# LEGISLATIVE EXACTIONS AFTER KOONTZ V. ST. JOHNS RIVER MANAGEMENT DISTRICT

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#### INTRODUCTION

The U.S. Supreme Court's decision in *Koontz v. St. Johns River Management District*<sup>1</sup> is, in many ways, a natural outgrowth<sup>2</sup> from the Court's prior regulatory takings decisions in *Nollan v. California Coastal Commission*<sup>3</sup> and *Dolan v. City of Tigard*.<sup>4</sup> But it is also a philosophical departure from the many lower courts that seemed determined to limit *Nollan* and *Dolan's* scope over the last twenty-five years.<sup>5</sup> With *Koontz*, the Supreme Court signaled—with a bullhorn—that the unconstitutional conditions doctrine is alive and well, at least in takings cases.

Writing for a deeply divided court, Justice Alito explained that courts shall review monetary exactions under *Nollan* and *Dolan*—as an unconstitutional condition—rather than under the wildly permissive *Penn Central* balancing test.<sup>6</sup> The *Koontz* Court also held that the *Nollan* and *Dolan* framework applies to denied permits as well as conditions attached to

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<sup>&</sup>lt;sup>1</sup> 133 S.Ct. 2586 (2013).

<sup>&</sup>lt;sup>2</sup> 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, Pacific Legal Foundation, Program for Judicial Awareness, Working Paper Series, No. 13-512, November 31, 2013, at 22-32 available at <u>http://blog.pacificlegal.org/wordpress/wpcontent/uploads/2013/11/SSRN-id2348844.pdf</u> (last visited Dec. 24, 2014) ("Koontz is completely consistent with Nollan and Dolan and the unconstitutional conditions doctrine.").

<sup>&</sup>lt;sup>3</sup> 483 U.S. 285 (1987).

<sup>&</sup>lt;sup>4</sup> 512 U.S. 374 (1994).

<sup>&</sup>lt;sup>5</sup> 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.").

<sup>&</sup>lt;sup>6</sup> Koontz, 133 S.Ct. at 2593-94 (2013).

a granted permit.<sup>7</sup> This often occurs where an applicant refuses to accede to an extortionate condition.<sup>8</sup>

But *Koontz* left open several crucial issues that lower courts will have to resolve. The most significant questions is whether legislative exactions must also satisfy the *Nollan* and *Dolan* standards. In this article, we answer in the affirmative by examining the state of takings law in the wake of *Koontz*.

In Section I, we describe the Court's decision in *Koontz* within the historical context of takings law and the unconstitutional-conditions doctrine. We also discuss post-*Koontz* scholarship. In Section II, we explore the historical common-law backdrop for land use regulation and identify essential principles that should determine whether *Nollan's* nexus test should apply in any given case. In Section III, we examine, the theoretical foundations for *Nollan, Dolan* and *Koontz*, as well as the unresolved doctrinal questions. Finally, in Section IV, we explain the implications of *Koontz*, and consider its application with three recurring issues in exactions law: (a) legislatively imposed exactions; (b) open-space and aviation dedication requirements; and (c) controversial affordable-housing linkage fees.

# I. CONSTITUTIONAL LIMITATIONS OF DEDICATION REQUIREMENTS: NOLLAN, DOLAN & KOONTZ

*Nollan v. California Coastal Commission* was a watershed victory for landowners and a setback for urban planners who wanted greater discretion over development-permit conditions. *Nollan* made clear that the Takings Clause of the Fifth Amendment limits government's discretion to impose permit conditions. Defendants, however, have successfully limited *Nollan's* application over the last 25 years.<sup>9</sup>

Despite further clarifying *Nollan's* nexus test in 1994, the Supreme Court's decision in *Dolan v. City of Tigard* included language that gave progressive commentators hope that *Nollan* could be strictly limited to its facts.<sup>10</sup> Specifically, Justice Rehnquist's opinion implied that conditions

<sup>10</sup> See e.g., 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, 580-81 (2009) (arguing that Nollan and Dolan have only limited application).

