority may nonetheless incur takings liability if its conduct effects a taking of private property).

But in other cases, the State, or her political subdivisions, may take actions that result in public appropriation of private property while denying that it has engaged in an exercise of eminent domain. In such cases, government does not intend to formally acquire title to the affected property, but it nonetheless engages in conduct that gives rise to takings liability.⁵⁶ The classic example is a public works project that floods a neighboring property.⁵⁷ There, government has effectively appropriated that land, which triggers a self-executing duty under the Takings Clause to justly compensate the owner.⁵⁸ Likewise, in some cases, regulatory restrictions may so severely limit permissible uses of private property that government has—in practical effect—taken the property for public use.⁵⁹

If the State refuses to acknowledge its obligation to pay just compensation, the owner must file an “inverse condemnation” action in court—usually alleging a violation of federal civil rights under 42 U.S.C. § 1983, or alternatively invoking state procedures—seeking an order from the court to compel payment of just compensation.⁶⁰ To prevail, the landowner must demonstrate that the State’s actions have effected a taking. Of course, in cases where public actors have physically occupied portions of the property, as in the flooding example, the landowner can easily prove the taking because our jurisprudence recognizes that a physical invasion is a *per se* taking.⁶¹ But proving a taking is not easy in regulatory takings cases. Unless a restriction deprives the owner of all economically beneficial uses, courts apply the *ad hoc* balancing test from *Penn Central*, which almost inevitably favors government.⁶²

While a landowner could theoretically prevail under *Penn Central*, the reality is that the court will usually reject the claim so long as the authorities allow at least some modest development (e.g., a single family home), regardless of the size of the parcel.⁶³ This affords government broad latitude to deny development

56. See *Baker*, 705 P.2d at 865-67.

57. See *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1871).

58. *Hendler*, 952 F.2d at 1371.

59. See, e.g., *Lockaway Storage v. Cnty. of Alameda*, 156 Cal. Rptr. 3d 607, 627 (Cal. Ct. App. 2013) (upholding the judgment of a superior court that a restriction shutting down a development project amounted to a taking under *Penn Central*).

60. *Baker*, 705 P.2d at 865-67.

61. See *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 426 (1982).

62. See Adam R. Pomeroy, *Penn Central After 35 Years: A Three-Part Balancing Test or a One-Strike Rule?*, 22 FED. CIR. B.J. 677, 696 (2012-13).

63. The parcel as a whole doctrine holds that a regulatory taking claim must consider how the regulations impact the parcel as a whole—otherwise landowners could conceptually segment the property into smaller portions, which would tilt the *Penn Central* factors in their favor. See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331 (2002); see also Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988). Though this rule prevents gamesmanship on the part of landowners pursuing takings claims, it arguably results in inequitable results for owners of larger parcels. See *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991) (While “a taking can appear to emerge if the property is viewed too narrowly,” it is just as true that “[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined.”).

permits without incurring takings liability. In turn, public authorities might threaten a landowner with a permit denial to force concessions. Most commonly, authorities threaten a permit denial to compel the owner to submit less ambitious development plans. But sometimes they condition permit approval on an agreement to dedicate an interest in the subject property to the public or on a demand that the owner pay money to some public fund or finance a public project.

These are the difficult cases because they intersect competing takings and common law doctrines. That is, the owner has a common law right to reasonable use of his property, but the authorities may deny that right under the police power if a restriction even arguably advances some public interest. It is, of course, an abuse of the regulatory process for land use authorities to use a permitting regime as a means to acquire property without the payments entailed in a formal condemnation process. Yet, by the same token, a permit denial usually does not result in takings liability.

Not surprisingly, the states vary in their approach when confronted with these issues.⁶⁴ Recognizing the potential for abuse, some states require that the authorities demonstrate the propriety of an imposed condition.⁶⁵ Others require only that government show some theoretical connection between the condition and some adverse public harm, for which the condition should be intended to mitigate.⁶⁶ But the common thread of these divergent approaches is the principle that there must be some “reasonable relation” (or as the Supreme Court would later put it, a “rough proportionality”) between a condition imposed on a permit and the impact that a proposed project will likely have on the public.⁶⁷ This “rough proportionality” standard more closely tracks the early conception of the police power as authorizing regulation *only* for the purpose of avoiding affirmative harm to others.⁶⁸ Thus, a governmental defendant cannot point to a rational

64. *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (surveying the development of exactions law in the various states).

65. *See, e.g., Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (1961).

66. *Billings Properties, Inc. v. Yellowstone Cnty.*, 394 P.2d 182 (1964); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966).

67. *Dolan*, 512 U.S. at 391 (“We think the ‘reasonable relationship’ test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term ‘reasonable relationship’ seems confusingly similar to the term ‘rational basis’ which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.”).

68. *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987) (“Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission’s assumed power to forbid construction of the house in order to protect the public’s view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end.”); *Dolan*, 512 U.S. at 394 (“If petitioner’s proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere.”).

basis to defend a contested condition requiring dedication of a property interest.⁶⁹

III. DEDICATION REQUIREMENT LIMITATIONS: *NOLLAN*, *DOLAN*, AND *KOONTZ*

The Supreme Court first addressed the question of when regulatory conditions are an improper exercise of eminent domain powers in *Nollan v. California Coastal Commission*. This was a watershed victory for landowners and a setback for urban planners who wanted greater discretion over development permit conditions. As *Nollan*, and later *Dolan v. City of Tigard*, made clear, the Takings Clause of the Fifth Amendment constrains government discretion to impose permit conditions. Governments, however, had largely succeeded in limiting *Nollan* and *Dolan*'s application until *Koontz v. St. Johns River Management District*.⁷⁰

A. *NOLLAN V. CALIFORNIA COASTAL COMMISSION*: THE NEXUS TEST

A quarter century has passed since a splintered Supreme Court issued its decision in *Nollan v. California Coastal Commission*.⁷¹ This controversial case has forever changed the landscape of takings law in America by setting a heightened constitutional standard for government conditions on development permits.⁷² Before *Nollan*, it was at least arguable that conditions imposed on a building permit should be reviewed under either a highly deferential due process standard or, if a regulatory taking had been alleged, under the *Penn Central* balancing test—both exceedingly high bars for plaintiffs.⁷³ But in holding that an imposed condition violates the Takings Clause unless it bears a nexus to the impact that a proposed project might have on the public, *Nollan* shifted the burden to the permitting authority to demonstrate the propriety of a contested condition.⁷⁴

69. See J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 385 (2002).

70. Needleman, *supra* note 5, at 1572 ("Perhaps in recognition that municipalities are faced with increasingly dwindling funds, a number of courts have created bright-line distinctions in order to shelter various municipal decisions from a heightened scrutiny analysis.").

71. *Nollan*, 483 U.S. 825.

72. James S. Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 398 (2009) ("It held for the first time that the Constitution prohibits the government from requiring that landowners dedicate property to a public purpose in order to obtain permission to develop their land unless there is a connection between the exaction and certain impacts caused by the development.").

73. *Nollan*, 483 U.S. at 843 (Brennan, J., dissenting) (quibbling with the majority's conclusion that a permit condition may amount to a taking because the State could have outright denied the owner's permit application without incurring any liability: "There can be no dispute that the police power of the States encompasses the authority to impose conditions on private development.").

74. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1463 (1989) ("[The Court] struck down a condition on a regulatory exemption as unconstitutional because [it was] not germane to state interests that would have justified denying the exemption.").

In *Nollan*, the Court asked whether the California Coastal Commission could condition approval of a permit to build a bungalow on the requirement that the owners dedicate an easement for the public to traverse across their property. The Court was confronted with two well-established constitutional principles in a seemingly irreconcilable conflict. On the one hand, as Justice Brennan emphasized in dissent, the Nollan family had no vested right to build on their beachfront property, and the government could have denied their permit application for any number of reasons, subject to some minimal due process review.⁷⁵ Moreover, a takings claim seeking just compensation for the denial of the permit would have been reviewed under the *Penn Central* balancing test and would have almost assuredly failed.⁷⁶ On the other hand, takings jurisprudence mandates that government cannot simply appropriate private property without paying just compensation for what is taken.⁷⁷

Writing for the majority, Justice Scalia explained that the power to prohibit development does not necessarily include the power to impose any conceivable condition on a development permit.⁷⁸ Illustrating the point, he explained that a municipality could unquestionably authorize an ordinance prohibiting the shouting of “fire” in a crowded theater, but that it could not legitimately carve out an exception for individuals willing to pay a \$100 tax.⁷⁹ This is because the tax exception would be completely unrelated to the purpose of the prohibition. By analogy, he reasoned that the greater power to deny a development permit only includes the lesser power to impose conditions on permit approval where there is a connection, or “nexus,” to an adverse public harm that would justify an outright denial.⁸⁰ Without such a connection, a condition requiring dedication of property

75. *Nollan*, 483 U.S. at 843-44.

76. Generally, a *Penn Central* claim will fail unless the landowner is denied close to all economically beneficial uses of the property. *See, e.g.*, *CCA Assocs. v. United States*, 667 F.3d 1239, 1246, 1248 (Fed. Cir. 2011) (rejecting a takings claim despite the fact that the United States passed legislation specifically to void its contract with the property owner, therein forcing the owner to house low income families at below-market rates for a period of five years, and causing a loss of over eighty-one percent of the business’s net income [totaling \$700,000]).

77. *See Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546 (2005) (noting that in *Nollan*, “the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking.”).

78. The California courts had accepted the Coastal Commission’s argument that the contested condition could be imposed requiring dedication of a lateral easement across the Nollan family’s property, on the ground that their home—once constructed—would create a psychological barrier, which might inhibit the public from exercising their right to access the beach. *Nollan*, 483 U.S. at 835-36. In response, the Supreme Court acknowledged that such concerns might justify certain restrictions on the manner in which the property may be used. *Id.* Yet the majority reasoned that the Commission could only impose conditions that would mitigate harms that might justify denial outright. *See Lingle*, 544 U.S. at 547-48. As such, concerns over a “psychological barrier” could not be invoked to justify a requirement that the Nollan’s dedicate an easement to the public because the condition was completely unrelated to the asserted concern over the project’s impact on the public-psyche. *Nollan*, 483 U.S. at 838-39.

79. *Nollan*, 483 U.S. at 837.

80. *Id.* at 836-37.

is a naked transfer of wealth—an “out-and-out plan of extortion.”⁸¹

B. *DOLAN V. CITY OF TIGARD: THE ROUGH PROPORTIONALITY TEST*

While *Nollan* set forth the general principle that conditions imposed on permits must relate to the impact that the proposed project might have on the public, it offered courts little guidance on how to apply this test. The Supreme Court thus granted *certiorari* in *Dolan v. City of Tigard* to clarify the requirements of the nexus test.⁸² Specifically, *Dolan* presented the issue of whether it was necessary for the permitting authorities to demonstrate any particular degree of connection between the condition imposed and the adverse impact to be mitigated or whether any mere tenuous connection was sufficient.

In *Dolan*, a small business owner sought to expand her store and to enlarge her parking lot.⁸³ Since she was proposing a project that would likely result in greater stormwater runoff into nearby streams, it was reasonable to impose certain conditions to mitigate the impact her development would have on the watershed and the public water control infrastructure.⁸⁴ Similarly, the authorities could justify certain conditions to mitigate her project's impact on the city's transportation systems because, by enlarging her parking lot, she would likely increase vehicular traffic in the area.⁸⁵ But the City could not go “too far”—in the name of addressing these concerns—without running afoul of the Takings Clause.⁸⁶

Dolan created the “rough proportionality” requirement.⁸⁷ In other words, government must specifically tailor the demanded condition to mitigate anticipated harms from a development project.⁸⁸ This rationale comports with the original narrow conception of the police power because it disallows any condition unrelated to mitigating specifically anticipated public harm or beyond what

81. *Id.* at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981)).

82. The lower courts had applied *Nollan* in an inconsistent manner, “[w]ith many of the lower courts adopting a variant more akin to ‘plausible nexus,’” than any exacting fact-based standard. *EAGLE*, *supra* note 19, at § 7-10(b)(4).

83. *Dolan v. City of Tigard*, 512 U.S. 374, 379 (1994).

84. *Id.* at 392-93.

85. *Id.* at 395.

86. Some commentators have likened *Dolan*'s “rough proportionality” test to a heightened form of rational basis. *EAGLE*, *supra* note 19, at § 7-10(b)(4) (“It seems, on balance, that Rehnquist contemplated at least what the present author would refer to as a ‘rational basis in fact’ or ‘meaningful rational basis’ test.”) (citing Gerald Gunther, *Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972) (contemplating a “rational basis with bite”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1612 (2d ed. 1988) (referring to a test requiring an individualized assessment of the facts justifying a regulatory action as “covertly heightened scrutiny.”).

87. *Dolan* essentially adopted the “reasonable relationship” test that a majority of state courts had already implemented; however, Justice Rehnquist was explicit in rejecting the term “reasonable relationship” in favor of “rough proportionality.” *Dolan*, 512 U.S. at 390–91.

88. *Id.* at 391 (explaining that to enforce an exaction requirement, government bears the affirmative duty to make an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development . . .”).

is necessary to prevent the landowner from invading the rights of others.⁸⁹

Accordingly, *Dolan* held that an imposed condition is only legitimate if it is proportional to the anticipated public impact of the project.⁹⁰ The Court thus struck down conditions requiring Ms. Dolan to dedicate portions of her property to the public because those requirements exceeded what was necessary to mitigate public concerns.⁹¹ In other words, the City's concerns would have justified narrowly tailored conditions, but the power to impose conditions is constrained by the principle that restrictions must be truly necessary to mitigate affirmative public harms.⁹²

C. OPEN QUESTIONS IN THE WAKE OF *NOLLAN* AND *DOLAN*

1. Should *Nollan* and *Dolan* Apply to Legislative and Monetary Exactions?

Dolan might have clarified the nexus test, but the opinion also gave fodder to those contending that the test should be sparingly applied.⁹³ In offering an apparent basis for distinguishing exactions cases from other constitutional challenges to land use restrictions—where the courts have afforded government planners broad latitude—Justice Rehnquist noted “two relevant particulars.”⁹⁴ First, he suggested that the exactions in *Nollan* and *Dolan* could be distinguished from cases applying a more deferential standard because both *Nollan* and *Dolan* involved an “adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”⁹⁵ By contrast, he observed that those cases applying a more deferential standard of review concerned “legislative

89. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926). (reaffirming the common law origins of the police power in the law of nuisance); EAGLE, *supra* note 19, at § 2-1 (“The police power . . . preserve[s] the public order and prevent[s] offenses against the state. . . [and is] calculated to prevent [the] conflict of rights” (citing THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 572 (1868))).

90. *Dolan* quoted the Nebraska Supreme Court’s decision in *Simpson v. North Platte*, 292 N.W.2d 297 (Neb. 1980), to demonstrate the point. “The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.” *Dolan*, 512 U.S. at 391 (quoting *Simpson*, 292 N.W.2d at 302).

91. *Dolan*, 512 U.S. at 393.

92. *Id.* at 391 (“No precise mathematical calculation is required, but 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.”).

93. *Id.* at 385 (offering a potential ground for treating legislative exactions as different from exactions imposed on an *ad hoc* basis, the Court observed: “The sort of land use regulations discussed in [*Euclid*, *Pennsylvania Coal*, and *Agins*] . . . differ [sic] in [that] . . . they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”).

94. *Id.* at 385.

95. *Id.* But Rehnquist overlooks the fact that the California Coastal Act required the Coastal Commission to condition the *Nollan*’s permit approval on a requirement that they dedicate an easement to the public. Martin, *supra* note 2, at 19.

determinations classifying entire areas of [a] city”⁹⁶ Second, he suggested that the exactions in *Nollan* and *Dolan* could be distinguished on the ground that they concerned “a requirement to deed portions of their property[,]” as opposed to a challenge to a mere “limitation on . . . use.”⁹⁷

Not surprisingly, many commentators and courts latched onto this language, surmising that *Nollan* and *Dolan* are inapplicable in review of legislative and monetary exactions.⁹⁸ Throughout the late 1990s, and into the next decade, the trend was to strictly limit *Nollan* and *Dolan* to their facts.⁹⁹ For example, in *West Linn Corporate Park, L.L.C. v. City of West Linn*, the Oregon Supreme Court held that a condition requiring a landowner to improve public property was beyond the scope of *Nollan* and *Dolan*, on the ground that the condition was legislatively imposed.¹⁰⁰ Likewise, in *McClung v. City of Sumner*, the Ninth Circuit held that legislatively imposed exactions and monetary exactions must be reviewed under the amorphous *Penn Central* balancing test, which inevitably denies takings liability.¹⁰¹ Yet, there were reasons to question the trend toward limiting *Nollan* and *Dolan*—especially in light of a Supreme Court decision, on the heels of *Dolan*, summarily vacating an opinion of the California Court of Appeals that had held the nexus test inapplicable in review of monetary exactions.¹⁰²

96. *Id.*

97. *Id.*

98. In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), the Supreme Court offered further comments that led commentators to insist that *Nollan* and *Dolan* must be limited to *ad hoc* administratively imposed exactions. See, e.g., Jason M. Divilbiss, *The Public Interest is Vindicated: City of Monterey v. Del Monte Dunes*, 31 URB. LAW 371, 380 (1999) (suggesting that *Del Monte Dunes* establishes that the *Nollan* and *Dolan* threshold is limited to “the [n]arrow [c]ategorical [e]xceptions of [t]itle or [e]xaction [t]akings”); but see Steven J. Eagle, *Del Monte Dunes, Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10103-05 (2000) (“It seems highly unlikely that the Supreme Court would unanimously declare through dicta in *Del Monte Dunes* that the *Dolan* ‘rough proportionality’ principle should not develop to meet the exigencies of cases as they arise, much less to deal with deliberate municipal circumventions.”).

99. See, e.g., *In re Smith v. Town of Mendon*, 822 N.E.2d 1214, 1218 (N.Y. 2004) (refusing to apply *Nollan* and *Dolan* to conservation easements); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001) (refusing to apply *Nollan* and *Dolan* to monetary exactions); *Homebuilders Ass’n of Metro. Portland v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 411 (Or. Ct. App. 2003) (same); *Home Builders Ass’n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997) (refusing to apply *Nollan* and *Dolan* to legislatively imposed exaction requirements).

100. *W. Linn Corporate Park, L.L.C. v. City of W. Linn*, 240 P.3d 29, 45 (Or. 2010).

101. *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) *abrogated by* *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (“To extend *Nollan/Dolan* analysis here would subject *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police power.”).

102. The California Supreme Court ultimately held that monetary exactions are subject to review under *Nollan* and *Dolan* in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), but only after the U.S. Supreme Court granted *certiorari* and remanded the case after vacating a lower court decision that had refused to apply *Nollan* and *Dolan*. See *Ehrlich v. Culver City*, 19 Cal. Rptr. 2d 468, 471 (Cal. Ct. App. 1993), *vacated and remanded*, 114 S.Ct. 2731 (1994). In summarily vacating the Court of Appeals decision, some commentators inferred that the Court intended for *Nollan* and *Dolan* to apply in review of monetary exactions. See Stephen R. McCutcheon, Jr., *Lessened Protection for Property Rights—The Conjunction Application of the Agins v. City of Tiburon Disjunctive Test*, 27 PAC. L.J. 1657, 1675 (1996); see also Matthew S. Watson, *The Scope of the*

2. Implied Limited Application of *Nollan* and *Dolan*: *Lingle v. Chevron U.S.A.*

In *Lingle v. Chevron U.S.A.*, Justice O'Connor seemed to offer further authority for the proposition that monetary exactions are exempt from the nexus and rough proportionality tests. She explained that *Nollan* and *Dolan* only applied heightened scrutiny because the dedication requirements in those cases would have forced the landowners to surrender their right to exclude the public from their property.¹⁰³ "In each case, the Court began with the premise that, had government simply appropriated the easement in question, this would have been a *per se* physical taking[;]" both cases "involved dedications of property so onerous that, outside the exactions context, they would have been deemed *per se* physical takings."¹⁰⁴ From this, many courts and commentators drew a negative inference that exactions demanding waiver of something other than the right to exclude are reviewed under the less demanding *Penn Central* balancing test.¹⁰⁵

Supreme Court's Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions, 20 WHITTIER L. REV. 181, 205 (1998) ("The *Ehrlich* remand seems to indicate the new exaction test refined in *Dolan* is just that—a new exaction test, not merely a new physical exaction test."). Further hinting that *Nollan* and *Dolan* should apply in review of monetary exactions, Justices Scalia, Kennedy and Thomas dissented in denial of a petition for *certiorari* in *Lambert v. City and Cnty. of San Francisco*, 529 U.S. 1045 (2000), opining that: "When there is uncontested evidence of a demand for money or other property—and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) the denial would have ensued even if the demand had been met."

Nonetheless, many lower courts refused to apply *Nollan* and *Dolan* in review of monetary exactions. Compare *Ocean IV Homeowners Ass'n v. City of North Myrtle Beach*, 548 S.E.2d 595, 602 (S.C. 2001) (suggesting that the nexus and rough proportionality tests are only applicable in review of a requirement for dedication of real property); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (refusing to apply *Dolan* in review of traffic impact fee); *Waters Landing Ltd. v. Montgomery Cnty.*, 650 A.2d 712, 724 (Md. 1994) (limiting *Nollan* and *Dolan* to their facts); *with Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 824-5 (N.Y. 2003) (applying *Nollan* and *Dolan* in review of fees required in lieu of dedication); *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 635 (Tex. 2004) (applying *Nollan* and *Dolan* upon concluding that "[a] requirement that a developer improve an abutting street at its own expense is in no sense a land use restriction; it is much closer to a required dedication of property . . ."); *Trimen Dev. Co. v. King Cnty.*, 877 P.2d 187, 191 (Wash. 1994) (applying *Dolan* in review of ordinance imposing park development fees).

And the *still unresolved* question of whether *Nollan* and *Dolan* apply to legislative exactions has the lower courts just as divided. Compare *Town of Flower Mound*, 135 S.W.3d at 643 (declining to distinguish between legislatively and administratively imposed exactions in Texas); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000) (same); *B.A.M. Dev. L.L.C. v. Salt Lake Cnty.*, 196 P.3d 601, 603-04 (Utah 2008); *with Mead v. City of Cotati*, 389 Fed. Appx. 637, 638-39 (9th Cir. 2010) (limiting application of *Nollan* and *Dolan* to administratively imposed exactions); *Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011) (characterizing the landowner's invocation of *Nollan* and *Dolan* in challenge to legislatively required exactions as an "attempt to [find] . . . loopholes in the *Lingle* rule that challenges to regulation as not substantially advancing a legitimate governmental interest are not appropriate under the Takings Clause"). See also David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 567, 572-74 (1999) (surveying lower court opinions wrestling with the legislative exactions issue).

103. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546 (2005).

104. *Id.* at 546-47.

105. See, e.g., *McClung*, 548 F.3d at 1228.

Furthermore, Justice O'Connor was careful in repeatedly characterizing *Nollan* and *Dolan* as concerning "takings challenges to adjudicative land use exactions . . ." ¹⁰⁶ She offered this as a potential ground for distinguishing those cases from a takings claim challenging legislatively required exactions. Yet she offered no analysis or commentary to support her conclusion that this should be a meaningful distinction. She apparently relied on the fact that Justice Rehnquist had noted this as a potentially relevant distinction, but neither *Dolan* nor *Lingle* offers any theoretical grounding for why courts should view legislative exactions in a different light—beyond the vaguely articulated concern that the court must be careful not to upset the presumption of constitutionality that generally applies when a zoning restriction is challenged. ¹⁰⁷

In any event, Justice O'Connor's analysis of *Nollan* and *Dolan* was included as part of a broad restatement of takings law, and, therefore, was nonessential to her holding. ¹⁰⁸ In *Lingle*, the Court considered whether the Takings Clause requires government defendants to demonstrate that a challenged zoning restriction "substantially advances" a legitimate government interest. ¹⁰⁹ The Court rejected this test because the Takings Clause looks to the burden imposed on a landowner, as opposed to the propriety of a regulatory enactment. ¹¹⁰ *Lingle* thus repudiated the so-called "substantial advancement" test—making clear that *Penn Central's ad hoc* balancing test should apply in review of most takings claims and reaffirming that due process challenges are reviewed under the rational basis test outlined in *Village of Euclid v. Ambler Realty*. ¹¹¹

Accordingly, O'Connor addressed *Nollan* and *Dolan* only in so far as was necessary to explain why *Lingle's* repudiation of the "substantial advancement" test should not upset the continued validity of the nexus and rough proportionality tests. ¹¹² As she explained, those cases are not rooted in the "substantial advancement" test, but instead constitute a "special application of the unconstitutional conditions doctrine." ¹¹³ This explains why—unlike other takings tests—the nexus and rough proportionality tests look to the propriety of the challenged

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

107. *Id.* (citing *Dolan* and *Del Monte Dunes*).

108. *Id.* at 545 (stating that the holding in *Lingle* should not be understood to disturb the court's prior holdings in *Nollan* and *Dolan*).

109. *Id.* at 540 (rejecting the "substantially advances" formula as a due process test).

110. *Id.* at 529.

111. It may be a misnomer to refer to *Euclid* as requiring "rational basis review." We employ the term here simply because that is what most courts understand *Euclid's* test to require. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). But *Euclid's* actual wording requires a showing that the averred restriction "bears a rational relation" to some public good. *Id.* This standard is arguably more demanding than the toothless rational basis analysis applied in most zoning cases today. *Id.*

112. *Lingle* addressed *Nollan* and *Dolan* to make clear that the nexus and rough proportionality tests were not rooted in the substantial advancement test. See *W. Linn Corporate Park, L.L.C. v. City of W. Linn*, 240 P.3d 29, 41 (Or. 2010).

113. *Lingle*, 544 U.S. at 530.

regulatory action.¹¹⁴ Yet, although *Lingle* made clear that *Nollan* and *Dolan* remain viable, many courts severely limited their application, in part relying on O'Connor's commentary.

D. *KOONTZ V. ST. JOHNS RIVER MANAGEMENT DISTRICT*

1. Facts and Procedural History

The Supreme Court declined to offer further guidance on *Nollan* and *Dolan* until it decided *Koontz* in the spring of 2013. This case arose out of the Orlando area in Florida, where the Petitioner, Mr. Koontz, was denied a permit to build on his commercially zoned property in 1994.¹¹⁵ Mr. Koontz was an entrepreneur with plans to develop the subject property.¹¹⁶ Had he moved quickly when he acquired the land in 1972, he would have had little trouble in procuring the necessary permits. But, in 1984, Florida enacted comprehensive environmental reforms that now require a state agency to review development applications to ensure that proposed projects will not result in the loss of wetlands—a problem that the legislature thought pressing because Florida had experienced a significant reduction in wetlands over the past century.¹¹⁷ Thus, when Mr. Koontz sought his permit application, he needed approval from the St. Johns River Management District.¹¹⁸

The Management District was concerned that Mr. Koontz's project might adversely affect nearby wetlands, but the record lacked substantial evidence that the project would have any meaningful impact.¹¹⁹ Nonetheless, they pressed Mr. Koontz to make concessions, encouraging him to scale back his plans and insisting that he agree to a requirement that would forever prevent him from developing the remaining portion of his land.¹²⁰ Reluctantly, Mr. Koontz said he would agree to this condition, but the Management District then insisted on more conditions, which he believed would have rendered his project economically

114. In a certain respect *Nollan* constitutes a special application of the Takings Clause because it holds that courts should affirmatively enjoin government from imposing conditions that it deems improper. As *Lingle* made clear, the Takings Clause is generally unconcerned with the propriety of a contested regulatory decision, and the courts have all too often blurred due process concepts in the takings analysis. *Id.* at 540-41. Indeed, the Takings Clause generally assumes the government's authority to enact a restriction and asks merely whether the restriction goes "too far" in abrogating common law property rights. Yet *Lingle* confirmed that *Nollan* is rooted in the Takings Clause, not the due process clause—even though the nexus test asks whether a contested condition is proper. *Id.* at 546.

115. *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586, 2592-93 (2013).

116. *Id.*

117. See Henderson Act, 984 Fla. Laws § 403.905(1).

118. *Koontz*, 133 S. Ct. at 2592-93.

119. Based on the record, the Florida courts determined that there was no nexus between the conditions the agency was insisting upon and any impact the project would have on the public. *Id.* at 2593.

120. *Id.* at 2592-93.

unfeasible.¹²¹ Specifically, the Management District signaled it would only approve his permit if he agreed to improve offsite public property miles away, which would have required him to expend his own money.¹²²

When Mr. Koontz refused to accede to this contemplated condition, the Management District denied his permit application.¹²³ This precipitated a twenty-year legal battle wherein the Florida courts found that: (1) his permit application was denied because he refused to accede to the contested condition; and (2) the contested condition was unrelated to any impact that the project would have on the public.¹²⁴ With these determinations in mind, the courts then turned to the question of whether the Management District violated the Takings Clause by denying Mr. Koontz's permit.¹²⁵

Since the courts had already determined that the contested condition was unrelated to any impact his project might have had on the public, the Management District's best defense was to argue that the nexus test was entirely inapplicable. Accordingly, the District rested its case on the contention that *Nollan* and *Dolan* could not apply in monetary exaction cases. In the alternative, the District contended that the nexus and rough proportionality tests could not apply when a permit has been denied. The Supreme Court of Florida accepted those arguments, but the United States Supreme Court eventually rejected them.

2. The Nexus Test Applies to Monetary Exactions

Writing for the majority, Justice Alito opined that there is no principled basis for excluding monetary exactions from *Nollan* and *Dolan* review.¹²⁶ The Management District mounted its defense on the notion that the modern regulatory state would be impossible if government incurred potential takings liability every time regulation forces an individual or business to expend money.¹²⁷ The Management District pointed to *Eastern Enterprises v. Apfel*, where the Court rejected a constitutional challenge to a regulatory requirement that a coal company contribute to an employee retirement fund.¹²⁸ In that case, five justices concluded that

121. Br. of Pet. at 6, *Koontz v. St. Johns River Management Dist.*, Case No. 11-1447 (2012) (stating that the District's conditions "raised serious concerns about the continued economic feasibility of his modest project.").

122. *Koontz*, 133 S. Ct. at 2592-93.

123. *Id.*

124. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1223, 1231 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013) (noting the case's "extended procedural history").

125. Florida law requires that a landowner must be compensated when a permit denial violates the Takings Clause. FLA. STAT. § 373.617(3). Accordingly, Mr. Koontz sought compensation for the denial of his permit on the theory that it violated the essential holding in *Nollan*.

126. *Koontz*, 133 S. Ct. at 2600 ("We are not here concerned with whether it would be 'arbitrary or unfair' for respondent to order a landowner to make improvements to public lands that are nearby Whatever the wisdom of such a policy, it would transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a *per se* taking similar to the taking of an easement or a lien.").

127. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

128. *Id.*

the Takings Clause “does not apply to government-imposed financial obligations that “[do] not operate upon or alter an identified property interest.””¹²⁹

Relying on *Eastern Enterprises*, the Management District argued that the Takings Clause should not apply when a regulatory body requires an individual to spend financial assets to benefit the public.¹³⁰ But *Eastern Enterprises* was concededly only a plurality opinion, and the parties disputed whether its discussion of the Takings Clause was precedential. As counsel for Mr. *Koontz* argued—pointing to a line of cases predicated upon the assumption that the Takings Clause protects financial assets—a condemning authority could completely evade the requirement to pay just compensation if requirements to expend money were categorically excluded from the protections of the Takings Clause.¹³¹

In the end, the Court rejected the Management District’s arguments, holding that the Takings Clause protects financial assets just as it protects real property.¹³² Thus, heightened scrutiny applies where a permit is conditioned on a requirement to expend financial resources.¹³³ But *Koontz* leaves unresolved an important analytical issue: when does its rationale begin to undercut the principle that courts typically review land use restrictions under a highly deferential standard?¹³⁴

On the one hand, the Court was clear in holding that an affirmative requirement to dedicate personal resources to improve public property implicates *Nollan* and *Dolan*.¹³⁵ Yet the opinion offers no doctrinal basis for distinguishing between such a condition and a run-of-the-mill zoning requirement that might necessitate a financial expenditure. For example, a zoning code might mandate that new homes must meet the standards for LEED certification, as set forth by the U.S. Green Building Council, or might impose a requirement that new industrial facilities must install best available technologies to reduce greenhouse gas emissions.¹³⁶

129. *Koontz*, 133 S. Ct. at 2590 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).

130. *Id.* at 2598-99.

131. Apparently, Justice Alito thought this a compelling point. At the preface of his analysis, he noted that “if we accepted this argument it would be very easy for land use permitting officials to evade the limitations of *Nollan* and *Dolan*.” *Id.* at 2599.

132. *Id.* at 2600.

133. *Koontz* stands for the essential proposition that government cannot use the permitting process as an excuse to force special concessions from individuals or businesses. *Id.*

134. The opinion suggests only that the exaction requirement must be linked to an identifiable property interest. *Id.* (“[P]etitioner does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money Instead, petitioner’s claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a ‘*per se* [takings] approach’ is the proper mode of analysis under the Court’s precedent.”) (citing *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003)).

135. *Id.*

136. *See, e.g., BOS., MASS., Zoning Code art. 37* (2015) (requiring all large-scale projects to meet U.S. Green Building Council’s LEED certification standards).