 $<sup>^{7}</sup>$  *Id.* at 2595.

<sup>&</sup>lt;sup>8</sup> *Id.* at 2595-2603.

<sup>&</sup>lt;sup>9</sup> Jane C. Needleman, 28 Cardozo L. Rev. 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.").

imposed under a legislatively enacted code might extend beyond *Nollan's* purview.<sup>11</sup> Thereafter, Justice O'Connor's opinion in *Lingle v. Chevron* U.S.A. arguably suggested that *Nollan* and *Dolan* might not include takings claims challenging conditions requiring an expenditure of financial resources—or, for that matter, any condition that does not go so far as to require dedication of an easement authorizing the public to physically use a portion of the land in question.<sup>12</sup>

The Court, however, didn't offer true guidance on these questions until it finally decided *Koontz v. St. Johns River Management District*, where it considered and rejected the argument that monetary exactions are exempt from review under *Nollan* and *Dolan*.<sup>13</sup> Even though many jurisdictions had embraced this conceived exception, *Koontz* held that *Nollan* and *Dolan* could not be so limited.<sup>14</sup> Perhaps even more interesting was the claim that *Nollan* and *Dolan* didn't apply where a government denies a permit because the applicant refuses to accede to contested conditions. Here too the Court rejected the proffered defense.<sup>15</sup> In this Section we examine *Koontz* as a logical outgrowth of *Nollan* and *Dolan*—emphasizing those significant questions left unanswered.

### 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*.<sup>16</sup> This controversial decision has forever changed the landscape of takings law in America by setting a heightened constitutional standard for assessing the propriety of conditions imposed on development permits.<sup>17</sup> Before *Nollan* there was

<sup>&</sup>lt;sup>11</sup> Dolan, 512 U.S. at 385 (distinguishing *Nollan* from less exacting takings standards on the assumption that the exaction challenged in *Nollan* was not imposed by a legislative determination); *but see Nollan*, 483 U.S. at 830 (noting that the California Coastal Act required the Coastal Commission to condition permit approval for new homes—at least those which would increase the floor area, height or bulk by more than 10 percent—on a requirement to dedicate a grant of access to the public).

<sup>&</sup>lt;sup>12</sup> 544 U.S. 528, 546-47 (2005); *but see Nollan*, 483 U.S. at 830.

<sup>&</sup>lt;sup>13</sup> 133 S.Ct. 2586 (2013).

<sup>&</sup>lt;sup>14</sup> *Id*. at 2603.

<sup>&</sup>lt;sup>15</sup> *Id.* at 2595 ("The principles that undergird our decisions in *Nollan* and *Dolan* 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.").

<sup>&</sup>lt;sup>16</sup> 483 U.S. 825 (1987).

<sup>&</sup>lt;sup>17</sup> 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

great room to argue that conditions imposed on a building permit should be reviewed under either a highly-deferential due process standard or, if a regulatory taking has been alleged, under the *Penn Central Transportation Co. v. New York City* balancing test—both exceedingly low bars for defendants.<sup>18</sup> 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.<sup>19</sup>

In *Nollan*, the Court was confronted with a Gordian knot. The case dealt with two well-established constitutional principles in a seemingly irreconcilable conflict. On the one hand—as Justice Brenan emphasized in dissent—the Nollan family had no vested right to build on their beachfront property, and their permit application could have been denied for any number of reasons, subject to some minimal due process review.<sup>20</sup> 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.<sup>21</sup> On the other hand, takings jurisprudence mandates that government cannot simply appropriate private property without paying just compensation for what is taken.<sup>22</sup> Thus the question presented—whether the California Coastal Commission could condition approval of a permit to build a bungalow on the requirement that

<sup>19</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1463 (1989) (explaining 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.").

<sup>20</sup> *Nollan*, 483 U.S. at 843.

<sup>21</sup> 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, 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]).

 $^{22}$  Lingle, 544 U.S. at 546 (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.").

certain impacts caused by the development.").