This sort of regulation undoubtedly imposes added costs on property owners seeking to develop their land.¹³⁷ But our due process jurisprudence recognizes that such regulations are valid, and the courts have long applied the *Penn Central* balancing test to defeat takings claims challenging regulations that make it more costly to develop land, unless the restrictions wholly deprive the landowner of all economically beneficial uses. Accordingly, the simple answer might be that requirements imposed by statutes are categorically exempt from *Nollan* and *Dolan* review. But as we explain in the following sections, there are compelling reasons to reject a categorical legislative-exactions exception.¹³⁸ As such, the Court may eventually endeavor to draw a line in the sand.¹³⁹

3. The Nexus Test Applies to Extortionate Denials

In addition to addressing the long-standing question of whether *Nollan* and *Dolan* apply to monetary exactions, *Koontz* addressed the question of whether a court should review a permit denial under *Nollan* and *Dolan*. The Management District argued that nothing is actually taken when a permit is denied unless the denial goes so far as to amount to a taking under the *Penn Central* balancing test or the *per se* test set forth in *Lucas v. South Carolina Coastal Council* for total deprivation of economically beneficial uses.¹⁴⁰ To be sure, Mr. Koontz was never affirmatively required to expend money or to do anything—he was simply forced to submit a new permit application if he wanted to attain approval to build.¹⁴¹ Thus, the Management District maintained that Mr. Koontz could only invoke the Takings Clause to challenge the permit denial—not to challenge the alleged

137. See *Koontz*, 133 S. Ct. at 2600 (suggesting that a regulatory requirement directing someone to spend money may well be reviewed under the *Penn Central* balancing test, but indicating that the nexus and rough proportionality tests are triggered where the “government commands the relinquishment of funds linked to a specific, identifiable property interest . . .”).

138. See Christopher T. Goodin, *Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: “A Distinction Without a Constitutional Difference,”* 28 U. HAW. L. REV. 139, 158-67 (2005); David L. Callies & Christopher T. Goodin, *The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard After Lingle v. Chevron U.S.A., Inc.,* 40 J. MARSHALL L. REV. 539, 563-64 (2007); Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide,* 38 URB. LAW. 487, 501-21 (2006).

139. Unfortunately the line may prove to be exceedingly difficult to draw. It may be that the only principled basis for drawing a line would be to distinguish between conditions affirmatively requiring the expenditure of personal resources for the public good—when tied to approval of a permit—and regulations that merely result in lost economic value. This potential distinction would review mere prohibitions (e.g., set-back requirements or height limitations) under the *Penn Central* balancing test, but would apply *Nollan* and *Dolan* in review of proscriptive requirements that necessarily impose higher costs (e.g., a requirement to satisfy LEED certification). Still, even this limited approach would work a quiet revolution in land use law.

140. *Koontz*, 133 S. Ct. at 2596.

141. See *St. Johns River Mgmt. Dist. v. Koontz*, 5 So.3d 8, 20 (2009) (“In what parallel legal universe or deep chamber of Wonderland’s rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner.”) (Griffin, J. dissenting).

extortionate conditions, or the District's impropriety. The argument boiled down to the notion that one can only challenge a condition once it has been imposed, and, until then, contemplated conditions are merely hypothetical.

But, as Justice Alito recognized, such an approach would effectively allow permitting authorities to subvert *Nollan* and *Dolan* by requiring landowners to agree to questionable permitting requirements as a condition precedent to permit approval.¹⁴² Thus, though Mr. Koontz had not actually given up any property interest, the Court held that *Nollan* and *Dolan* must apply.¹⁴³ In explaining this result, Justice Alito expounded upon the doctrinal foundations of *Nollan* and *Dolan*.

Recognizing that *Nollan* and *Dolan* are rooted in the unconstitutional conditions doctrine, the Court held that permitting authorities cannot evade the nexus and rough proportionality tests by simply denying a permit application.¹⁴⁴ *Koontz* made clear that the constitutional violation occurs when the landowner is forced into a choice between (a) exercising the right to develop, subject to a requirement to waive Fifth Amendment rights and (b) denial of a permit application.¹⁴⁵ As such, there is no requirement that a landowner must first waive constitutional rights to invoke the doctrine.¹⁴⁶

E. STILL UNANSWERED QUESTIONS AND SCHOLARLY REACTIONS TO *KOONTZ*

The scholarly reactions to the *Koontz* decision range from extreme anger¹⁴⁷ to complaints that the opinion did not go far enough.¹⁴⁸ Commentators have, however, offered little insight about its application to legislative exactions.

1. *Koontz's* Harshest Critic

The harshest academic criticism of the *Koontz* decision so far has come from University of Vermont Law School professor John D. Echeverria, who is

142. *Koontz*, 133 S. Ct. at 2595 (“A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands as conditions precedent to permit approval.”).

143. *Id.* at 2595-97.

144. *Id.*

145. *Id.*

146. *Id.* at 2596 (“Even 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.”).

147. See generally John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. (2014); see also Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill? —The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 *TOURO L. REV.* 455, 468 (2014) (“The Court ignored past precedent and created an amorphous, ill-defined legal standard that lower courts will have difficulty applying.”).

148. See Richard A. Epstein, *A Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 *HARV. J.L. & PUB. POL'Y* 23, 37 (2014) (arguing that the *Koontz* attorneys should have challenged the doctrine of environmental mitigation).

renowned as a leading commentator on regulatory takings. In an article with a title that does not hide his feelings about the case—*Koontz: The Very Worst Takings Decision Ever?*—Echeverria argues that the decision “conflicts with established doctrine,” “misrepresents pertinent precedent,” and has “cast a pall of confusion over takings law as a whole.”¹⁴⁹ He does, however, acknowledge the difficulties faced by the opinion’s author, Justice Samuel Alito, in holding a 5 to 4 majority for a decision that took over five months from oral argument to release.¹⁵⁰

Echeverria challenges what he describes as the Court’s two major doctrinal innovations: (1) that *Nollan* and *Dolan* apply to challenges to government decisions that deny development permits after a landowner has rejected a government demand for an exaction; and (2) that monetary exactions are subject to *Nollan* and *Dolan*. Although he predicts practical negative effects from the decision, his primary thesis “takes the approach of analyzing *Koontz* relative to the baseline defined by prior law,” or at least his interpretation of prior law.¹⁵¹

First, with regard to applying exactions doctrine to permit denials, Echeverria argues¹⁵² that *Koontz* conflicts with the Court’s previous decision in *City of Monterey v. Del Monte Dunes at Monterey*, which, in dicta, stated 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.”¹⁵³ Echeverria argues that the Court erred in allowing *Koontz* a *Nollan* and *Dolan* remedy. Instead, *Koontz* could have brought a due process challenge on the theory that the permit denial was arbitrary and unreasonable in these circumstances.¹⁵⁴ Or he could have brought a regulatory takings claim.¹⁵⁵ Of course, litigants rarely win either of these types of challenges.¹⁵⁶ Indeed, the poor hand that the law deals to plaintiffs with such claims could have contributed to the Supreme Court’s decision to open another route for property owners that, even Echeverria acknowledges, have claims with “intuitive appeal.”¹⁵⁷

Second, Echeverria argues that “Justice Alito used convoluted, illogical thinking to support” the Court’s extension of *Nollan* and *Dolan* to permit

149. Echeverria, *supra* note 147, at 1.

150. *See id.* at 1-2.

151. *Id.* at 3.

152. *See id.* at 20.

153. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999). *But see* Martin, *supra* note 2, at 17 (“But *Del Monte Dunes* was not a case involving a government attempt to use extortion to get something of value in exchange for a permit.”).

154. Echeverria, *supra* note 147, at 20.

155. *Id.*

156. *See* F. Patrick Hubbard *et al.*, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENV. L. & POL’Y 121, 141-42 (2003) (finding that property owners prevail in fewer than 10 percent of *Penn Central* cases).

157. Echeverria, *supra* note 147, at 20.

conditions involving money.¹⁵⁸ Echeverria's primary doctrinal problem is that *Nollan* and *Dolan* rest on the premise that "the permit condition, considered independently, would constitute a *per se* taking," but a monetary condition, "far from constituting a *per se* taking, is not even subject to challenge as a potential taking under the Takings Clause."¹⁵⁹ Thus, a monetary taking, in Echeverria's view, cannot properly be subject to *Nollan* and *Dolan*.¹⁶⁰

Finally, Echeverria outlines some practical objections to the Court's decision in *Koontz* and looks ahead to potential issues for the lower courts.¹⁶¹ Most relevant here, Echeverria acknowledges that, at least 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."¹⁶² Not surprisingly, given his overall view of *Koontz* and takings generally, Echeverria advocates for the narrower position—that *Nollan* and *Dolan* should be limited to *ad hoc* fees and not legislative exactions.¹⁶³

Echeverria's positions are interesting, and certainly informed, but their usefulness is limited by the fact that, regardless of his view about whether *Koontz* analyzed the prior cases appropriately, the Court issued the decision, and there is no turning back. The most pertinent questions are about how lower courts and the relevant players should adjust to *Koontz*.

2. Other Commentators Support the Court's Decision in *Koontz*

George Mason University School of Law Professor Ilya Somin, a leading commentator on eminent domain and regulatory takings, approaches *Koontz* and property rights more generally from a different perspective than Echeverria, but agrees that the decision matters: *Koontz* "could turn out to be the most important property rights victory in the Supreme Court in some time."¹⁶⁴

Somin specifically responds to the permit denial criticisms by Echeverria, who he describes as "a leading critic of judicial enforcement of restrictions on land use regulation and eminent domain," by explaining that Echeverria's complaints

158. *Id.* at 32.

159. *Id.* at 34.

160. *Id.*

161. *Id.* at 39-45.

162. *Id.* at 54.

163. *Id.* at 54-56. Echeverria offers little to support this conclusion, other than a couple of partial quotes from *Dolan* and *Lingle*. In *Dolan*, the Court stated 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." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1987). And in *Lingle*, the Court stated that *Nollan* and *Dolan* "involved Fifth Amendment takings challenges to adjudicative land use exactions." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546 (2005).

164. Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause*, 2013 CATO SUP. CT. REV. 215, 216 (2013).

prove too much as they would apply to any unconstitutional conditions case.¹⁶⁵ The solution is simple: “In practice [] governments can deal with the danger of lawsuits by restricting the demands they impose on landowners to those that are unlikely to violate the Takings Clause—just as they currently try to avoid making demands that would force landowners to give up other constitutional rights.” And even demands implicating the Takings Clause would survive constitutional scrutiny, so long as government couples them with adequate compensation.¹⁶⁶

With regard to monetary exactions, Somin takes a similar approach. Once again responding to Echeverria and, in fact, Justice Elena Kagan, who both warn about a flood of litigation from the decision, Somin explains that a “key problem with this sort of criticism of *Koontz* is that it can just as readily apply to federal judicial protection of a wide range of other constitutional rights that might be infringed upon by state and local government action.”¹⁶⁷ Somin acknowledges, however, that more litigation could result.¹⁶⁸ But “such an increase is [] as much a feature as a bug. It can help clarify applicable legal standards and deter officials from future rights violations.”¹⁶⁹ Finally, in response to Justice Kagan’s concern that it may not be easy to distinguish taxes from monetary exactions, Somin references the purpose of the Takings Clause itself—to “bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁷⁰ So, although the precise line may be elusive, the distinction is informed by the answer to the question of whether the exaction applies to all property owners or whether it is more narrowly targeted at individual landowners or small groups.¹⁷¹

In defending the *Koontz* decision, Christina Martin, an attorney at Pacific Legal Foundation, which argued *Koontz*, briefly addresses the question of whether legislatively imposed exactions now implicate *Nollan* and *Dolan*.¹⁷² She explains that the Supreme Court’s attempt in *Dolan* to distinguish the case from prior precedent validating zoning laws incorrectly led many to conclude that *Nollan* and *Dolan* “could apply only to adjudicative decisions.”¹⁷³ But *Dolan*

165. *Id.* at 230 (“If the government is not allowed to demand restrictions on freedom of speech, religion, Fourth Amendment rights, or any other constitutional rights when it negotiates with private parties, there is a chance that it will instead refuse to negotiate and simply deny permits—or, alternatively, issue them unwisely.”).

166. *Id.*

167. *Id.* at 231. “If demands for monetary payments can be used to circumvent the Takings Clause, they can also be used to get around the First Amendment, the Fourth Amendment, and most other individual rights.” *Id.* at 237.

168. *See id.* at 232.

169. *Id.*

170. *Id.* at 239.

171. *Id.*

172. Martin, *supra* note 2, at 18-19.

173. *Id.*; *see, e.g.,* *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 640 (Tex. 2004) (explaining that “as far as we can tell, all courts of last resort to address the issue” limit *Nollan* and *Dolan* to adjudicative exactions).

itself involved a legislatively mandated exaction codified under state law.¹⁷⁴ Thus, according to Martin, the distinction between *Nollan* and *Dolan* and the Court's prior zoning decisions is instead that the property owners "give up something of value in exchange for favorable treatment by government."¹⁷⁵ The dividing line is not, in fact, *ad hoc* versus legislative.¹⁷⁶

Other commentators complain that the *Koontz* Court did not go far enough. University of Chicago Law School Professor Richard A. Epstein, for example, offers a philosophical defense for the theory underlying the Court's decision in *Koontz*.¹⁷⁷ Epstein explains that when an exaction demand has "nothing to do with either harms prevented or benefits conferred," a local government faces "no price constraint that might lead it to moderate its demands" because the expenditure is not "on budget."¹⁷⁸ The purpose of eminent domain is to allow governments to take property and "move it into public control where we have some degree of confidence that its value in public hands is greater than its value in private hands."¹⁷⁹ But to fulfill that purpose, government has to make the right comparison and it can only do so when it must internalize the cost of its demands.¹⁸⁰

Epstein then, in a subsequent article, complains that the Court, and indeed *Koontz*'s attorney before the Court, should have challenged the doctrine of "environmental mitigation" before even reaching the takings issues.¹⁸¹ Epstein criticizes the very notion that "the government somehow owns an environmental easement over all property, which it will waive only if private individuals engage in acts of environmental mitigation."¹⁸² The Court in *Koontz*, of course, decided the case taking for granted that government can require mitigation related to environmental impacts. The point, however, is that when the exactions, monetary

174. Martin, *supra* note 2, at 19.

175. *Id.*

176. Cf. Molly Cohen et al., *Case Comment: Revolutionary or Routine? Koontz v. St. Johns River Water Management District*, 38 HARV. ENVTL. L. REV. 245, 257 (2014) ("If courts instead apply *Koontz* to all impact fees, erasing the longstanding legislative/ad hoc distinction recognized by many states, the on-the-ground effect will likely be considerable."). The authors explain that "[a]n across-the-board application of *Koontz* to all monetary exactions would force state and local governments to make individualized determinations of property owners' impacts without room for the local variation that courts in many states have been careful to preserve, and would indeed work a revolution on the traditionally local area of land use planning and regulation." *Id.*

177. Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 Touro L. REV. 265, 291-294 (2014).

178. *Id.* at 291.

179. *Id.* at 292 ("That process works well when the state puts cash on the barrelhead, but it does far worse when the state is allowed to add conditions to the mix, as by holding a building permit worth thousands of dollars hostage to an easement to cross land worth only a fraction of that amount.")

180. *Id.*; see also Somin, *supra* note 164 at 234 ("Forcing governments to internalize the costs that their regulations impose on landowners, will strengthen incentives to adopt only those regulations whose benefits are likely to exceed their costs.")

181. Epstein, *supra* note 148, at 37.

182. *Id.*

or otherwise, are neither related nor proportionate to the environmental or other externality, government must pay compensation in exchange for the requirement.

IV. UNDERLYING IMPLICATIONS AND THEORETICAL FOUNDATIONS OF *KOONTZ*

A. RECENT CASES AFFIRM THAT *PER SE* DEFENSES ARE HIGHLY QUESTIONABLE

The *Koontz* decision immediately followed *Arkansas Game & Fish Commission v. United States*, where the Court unanimously rejected a categorical rule immunizing government against takings liability for temporary floods.¹⁸³ In that case, the Army Corps of Engineers repeatedly flooded land owned by the State of Arkansas and eventually caused hundreds of thousands of dollars in damage to timber.¹⁸⁴ The Arkansas Game & Fish Commission brought a takings claim in the Federal Court of Claims, which issued a judgment that the United States had effected a taking. On appeal, the Federal Circuit held that there could be no takings liability because the flooding was non-permanent.¹⁸⁵ But, in reversing, Justice Ginsberg emphasized that there are very few *per se* defenses in our takings jurisprudence, opining that courts should review takings claims on their particular facts.¹⁸⁶

In fact, both *Koontz* and *Arkansas Game & Fish* demonstrate an unwillingness to embrace categorical defenses.¹⁸⁷ The *Koontz* opinion did not, of course, explicitly reiterate the principle that *per se* defenses are suspect. But, in rejecting both posited exceptions to *Nollan* and *Dolan*, the Court once again refused to embrace categorical rules limiting government's liability under the Takings Clause.¹⁸⁸ Rather, the Court expressed particular concern about the monetary exactions exception because a litigant could easily invoke it to circumvent the just compensation requirement for taking real property.¹⁸⁹

Last term, in *Horne v. U.S. Department of Agriculture*, the Supreme Court once more rejected a posited categorical defense, holding that the Takings Clause

183. *Arkansas Game & Fish Comm'n v. U.S.*, 133 S.Ct. 511, 522 (2012).

184. *Id.* at 515-16.

185. It was well established that takings liability arises when government permanently floods private property, or effects a *permanent* change that results in on-going recurrent flooding. *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, (1871); *United States v. Cress*, 243 U.S. 316, 325 (1917). But, the United States defended this takings claim arguing that there could be no takings liability if government causes only one flood, or if the actions causing flooding are suspended—regardless of how much damage may be caused to private property. *Arkansas Game & Fish Comm'n v. United States*, 637 F.3d 1366, 1378-79 (Fed. Cir. 2011) *rev'd and remanded*, 133 S. Ct. 511 (holding that because the flooding “was only temporary, [it could] not constitute a taking.”).

186. *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518 (“In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.”).

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

188. Despite her apparent repudiation of categorical rules in *Arkansas Game & Fish*, it must be noted that Justice Ginsberg dissented in *Koontz*. *Id.* at 2603-12.

189. *Id.* at 2599.

applies just the same when government seeks to take personal property as when it appropriates real property.¹⁹⁰ This further suggests that the Court may reject the legislative exactions exception as another overly simplistic *per se* defense. The burden presumably rests on government to offer a doctrinal basis for the legislative exception.

Moreover, in these recent cases, the Court was unimpressed when government relied—in the absence of firm doctrinal footing—on a “parade of horrors” line of argument.¹⁹¹ The rationales in these decisions suggest that the Court will dismiss an alarmist argument premised simply on the idea that it will otherwise be more difficult for government to carry out regulatory programs. Of course, this may not signal a doctrinal shift in the Court’s application of the Takings Clause so much as a *sui generis* approach in these cases. But the Court’s refusal to reflexively accept government’s policy concerns is consistent with the well-established principle that the Takings Clause rejects utilitarian considerations.¹⁹²

B. KOONTZ SUGGESTS THAT COURTS SHOULD REJECT ANY CATEGORICAL RULE THAT MIGHT ALLOW SYSTEMATIC CIRCUMVENTION OF *NOLLAN* AND *DOLAN*

Justice Alito’s opinion in *Koontz* suggests that courts should reject any rule that would allow government to immunize itself from the strictures of the nexus and rough proportionality tests.¹⁹³ Though not expressly invoking the maxim, Alito’s rationale embraced the precept that no man should be able to benefit from his own wrongdoing.¹⁹⁴ That is, he recognized an essential problem with a formalistic exception that would allow permitting authorities to evade heightened scrutiny when the constitutional injury would be the same with or without the exception. As Alito explained, the unconstitutional conditions doctrine recognizes the same constitutional injury, i.e., a government-forced choice between (a) foregoing development opportunities, while preserving Fifth Amendment rights and (b) sacrificing those rights in order to obtain authorization to carry out development—regardless of whether the condition is imposed as a term of an approved permit or as a precondition of permit approval.¹⁹⁵

190. See generally, *Horn v. Dep’t of Agric.*, 133 S. Ct. 2053 (2015).

191. *Arkansas Game & Fish Comm’n v. U.S.*, 133 S.Ct. 511, 521 (2012) (noting that “[t]he sky did not fall after *Causby* and today’s modest decision argues no deluge of takings liability.”); *Koontz*, 133 S. Ct. at 2600 (dismissing the dissent’s concerns as “exaggerate[d]”).

192. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

193. *Koontz*, 133 S. Ct. at 2595 (“A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.”).

194. See *Messersmith v. Am. Fid. Co.*, 133 N.E. 432, 433 (1921) (Cardozo, J.) (“[N]o one shall be permitted to take advantage of his own wrong . . .”).

195. *Koontz*, 133 S. Ct. at 2595 (“[W]e have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions

Of course, this rationale applies equally to the potential legislative exactions exception to *Nollan* and *Dolan*. Indeed, the constitutional injury is the same regardless of whether a government entity imposes a condition requiring dedication of real property at its discretion or through an enacted zoning code.¹⁹⁶ Either way, the permit applicant must choose between waiving the constitutional right to just compensation as a condition of permit approval or forestalling development plans.¹⁹⁷

C. ELUCIDATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE IN *KOONTZ*
GIVES A DOCTRINAL BASIS FOR REJECTING THE LEGISLATIVE EXCEPTION

While *Dolan* explained that the nexus and rough proportionality tests constitute a “special application of the unconstitutional conditions doctrine[,]” the Court did not really elucidate the theoretical underpinnings of this doctrine in the land use permit context until *Koontz*.¹⁹⁸ In its classic formulation, the unconstitutional conditions doctrine holds that government cannot force an individual to choose between a discretionary benefit and exercising constitutional rights.¹⁹⁹ For example, government cannot condition an award of unemployment benefits,²⁰⁰ or a tax credit, on a requirement to waive First Amendment rights.²⁰¹

Koontz made clear that an unconstitutional conditions violation occurs with the imposition of a choice between attaining permit approval and giving up a property interest because that amounts to a demand to waive the constitutional right to receive just compensation for the taking of that property interest.²⁰² Moreover, the Court suggests that the doctrine has special force in the land use permit context because constitutional rights are laid before the guillotine on either side of the equation when a permit is conditioned on a requirement to give up an interest in property.²⁰³ This is because the right to make reasonable use of

doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”).

196. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 542 (2005) (emphasizing that the takings injury is in the imposition of regulatory measures that severely burden property in “*magnitude or character*”).

197. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177-78 (1871) (applying a takings analysis despite formalistic problems with the pleadings).

198. *Id.* at 530.

199. Sullivan, *supra* note 74, at 1415.

200. *See Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963) (holding that state could not apply eligibility provisions of an unemployment compensation statute so as to deny benefits to claimant who had refused employment on account of her religious beliefs).

201. *See Speiser v. Randall*, 357 U.S. 513, 535-36 (1958).

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

203. In noting that “land use permit applicants are especially vulnerable to [extortionate dedication demands] . . . because the government often has broad discretion to deny a permit that is worth far more than property it would like to take[.]” the opinion suggests that there is something especially concerning about government taking advantage of the economic reality that a landowner will usually have little recourse to challenge an outright denial. *Id.* at 2594-95 (explaining that in the land use context the unconstitutional conditions doctrine works to protect the landowner’s right to use his or her property without extortionate

one's property is a constitutional right in itself as opposed to a mere "discretionary benefit."²⁰⁴

Though *Koontz* did not address the potential legislative exactions exception, its rationale should foreclose such an exception. If the *sine qua non* of an unconstitutional conditions violation is government's imposed choice between giving up a constitutional right to attain something wanted and foregoing the wanted item, it does not matter whether the choice arrives by legislative enactment or through the discretion of permitting authorities.²⁰⁵ Still, until the Supreme Court squarely addresses the question, the lower courts will struggle with this issue.²⁰⁶

D. THE RATIONALE IN *KOONTZ* MAY APPLY IN NON-LAND USE PERMIT CASES

Koontz was a land use permit case. But its rationale may apply equally in any situation where an individual or business must obtain administrative approval before engaging in regulated conduct.²⁰⁷ Indeed, the unconstitutional conditions doctrine has been understood to impose substantive limitations on the conditions that may be imposed on a permit or license to engage in a specific trade or business practice.²⁰⁸ To be sure, the Supreme Court first articulated the doctrine in *Frost Trucking v. California*, striking down a California statute that unconstitutionally conditioned the right of commercial carriers to operate on public

government demands, while accommodating the reality that a landowner must be required to bear the full costs of their proposals in order to avoid negative externalities).

204. Nonetheless, as *Koontz* recognizes, land use authorities retain broad discretion to deny permit applications without incurring takings liability—so much so that a permit approval may be viewed in some respect as a “gratuitous governmental benefit.” *Id.* at 2596. But, this reality—that government retains such broad latitude to deny a permit application—was in itself a concern for the *Koontz* court in so far as ensures that a landowner will have little choice but to accede to a government demand for dedication of a property interest, where that interest is less valuable than the permit would be. *Id.* at 2595.

205. *Koontz* made clear that the “principles that undergird [the unconstitutional conditions doctrine] do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.” *Id.* at 2595. This suggests that the unconstitutional conditions doctrine should apply with the same force—regardless of how the government styles its conduct—where there is a forced choice between attaining a permit approval and satisfying an extortionate dedication requirement.

206. One conceived basis for this distinction is that legislative bodies are—*hypothetically*—less likely to treat the permitting process as an opportunity to force valuable concessions from landowners. The assumption is that legislative bodies are more accountable to the people; however, this discounts the fact that legislative bodies are often spurred by the utilitarian impulse, which would sacrifice the interest of a few individuals for the benefit of the community on the whole. In any event, this rationale offers no doctrinal basis for concluding that the same extortionate condition should be reviewed under a different standard when a legislative body imposes the very same constitutional injury.

207. *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 154 (1968) (The unconstitutional doctrine is most applicable where government threatens denial of “benefits . . . [for which the] individual is reluctant to forego . . .”).

208. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (rebuffing Rhode Island's argument that as a condition of entering business in Rhode Island companies waive First Amendment rights).

highways.²⁰⁹

Because the *Koontz* decision offers clear guidance on how courts should apply the unconstitutional conditions doctrine, litigants may usefully engage the doctrine to contest over-regulation. *Koontz* reiterates that the doctrine protects property rights; it is logical to assume that it should equally protect economic liberties as well.²¹⁰ Thus, for example, businesses might contest regulations requiring them to display certain notices because they condition the right to conduct lawful business operations on a requirement to waive First Amendment protections against compelled speech.²¹¹ The unconstitutional conditions doctrine may also offer business licensees a ground to contest conditions that require the business to waive their constitutional rights against unreasonable searches or self-incrimination.²¹² And of course, a citizen or business could invoke *Koontz* if a commercial license or some other discretionary benefit is made contingent on a requirement to improve public properties, or to pay monies unrelated to the purpose of the regulatory regime.

V. APPLYING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND DEDICATION REQUIREMENTS AFTER *KOONTZ*

A. SHOULD LEGISLATIVELY IMPOSED EXACTIONS BE REVIEWED UNDER *NOLLAN*, *DOLAN*, AND *KOONTZ*?

Here we consider the future of exactions law. Specifically, we address a few recurring issues. For the sake of this discussion, we consider a hypothetical zoning code requiring developers to dedicate aviation and open space easements as a permit approval condition. And because our hypothetical City Council was concerned about the rising costs of housing, we consider the constitutionality of a provision requiring developers to pay a fee to subsidize affordable housing as a condition of permit approval. The threshold question is whether *Nollan* and *Dolan* should apply to these legislatively imposed exactions. We answer in the affirmative.

209. See *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 590, 593-94 (1926) (striking down a California law that prohibited out-of-state commercial carriers from using public highways unless they would assent to a regulatory regime that California was constitutionally forbidden from directly imposing on these companies).

210. Economic liberties and property rights are constitutionally protected rights, but are both relegated to the disfavored status of non-fundamental under the modern bifurcated approach to due process. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

211. See *Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 956 (D.C. Cir. 2013).

212. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost*, 271 U.S. at 594.

1. Mixed Signals From *Lingle*

Because courts had increasingly embraced the legislative exactions exception before *Koontz*, it makes sense to stake the defense of our hypothetical dedication requirements on the theory that legislatively imposed exactions should be reviewed under *Penn Central*, not *Nollan* and *Dolan*.²¹³ Setting aside *Koontz* for the moment, *Lingle* seems to lend support for this proposition, at least on first blush.²¹⁴ Indeed, the opinion assumes that there is a relevant distinction between legislatively imposed exactions and those imposed at the discretion of an administrative body.²¹⁵

Yet, in the substantive portion of the *Lingle* opinion—where the Court rejected the “substantial advancement” test—Justice O’Connor outlined a general principle of takings law, which undercuts the theory that legislative exactions should be treated differently. Specifically, she explained that any proper takings test must look to the *burden* imposed by a regulatory restriction because the test must ultimately ask whether the restriction goes too far.²¹⁶ Accordingly, it makes little sense to exclude legislatively imposed exactions from review under the nexus and rough proportionality tests where the burden imposed on property rights is the same regardless of whether the condition was imposed at the discretion of an adjudicative body, or pursuant to an enactment passed by a legislative body. Indeed, a requirement to dedicate an easement is no less onerous if blessed by a legislative enactment: the constitutional injury is the same either way.

2. *Frost Truck Co. v. California* and *44 Liquormart, Inc. v. Rhode Island* Suggest that there is No Doctrinal Basis for Excluding Legislative Conditions

Despite continued insistence by various commentators that there should be an exception to *Nollan* and *Dolan* for legislatively imposed exactions, there is no

213. To be sure, many commentators have made this argument. See, e.g., Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 533-35 (2012) (stating that the “Court strongly implied—if not expressly declared—that the strictures of *Dolan* (and by implication *Nollan*) are inapplicable to exactions that are part of a community plan and broadly applicable[.]” and that *Lingle* appears to confirm that understanding.”); Benjamin S. Kingsley, *Making It Easy to Be Green: Using Impact Fees to Encourage Green Building*, 83 N.Y.U. L. REV. 532, 560-61 (2008).

214. See Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 607 (2009) (observing that while “two United States Supreme Court justices have weighed in . . . [to] directly assert that *Dolan* (and implicitly *Nollan*) should be applied to legislatively imposed fees[.]” the “unanimous *Lingle* Court seemed to reach the opposite conclusion.”).

215. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546 (2005).

216. *Id.* at 529 (emphasizing that any legitimate takings test must focus on “the magnitude or character of the burden a particular regulation imposes upon private property rights or how any regulatory burden is distributed among property owners.”).

apparent basis for invoking a legislative exception.²¹⁷ Unconstitutional conditions cases confirm that the doctrine applies with equal force to legislative enactments. Indeed, the seminal unconstitutional conditions case—*Frost Trucking*—addressed a California statute (a legislative exaction) that unconstitutionally required private carriers to “dedicate [their] property to the business of public transportation and [to] subject [themselves] to all the duties and burdens imposed by the act upon common carriers.”²¹⁸ Since the Supreme Court recognized that the State of California was constitutionally prohibited from converting private carriers into common carriers “by mere legislative command,” the Court held that California could not accomplish that same end by enacting a law requiring private carriers to voluntarily submit themselves to being common carriers.²¹⁹

Invoking the unconstitutional conditions doctrine, courts have found many legislative enactments to impose unconstitutional conditions on the exercise of discretionary benefits. For example, in *44 Liquormart Inc. v. Rhode Island*, the Court struck down a Rhode Island law regulating commercial speech.²²⁰ Likewise, in *United States v. American Library Association, Inc.*, the Court held unconstitutional a statute conditioning receipt of government funds on a restriction of First Amendment rights.²²¹

Unconstitutional conditions cases have never distinguished between legislatively imposed conditions and those imposed at the discretion of an administrative body; the constitutional injury is identical in either case.²²² More fundamentally, unconstitutional conditions cases suggest that a legislative exaction exception would inappropriately allow government to systematically coerce waiver of protected rights. As the Court explained in *Frost Trucking Co.*, “[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all.”²²³

3. Signs the Judicial Tides May be Turning on the Issue of Legislative Exactions

We must wait to see how the lower courts will approach legislative exactions after *Koontz*. But the Ninth Circuit’s recent decision in *Horne v. U.S. Dep’t of*

217. *Parking Ass’n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (J. Thomas dissenting from denial of *certiorari*) (“The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.”).

218. *Frost v. R.R. Comm’n of State of Cal.*, 271 U.S. 583, 592 (1926).

219. *See id.*

220. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996).

221. *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003).

222. *Burling and Owen*, *supra* note 72, at 437 (observing that “[n]ot one of the Supreme Court cases applying the doctrine of unconstitutional conditions makes a distinction between legislatively imposed and adjudicatively determined conditions.”).

223. *Frost*, 271 U.S. at 594.

Agriculture suggests that *Koontz* may have effected a sea change.²²⁴ In that case, the court held that the nexus and rough proportionality tests applied to a marketing order that the U.S. Department of Agriculture (USDA) imposed on raisin producers under a New Deal era statute. The statute authorized the USDA to confiscate a certain portion of raisin producers' annual crops to stabilize market prices and to impose fines on producers who refused to comply.

In response, several California farmers invoked the Takings Clause to challenge this regulatory confiscation program—specifically, the imposed fines for non-compliance. They maintained that the marketing order constituted a taking under *Loretto v. Manhattan Teleprompter*, which holds that a permanent physical invasion of property constitutes a *per se* taking.²²⁵ The Ninth Circuit rejected that argument, but was reversed 8-1 by the Supreme Court, with Chief Justice Roberts emphasizing that there are no exceptions to *Loretto's* categorical rule.