<sup>&</sup>lt;sup>18</sup> Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Nollan, 483 U.S. at 842-43 (J. Brennan dissenting) ("There can be no dispute that the police power of the States encompasses the authority to impose conditions on private development.").

the owners dedicate an easement for the public to traverse across their property—raised a novel constitutional issue of tremendous practical importance.

Writing for the majority, Justice Scalia unraveled the knot, explaining that the power to prohibit development does not necessarily include the power to impose any conceivable condition on a development permit.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> Without such a connection, a condition requiring dedication of property is a naked transfer of wealth—an "out-and-out plan of extortion."<sup>26</sup>

# 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 as to 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.<sup>27</sup> Specifically *Dolan* presented the issue

<sup>&</sup>lt;sup>23</sup> 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.

<sup>&</sup>lt;sup>24</sup> Nollan, 483 U.S. at 837.

<sup>&</sup>lt;sup>25</sup> *Id.* at 836.

<sup>&</sup>lt;sup>26</sup> *Id.* at 837.

<sup>&</sup>lt;sup>27</sup> 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. STEVEN J. EAGLE, REGULATORY TAKINGS, § 7-10(b)(4) (3d ed. 2005).

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 it was enough to demonstrate any mere tenuous connection.

In *Dolan*, a small business owner sought to expand her store and to enlarge her parking lot.<sup>28</sup> Since she was proposing a project that would likely result in greater storm-water 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.<sup>29</sup> 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.<sup>30</sup> But the City could not go 'too far'—in the name of addressing these concerns—without running afoul of the Takings Clause.<sup>31</sup>

*Dolan* held that there must be a "rough-proportionality."<sup>32</sup> In other words, the condition must be specifically tailored to mitigate anticipated harms from a development project.<sup>33</sup> This rationale comports with the original narrow conception of the police powers because it disallows any condition unrelated to the mitigation of a specifically anticipated public harm, or which goes beyond what is necessary to prevent the landowner from invading the rights of others.<sup>34</sup>

<sup>32</sup> *Dolan* essentially adopting 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.

 $^{33}$  *Id.* at 512 U.S. 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...").

<sup>&</sup>lt;sup>28</sup> Dolan, 512 U.S. at 379.

<sup>&</sup>lt;sup>29</sup> *Id.* at 392-93.

<sup>&</sup>lt;sup>30</sup> *Id.* at 395.

<sup>&</sup>lt;sup>31</sup> Some commentators have likened *Dolan's* "rough proportionality" test to heightened form of rational basis. EAGLE, *Supra* note 27 at Sec. 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 "convert heightened scrutiny.").

<sup>&</sup>lt;sup>34</sup> See Village of Euclid v. Ambler Reality, 272 U.S. 365, 387-88 (1926) (reaffirming the common law origins of the police powers in the law of nuisance); EAGLE, Supra note 27 at Sec. 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

Accordingly, Dolan held that an imposed condition is only legitimate if it is proportional to the anticipated public impact of the project.<sup>35</sup> On this ground the Court 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.<sup>36</sup> In other words, the City's concerns would have justified narrowly tailored conditions-but where an inch was justified, the City had sought to take a mile.<sup>37</sup>

#### C. Open Questions After Lingle v. Chevron U.S.A.

Dolan may have clarified the nexus test, but the opinion also gave fodder to those contending that the test should be sparingly applied.<sup>38</sup> In offering an apparent basis for distinguishing exactions cases from other constitutional challenges to land use restrictions-where the courts have afforded planners broad latitude-Justice Rehnquist noted "two relevant particulars of the present case."<sup>39</sup> 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."<sup>40</sup> By contrast he observed that those cases applying a more deferential standard of review concerned "legislative determinations

<sup>(1868)).</sup> 

<sup>&</sup>lt;sup>35</sup> Dolan quoted the Nebraska Supreme Court's decision in Simpson v. North Platte, 206 Neb. 240, 292 N.W.2d 297 (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).

<sup>&</sup>lt;sup>36</sup> Dolan, 512 U.S. at 391.

<sup>&</sup>lt;sup>37</sup> 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.").

 $<sup>^{38}</sup>$  Id. at 385 (offering a potential ground for treating legislative exactions 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[s] 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.").

<sup>&</sup>lt;sup>39</sup> *Id.* at 385. <sup>40</sup> *Id.* at 385. But, as noted *Supra* note 5, 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.

classifying entire areas of [a] city...<sup>41</sup> 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.<sup>42</sup>

Not surprisingly many commentators and courts latched onto this language, surmising that *Nollan* and *Dolan* are inapplicable in review of legislative and monetary exactions.<sup>43</sup> Throughout the late 1990s, and into the next decade, the increasing trend was to strictly limit *Nollan* and *Dolan* to their facts.<sup>44</sup> For example, in *W. Linn Corporate Park, L.L.C. v. City of West Lynn*, 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.<sup>45</sup> 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 almost inevitably denies takings liability.<sup>46</sup> Though standing in sharp conflict with the high courts of several states, and in apparent tension with signals that the

<sup>45</sup> W. Linn Corporate Park, L.L.C. v. City of W. Linn, 349 Or. 58, 86-87, 240 P.3d 29, 45 (2010).

<sup>&</sup>lt;sup>41</sup> *Id*.

<sup>&</sup>lt;sup>42</sup> Id.

<sup>&</sup>lt;sup>43</sup> 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. Divelbiss, *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.").

<sup>&</sup>lt;sup>44</sup> See e.g., In re Smith v. Town of Mendon, 822 N.E.2d 1214 (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 (Ariz. 1997) (refusing to apply Nollan and Dolan to legislatively imposed exaction requirements).

<sup>&</sup>lt;sup>46</sup> *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 (U.S. 2013) (opining that "[t]o 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 powers.").

Supreme Court had given on the heels of *Dolan* in summarily vacating a decision of the California court of appeals, *City of West Lynn* and *McClung* were emblematic of a growing trend to limit application of the nexus and rough proportionality tests.<sup>47</sup>

Nonetheless, many lower courts refused to apply *Nollan* and *Dolan* in review of monetary exactions. Compare *Ocean IV Homeowners Ass'n Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (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 (Kan. 1995) (refusing to apply *Dolan* in review of traffic impact fee); *Waters Landing Ltd. P'ship v. Montgomery Cnty.*, 650 A.2d 712 (Md. 1994) (limiting *Nollan* and *Dolan* to their facts); with *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004) (applying *Nollan* and *Dolan* in review of fees required in lieu of dedication); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 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, 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, 604 (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

<sup>&</sup>lt;sup>47</sup> The California Supreme Court ultimately held that monetary exactions are subject to review under Nollan and Dolan in Ehrlich v. City of Culver City, 12 Cal. 4th 854 (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, 15 Cal.App.4th 1737, 1743, 19 Cal.Rptr.2d 468, 471 (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 Supreme Court's Heightened Scrutinty 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 County of San Francisco, 529 U.S. 1045 (2000), opining that: "Where 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.").

In *Lingle*, Justice O'Connor seemed to offer further authority for the proposition that monetary exactions are exempt from the nexus and rough proportionality tests, as 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.<sup>48</sup> "In each case, 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."<sup>49</sup> As she explained, both cases "involved dedications of property so onerous that, outside the exactions context, they would have been deemed *per se* physical takings."<sup>50</sup> 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.<sup>51</sup>

Furthermore, O'Connor was careful in repeatedly characterizing *Nollan* and *Dolan* as concerning "takings challenges to adjudicative land-use exactions..."<sup>52</sup> 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 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.<sup>53</sup>

In any event, Justice O'Connor's analysis of *Nollan* and *Dolan* was included as part of a broad restatement of takings law, and was non-essential to her holding.<sup>54</sup> In *Lingle*, the Court considered whether the

<sup>48</sup> *Lingle*, 544 U.S. at 546. <sup>49</sup> *Id*.

 $50^{50}$  *Id.* at 547.

<sup>51</sup> *Supra* note 46.

<sup>52</sup> *Lingle*, 544 U.S. at 547.

<sup>53</sup> Id. (citing Dolan and Del Monte Dunes).