Yet the Ninth Circuit's decision is still noteworthy in its conclusion that *Koontz* would be the controlling authority. The Ninth Circuit erred, of course, in refusing to apply *Loretto*. But in so far as it characterized *Horne* as a regulatory takings case, it is significant that circuit court applied *Koontz* instead of turning to the *Penn Central* balancing test, which courts have traditionally applied in review of regulatory restrictions.²²⁶ Though *Horne* did not specifically discuss the potential exception for legislative exactions, it affirmed the principle that *Nollan* and *Dolan* apply whenever government imposes a requirement that forces a property owner to choose between obtaining a permit to use his property and waiving protected constitutional rights.²²⁷

Following the Ninth Circuit's decision in *Horne*, the Northern District of California invalidated a San Francisco ordinance under *Koontz*. In that case, *Levin v. City & County of San Francisco*, the City sought to protect tenants in rent controlled apartments from being displaced from San Francisco's absurdly high rental market should a landlord seek to withdraw from the rental business.²²⁸ To that end, the City enacted an ordinance requiring landlords to apply for a permit before converting use of a rental property. Because this forced a choice upon landowners between pursuing their preferred uses and paying money for an ostensible public purpose, the Court held that the ordinance was subject to review

224. See *Horne v. Dep't of Agric.*, 750 F.3d 1128, 1142 (9th Cir. 2014).

225. *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419 (1982).

226. *Lingle* had previously affirmed that all takings claims are to be reviewed under *Penn Central*, unless the claimant can demonstrate that there has been a physical invasion or a total deprivation of all economically beneficial uses. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005) ("Outside these two relatively narrow categories (and the special context of land use exactions discussed below, see *infra*, at 2086-2087), regulatory takings challenges are governed by the standards set forth in *Penn Central* . . .").

227. "At bottom, the reserve requirement is a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Hornes' crops, but rather imposed a condition on the Hornes' use of their crops by regulating their sale." *Horne*, 750 F.3d at 1142.

228. See *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1080 (N.D. Cal. 2014).

under the nexus and rough proportionality tests.²²⁹

This signals a marked shift in the Ninth Circuit's jurisprudence. Prior to *Koontz*, the Ninth Circuit had effectively ossified a categorical rule that legislatively imposed exactions are exempt from *Nollan* and *Dolan* review.²³⁰ But because neither *Horne* nor *Levin* specifically addressed whether those prior cases remain valid, it remains unclear—at this juncture—whether the Ninth Circuit has simply reversed course without explanation, or whether there is an unresolved doctrinal rift which the Circuit must squarely address. In any event, the implication of these relatively high profile cases is that the *sine qua non* of an unconstitutional conditions violation occurs with the imposition of a constitutionally repugnant choice; under this doctrinal framework, there is no place for a legislative exception.²³¹

B. APPLYING *KOONTZ* TO LEGISLATIVELY IMPOSED OPEN SPACE AND AVIATION DEDICATION REQUIREMENTS

1. A Threshold Question: Is Anything Actually Taken With Aviation and Open Space Easement Dedication Requirements?

If there is no legislative exception to *Nollan* and *Dolan*, then a requirement to dedicate an easement to the public must be subject to review under the nexus and rough proportionality tests. Yet in the case of our hypothetical zoning code—requiring property owners to dedicate aviation easements or open space easements—one might ask a threshold question of whether the Takings Clause has any applicability at all if nothing is actually transferred.²³² Setting aside

229. *See id.* at 1081.

230. *Mead v. City of Cotati*, 389 F. App'x 637, 638 (9th Cir. 2010) (citing *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008)).

231. “[C]ritically, all’ of these cases ‘involve choice’: the *Nollans* could have continued to lease their property with the existing structure, Ms. *Dolan* could have left her store and parking lot unchanged, the *Hornes* could have avoided the Marketing Order by planting different crops, and the *Levins* and *Park Lane* can avoid paying the exaction by subjecting their property to continued occupation by an unwanted tenant. *See Levin*, 71 F. Supp. 3d at 1083.

232. As a California Court of Appeal recently explained: “In the exactions context . . . a necessary predicate for [*Nollan* and *Dolan*] to apply is that the public easement required as a condition of the permit has to be sufficiently onerous that it would constitute a compensable taking if simply appropriated by the government.” *Powell v. Cnty of Humboldt*, 222 Cal. App. 4th 1424, 1438-39 (2014). This approach generally comports with the rule that the landowner must always identify a property interest that has been taken in an inverse condemnation case. *See Acceptance Ins. Companies, Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (“When evaluating whether governmental action constitutes a taking without just compensation, a court employs a two-part test. First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was taken [W]e do not reach this second step without first identifying a cognizable property interest.”) (citing *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1364 (Fed. Cir. 2009); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212–13 (Fed. Cir. 2005) (internal quotation marks omitted)).

semantics, there may be an argument that these hypothetical “dedication requirements” are beyond the purview of *Nollan* and *Dolan* because they do not—in actuality—result in a forced transfer of private property.

Indeed, *Nollan*, *Dolan*, and *Koontz* are all predicated upon the understanding that the contested conditions required the landowner to dedicate an interest in private property to the public.²³³ Accordingly, a landowner seeking to invoke the nexus and rough proportionality tests must demonstrate that the contested condition would actually require the landowner to give the public a property interest as a *quid pro quo* of permit approval.²³⁴ Thus, a creative defendant might seek to avoid *Nollan* and *Dolan* on the theory that open space and aviation easements do not affirmatively require *transfer* of any property interest.²³⁵ But this argument could only work if the dedication requirements preserve and respect all common law property rights without taking any affirmative interest in the property for the public.²³⁶

2. Narrowly Tailored Aviation Easements

Given the fact that a physical invasion of private property would create a *per se* taking, a dedication requirement authorizing such an invasion is unquestionably subject to review under *Nollan* and *Dolan*.²³⁷ The more difficult question is whether a requirement to dedicate an aviation easement implicates *Nollan* and *Dolan* where the contemplated easement merely restricts what the owner may do with his land.²³⁸ In such a case, the exaction demand would be for acquisition of a negative easement, i.e., an enforceable property right allowing the holder of the easement to enjoin defined uses of the subject property.²³⁹ As such, *Nollan* and *Dolan* should still apply because dedication of an easement transfers an interest

233. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

234. *See Air Pegasus*, 424 F.3d at 1213.

235. *See In re Smith v. Town of Mendon*, 822 N.E.2d 1214 (N.Y. 2004).

236. *See United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945) (recognizing that government must pay just compensation for whatever interest is taken when government “chops [the property] into bits . . . [taking] what it wants, however few or minute, and leav[ing] [the owner] holding the remainder”); *see also* *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.”); *see also* *United States v. Petty Motor Co.*, 327 U.S. 372 (1946).

237. *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546-47 (2005).

238. Whether the aviation easement would in actuality allow for an invasion of private property may be viewed as a mixed question of law and fact. It depends both on the language of the easement and the exact point at which a low-altitude flight invades private property—either in flying through private airspace or in causing vibrations or emissions to invade the property. One potential analytical approach to this issue might be to consider whether dedication of the aviation easement would foreclose the landowner from thereafter bringing a takings claim to challenge air traffic patterns that effect an invasion.

239. Troy A. Rule, *Airspace and the Takings Clause*, 90 WASH. U. L. REV. 421, 472 (2012) (“A negative easement is ‘[a]n easement that prohibits the servient-estate owner from doing something, such as building an obstruction’ on the burdened parcel.”).

in the property to government.²⁴⁰ Specifically, the easement would be carved from the fee simple, therein taking away the previously unfettered right of the landowner to assert dominion over his own property and transferring a right of control to the public authority.²⁴¹

Nonetheless, government could seek to avoid the nexus and rough proportionality tests by insisting that an aviation easement merely prevents the landowner from interfering with the people's right to use public airspace. Here, the governmental defendant must argue that the easement merely prevents the landowner from engaging in conduct that the nuisance doctrine could affirmatively enjoin; in other words, the easement would have no legal implication beyond memorializing the scope of the owner's common law property rights.²⁴² If so narrowly conceived, such an aviation easement might be beyond the purview of the Takings Clause because *Lucas* recognized that one cannot state a takings claim for loss of the right to engage in conduct that would give right to a nuisance action.²⁴³

3. Reviewing Open Space Easements

An open space dedication requirement is, necessarily, a negative easement. This is because an open space easement simply prevents the landowner from developing on a portion of his property. Because an outright prohibition on development could achieve the same goal, a government entity might argue that a court should use the *Penn Central* balancing test to review an open space dedication requirement.

But a requirement to dedicate an open space easement is something more than a mere regulatory prohibition on development. First, zoning restrictions might be lifted as the political winds shift, but once an open space easement is recorded,

240. Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 55 (2012) (the right to enforce an easement is a "property right").

241. See JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1:1 (2011) ("An easement is commonly defined as a non-possessory interest in land of another."); RESTATEMENT (FIRST) OF PROPERTY: EASEMENT § 450 (2011); BLACK'S LAW DICTIONARY, 509 (6th Ed. 1990) ("A primary characteristic of an easement is that its burden falls upon the possessor of the land from which it issued . . .").

242. But, there is a necessary distinction between a mere regulation restricting land use and an affirmative requirement to dedicate an easement to the public. See, e.g., *Sneed v. Riverside Cnty.*, 218 Cal. App. 2d 205, 211 (Cal. Dist. Ct. App., 1963) (distinguishing between an exercise of police power and the taking of an easement that transfers property rights from the individual to "the public for public use," wherein "eminent domain principles are applicable."). Indeed, the former requires only a forbearance on the landowner's common law property rights, whereas the latter is an unconstitutional condition that seeks to exact dedication of an interest in real property and waiver of the right to demand just compensation for that interest. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("To say the appropriation of a public easement . . . does not constitute the taking of a property interest but rather . . . [is] a mere restriction on its use, . . . is to use words in a manner that deprives them of all their ordinary meaning.") (internal quotations omitted).

243. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-1032 (1992).

the prohibition is permanent.²⁴⁴ Second, a negative easement necessarily grants the holder an interest in the property, i.e., an enforceable right to prevent the landowner from exercising common law property rights.²⁴⁵

Accordingly, courts should review a requirement to dedicate an open space easement under the *Nollan* and *Dolan* framework. As illustrated in Section II, a fee simple absolute title entails the right to make any reasonable use of one's property at common law.²⁴⁶ As such, any requirement giving another party the right to preclude such reasonable uses necessarily transfers an interest in the property to another party—an interest in asserting dominion over the property. For this reason, *Nollan* and *Dolan* apply to open space dedication requirements.

C. APPLYING *KOONTZ* TO LEGISLATIVELY IMPOSED AFFORDABLE HOUSING LINKAGE FEES

Before *Koontz*, many jurisdictions reviewed monetary exactions under *Penn Central's* balancing test,²⁴⁷ *Koontz*, however, unequivocally repudiated that line of cases. The *Koontz* Court made clear that *Nollan* and *Dolan* apply to conditions requiring an applicant to pay money for public purposes.²⁴⁸ To be sure, *Koontz* calls into question permitting regimes requiring applicants to pay into special funds—regardless of which public goals the regimes seek to advance.²⁴⁹ As such,

244. An easement exists in perpetuity until the owner of the servient estate acquires the easement, or until otherwise designated in the terms of the easement. See Jan G. Laitos and Cathrine M. H. Keske, *The Right of Nonuses*, 25 J. ENVTL. L. & LITIG. 303, 367 (2010) (explaining that a “conservation easement contract effectively extinguishes the land’s development use rights in perpetuity.”).