 $^{54}$  Id. at 545 (stating that the holding in *Lingle* should not be understood to disturb the

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 Changes 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).

Takings Clause requires governmental defendants to demonstrate that a challenged zoning restriction "substantially advances" a legitimate government interest.<sup>55</sup> 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.<sup>56</sup> 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 from Village of Euclid v. Ambler Reality.<sup>57</sup> Accordingly, O'Connor addressed Nollan and Dolan only in so far as was necessary to explain why the Lingle's repudiation of the "substantial advancement" test should not upset the continued validity of the nexus and rough proportionality tests.<sup>58</sup>

As she explained, those cases are not rooted in the "substantial advancement" test, but instead constitute a "special application of the unconstitutional conditions doctrine."59 This explains why-unlike other takings tests-the nexus and rough proportionality tests look to the propriety of the challenged regulatory action. <sup>60</sup> Yet despite the fact that Lingle made clear that Nollan and Dolan remain viable, many courts have severely limited their application, in part relying on O'Connor's commentary.<sup>61</sup>

391. <sup>58</sup> Lingle addressed Nollan and Dolan to make clear that the nexus and rough *Linn*, 349 Or. 58, 79-80, 240 P.3d 29, 41 (2010). <sup>59</sup> *Id.* at 530.

<sup>60</sup> 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—despite the fact that the nexus test asks whether a contested condition is proper. Id. at 546.

<sup>61</sup> Supra note 46.

court's prior holdings in Nollan and Dolan).

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

<sup>&</sup>lt;sup>56</sup> *Id.* at 529.

<sup>&</sup>lt;sup>57</sup> It may be a misnomer to refer to *Euclid* as requiring "rational basis review." We employ the term here simply because that's what most courts understand *Euclid's* test to require. But Euclid's actual wording requires a showing that the averred restriction "bears a rational relation" to some public good—a standard that is arguably more demanding than the toothless rational basis analysis applied in most zoning cases today. Euclid, 272 U.S. at

#### D. Koontz v. St. Johns River Management District

#### 1. Facts and Procedural History

The Supreme Court would offer no further guidance on *Nollan* and *Dolan* until it decided *Koontz* in the spring of 2013. The case arose out of the Orlando area in Florida, where Petitioner, Coy Koontz, was denied a permit to develop his commercially zoned property in 1994.<sup>62</sup> Mr. Koontz was an entrepreneur, with plans to develop the subject property.<sup>63</sup> Had he moved quickly on his plans 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 a loss of wetlands—a problem that the Legislature thought pressing because Florida had experienced a significant reduction of wetlands over the past century.<sup>64</sup> Thus, when Mr. Koontz sought his permit application he had to attain approval from the St. Johns River Management District.<sup>65</sup>

The Management District was concerned that Mr. Koontz' project might adversely impact nearby wetlands, but the record lacked substantial evidence that the project would have any meaningful impact.<sup>66</sup> Nonetheless, the Management District 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.<sup>67</sup> Reluctantly, Mr. Koontz said he would agree to this condition, but the Management District then insisted on additional conditions, which he believed would have rendered his project economically unfeasible.<sup>68</sup> Specifically, the Management District made clear that it would only approve his permit if he would agree to an additional condition requiring him to improve off-site public property miles away—a condition that would have required him to expend his own

<sup>&</sup>lt;sup>62</sup> *Id.* at 2592-93.

<sup>&</sup>lt;sup>63</sup> Id.

<sup>&</sup>lt;sup>64</sup> See Henderson Act,1984 Fla. Laws ch. 84–79, pt. VIII, § 403.905(1).

<sup>&</sup>lt;sup>65</sup> *Koontz*, 133 S.Ct. at 2592-93.

<sup>&</sup>lt;sup>66</sup> 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.

<sup>&</sup>lt;sup>67</sup> *Id.* at 2592-93.