245. *Id.*

246. See, e.g., *Apartment Ass’n of Los Angeles, Inc. v. City of Los Angeles*, 24 Cal.4th 830, 841 (2001) (“It is, of course, axiomatic in Anglo American law that ownership of real property in fee simple absolute is the greatest possible estate”) (citing Edward Coke, 1 COKE (1628) INSTITUTES OF THE LAWS OF ENGLAND (Butler & Hargrove’s Notes ed.) 18a, § 11) (footnote omitted).

247. Cf. Carl J. Circo, *Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 55, 84 (2009) (arguing that *Lingle* established that the Takings Clause provides no constitutional protection against monetary fees).

248. See *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1084 (N.D. Cal. 2014).

249. In the wake of *Koontz*, it seems most evident that a requirement to pay into a public fund, or to pay for the rendering of services for the benefit of the public, will be subject to *Nollan* and *Dolan* review. The more difficult question may be in determining if and when building design requirements—imposed as a condition of approval—may be subject to *Nollan* and *Dolan* review. See Michael Miller, *The New Per Se Takings Rule: Koontz’s Implicit Revolution of the Regulatory State*, 63 AM. U. L. REV. 919, 945-46 (2014) (observing that at oral argument, Chief Justice Roberts suggested that a posited regulatory requirement would pass muster under the nexus and rough proportionality tests). To the extent such requirements force a landowner to choose between permit approval and expending more money than his or her preferred plans would have otherwise required, the owner could frame the condition as a monetary exaction. For example, a permit conditioned on a requirement to meet LEED certification standards will force the owner to expend demonstrably more in construction of a new home than he or she would spend with conventional construction methods. Assuming the owner can demonstrate the cost differential, he might have a claim under *Koontz*. Indeed, to the extent such requirements are imposed to promote public goals, the added costs are fairly characterized as a dedication to the public good. Alternatively, if these conditions were not imposed to promote public goods there would be a due process problem.

our hypothetical ordinance, requiring owners to pay into a fund to subsidize affordable housing as a condition of permit approval, must satisfy both the nexus and rough proportionality tests.

1. The Nexus Test Requires Evidence the Fee is Necessary

Monetary exactions are often referred to as mitigation fees because they are intended to mitigate—in some way—against the impact that a new development might have on the community.²⁵⁰ But to withstand review under *Nollan's* nexus test, the permitting authority must do more than simply assert, *ipse dixit*, that the fee is necessary to offset adverse impacts of a new development.²⁵¹ The governmental defendant bears the burden of demonstrating that there is at least some evidence in the record to conclude that the proposed project will have a specific adverse impact on the public and that the mitigation fee is likely to offset that harm—at least to some extent.²⁵²

In the case of our hypothetical fee to subsidize affordable housing, the permitting authorities would have to point to data demonstrating that there is a shortage of affordable housing for low-income residents in the community and that a new development project is likely to exacerbate this problem. The analysis must necessarily take into account the nature of the proposed project and economic realities in the community because, for example, the erection of a new apartment complex presumably increases the supply of rental units available, potentially bringing down living costs in the community.²⁵³ Yet, in other cases, there may be empirical evidence supporting a finding that new developments—

In the case of a requirement to meet standards for LEED certification, the added costs would be required in order to ensure that the project has minimal adverse impacts on the environment—a goal that should satisfy the nexus test. Accordingly, a monetary exactions analysis would likely turn on the question of whether those costs are roughly proportional to the anticipated impact of the project. And in turn that question may be informed by background principles of nuisance law, as it will be necessary to determine the degree to which the proposed project will impose negative externalities on the community. As a practical matter, a rough proportionality problem will likely be presented whenever the owner can demonstrate that he or she has effectively been forced to shoulder a disproportionate burden in an attempt to address a larger public problem. *See, e.g., Levin*, 71 F. Supp. 3d at 1085 (“Against the infinitesimally small impact of the withdrawal on the rent differential gap to which a tenant might now be exposed, the Ordinance requires an enormous payout untethered in both nature and amount to the social harm actually caused by the property owner’s action.”).

250. *See, e.g., Thomas W. Ledman, Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation*, 45 FLA. L. REV. 835, 838 (1993) (“A local government environmental mitigation fee program would evaluate the adverse environmental impacts of development and exact a fee from the developer proportional to the impact.”).

251. *Ehrlich v. Culver City*, 12 Cal. 4th 854, 868 (Cal. 1996) (“Where the local permit authority seeks to justify a given exaction as an alternative to denying a proposed use, *Nollan* requires a reviewing court to scrutinize the instrumental efficacy of the permit condition in order to determine whether it logically furthers the same regulatory goal as would outright denial of a development permit.”).

252. *See Commercial Builders of N. California v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (“*Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.”).

253. *Ehrlich*, 12 Cal. 4th at 868.

perhaps those marketed to high-income earners—are straining on the market for affordable housing by generally driving up the community’s property values.²⁵⁴

2. The Rough Proportionality Test Requires Greater Empirical Justification

Assuming the governmental defendant can point to sufficient evidence demonstrating a nexus between the mitigation fee requirement and the project’s likely impact on affordable housing, the amount of the fee is necessarily an issue of contention. *Dolan* requires that the fee must be proportional to the anticipated impact on affordable housing in the community.²⁵⁵ Thus, there must be an individualized assessment of the project and an empirical justification for the specific dollar amount in question.²⁵⁶ Of course, the more attenuated government’s rationale, the more speculative its analysis and the less likely it will pass muster.

Since the burden rests on the permitting authority to justify mitigation fees under *Dolan*, it is likely the permit applicant will prevail in many cases. The one thing that is clear is that the regime cannot be presumed constitutional.²⁵⁷ Its legitimacy depends entirely upon the facts of the case. Just as in a common law nuisance action, the party seeking to enjoin use of another’s property bears the burden of demonstrating that the contested use threatens negative externalities and that the remedy sought will go no further than is reasonably necessary to avoid those external harms.

VI. CONCLUSION

It is easy to understand why urban planners view dedication requirements as an attractive option. First, conditions imposed on a development permit can help regulate development, and, in some instances, may serve as a tool to discourage development of areas that the community might prefer to preserve in an unblemished natural state.²⁵⁸ Second, the ability to require landowners to make

254. *Commercial Builders of N. California*, 941 F.2d at 875 (finding that empirical studies may satisfy the nexus test).

255. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1987) (requiring an individualized assessment).

256. *See, e.g., Bldg. Indus. Ass’n of Cent. California v. City of Patterson*, 171 Cal. App. 4th 886, 899 (2009) (“The record in this matter reveals no reasonable relationship between the extent of City’s affordable housing need and development of either (1) the 214 residential lots that constitute the two subdivisions owned by Developer or (2) the 3,507 unentitled lots identified in the Fee Justification Study. Instead, the Fee Justification Study reveals that the in-lieu fee of \$20,946 per market rate unit was calculated based on an allocation to City of 642 affordable housing units, out of the total regional need for affordable housing identified in the 2001–2002 Regional Housing Needs Assessment for Stanislaus County. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642–unit figure and the need for affordable housing associated with new market rate development. Accordingly, the fee calculations described in the Fee Justification Study and Moran’s declaration do not support a finding that the fees to be borne by Developer’s project bore any reasonable relationship to any deleterious impact associated with the project.”).

257. *Dolan*, 512 U.S. at 396 (emphasizing that despite whatever laudable goals the authorities may have in mind, they bear a burden of demonstrating the constitutionality of exactions).

258. *See Br. Amicus Curiae of National Fed. of Indep. Bus. Small Business Legal Cntr. in Support of Pet.*,

concessions to attain necessary building permits is highly tempting, especially because developers are often willing to cut a deal to ensure a project is accomplished on-time and on-budget.²⁵⁹ This is particularly appealing when the landowner can offer something of value—whether that is a guarantee that a pristine section of land will remain undeveloped, an affirmative dedication of some other interest in the property, special funding for affordable housing projects, or something else altogether.²⁶⁰

Utilitarian principles undoubtedly encourage public authorities to impose dedication requirements on permit applicants because these requirements advance the interests of the public with minimal—if any—public burdens.²⁶¹ Yet the Fifth Amendment is inherently anti-utilitarian.²⁶² As Justice Black explained in *Armstrong v. United States*, the Takings Clause was designed to prevent government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁶³

Accordingly, the Takings Clause prevents government from imposing certain dedication requirements. Specifically, *Nollan* established the principle that conditions must bear an essential nexus to some adverse impact anticipated from the proposed project.²⁶⁴ And *Dolan* requires that the condition be roughly proportional to the anticipated impact.²⁶⁵

Koontz merely clarified that there is no exception for conditions requiring the dedication of financial assets, and that the nexus test applies just the same when a

Koontz v. St. Johns River Mgmt. Dist., No. 11-1447, 6-8 (2012) (explaining that land use authorities often “threaten denial in order to coerce the landowner into repeatedly proposing less ambitious building plans . . .”).

259. *Id.* at 8-9 (“A developer or a small business cannot afford to stall a project for too long because there can be no return on a real estate investment while the property remains undeveloped.”) (citing P.J. KEANE & A.F. CALETKA, *DELAY ANALYSIS IN CONSTRUCTION CONTRACTS*, WILEY-BLACKWELL, 2 (Blackwell Publishing, 2008)).

260. *See, e.g.*, *Hillcrest Prop., LLP v. Pasco Cnty.*, 939 F. Supp. 2d 1240, 1242 (M.D. Fla. 2013) (in striking down a legislative enactment that required property owners to dedicate property in the footprint of a planned highway as a condition of any permit approvals, the Court chided a County attorney for “proudly declar[ing], ‘The [regime] . . . saves the County millions of dollars each year in right of way acquisition costs, business damages, and severance damages.’”).

261. *See* Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 *ECOLOGY L.Q.* 577, 579 (1996) (summarizing utilitarian thought in the words of Henry Sidgwick as endorsing conduct yielding “the greatest amount of happiness on the whole . . .” and explaining that—although subject to debate among utilitarian thinkers—what matters is “the sum of happiness in the world.”).

262. That is to say the Takings Clause is rooted in a conception of natural justice, holding that the state cannot take private property without paying the “full and just equivalent” of what is taken—regardless of the perceived utility that an uncompensated taking would have for the public as a whole. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). In a sense, the Takings Clause accommodates utilitarian public concerns while allowing the government to pursue public endeavors; but it is anti-utilitarian in so far as it checks the power of the collective ‘People’ from forcing certain individuals to carry “more than his [or her] just share of the burdens of government . . .” *Id.* Thus when an individual “surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.” *Id.*

263. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

264. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

265. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1987).

permit has been denied on account of the developer's refusal to submit to improper conditions. But *Koontz* went further in explaining the doctrinal underpinnings of the Takings Clause and its interplay with the unconstitutional conditions doctrine. In doing so, *Koontz* offers strong authority for courts to reconsider whether there is a principled basis for a legislative exception. *Koontz* suggests that courts should reject such an exception, and that the nexus and rough proportionality tests should apply any time an owner's right to use his land has been conditioned on a requirement to give up any interest in real property or money.

* * *