<sup>&</sup>lt;sup>68</sup> 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.").

money.69

When Mr. Koontz refused to accede to this contemplated condition, the Management District denied his permit application.<sup>70</sup> 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.<sup>71</sup> 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' permit.<sup>72</sup>

Since the courts had already determined that the contested condition was unrelated to any impact his property 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* do not apply in monetary exaction cases. In the alternative, the District contended that the nexus and rough proportionality tests should not apply when a permit has been denied. The Supreme Court of Florida agreed on both points—and was reversed on each in the U.S. Supreme Court.

#### 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.<sup>73</sup> The Management District mounted its defense—circling the wagons around *Eastern Enterprises v. Apfel*—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.<sup>74</sup> In *Eastern Enterprises*, the Court rejected a constitutional challenge to a regulatory requirement that a coal company contribute to an employee

<sup>&</sup>lt;sup>69</sup> *Koontz*, 133 S.Ct. at 2592-93.

 $<sup>^{70}</sup>$  *Id*.

<sup>&</sup>lt;sup>71</sup> St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1223 (Fla. 2011) rev'd, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (U.S. 2013) (noting the cases' "extended procedural history").

<sup>&</sup>lt;sup>72</sup> Florida law requires that a landowner must be compensated when a permit denial violates the Takings Clause. Accordingly, Mr. Koontz sought compensation for the denial of his permit on the theory that it violated the essential holding in *Nollan*.

 $<sup>^{73}</sup>$  *Id.* 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.").

<sup>&</sup>lt;sup>74</sup> 524 U.S. 498 (1998).

retirement fund. In that case, five Justices concluded that the Takings Clause "does not apply to government-imposed financial obligations that '[do] not operate upon or alter an identified property interest."<sup>75</sup>

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 of the public.<sup>76</sup> But *Eastern Enterprises* was concededly only a plurality opinion, and the parties disputed whether its discussion of the Takings Clause was thus precedential. As counsel for *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.<sup>77</sup>

Ultimately the Court rejected the Management District's arguments, holding that the Takings Clause protects financial assets just like real property.<sup>78</sup> Thus, heightened scrutiny applies where a permit is conditioned on a requirement to expend financial resources.<sup>79</sup> 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?<sup>80</sup>

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*.<sup>81</sup> Yet the opinion offers no doctrinal basis for distinguishing between such a condition and a run-of-the-mill zoning

<sup>&</sup>lt;sup>75</sup> Koontz, 133 S. Ct. at 2590 (qouting *Eastern Enterprises*, 524 U.S. at 540 (KENNEDY, J., concurring in judgment and dissenting in part)).

<sup>&</sup>lt;sup>76</sup> *Id.* at 2598-99.

<sup>&</sup>lt;sup>77</sup> 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.

<sup>&</sup>lt;sup>78</sup> *Id.* at 2600.

<sup>&</sup>lt;sup>79</sup> *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*.

<sup>&</sup>lt;sup>80</sup> 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, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003)).

requirement that might require a financial expenditure. For example, a zoning code might mandate that new homes must meet the standards for LEED certification, or might impose a requirement that new industrial facilities must install best available technologies to reduce greenhouse gas emissions.<sup>82</sup>

This sort of regulation undoubtedly imposes added costs on property owners seeking to develop their land.<sup>83</sup> 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—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.<sup>84</sup> As such, the Court may eventually endeavor to draw a line in the sand.<sup>85</sup>

### 3. The Nexus Test Applies to Extortionate Denials

The issue of whether a court should review a permit denial under Nollan

<sup>&</sup>lt;sup>82</sup> See E.g., City of Boston, Zoning Code, Article 37, Green Building Standard (requiring all large-scale projects to meet U.S. Green Building Council's LEED certification standards.).

<sup>&</sup>lt;sup>83</sup> 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...").

<sup>&</sup>lt;sup>84</sup> 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).

<sup>&</sup>lt;sup>85</sup> 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.

and *Dolan* proved particularly thorny—at least during oral argument.<sup>86</sup> Justices Breyer, Sotomayor, Ginsberg and Kagan appeared antagonistic toward Koontz during the argument, each suggesting that courts should apply the more deferential *Penn Central* balancing test when reviewing permit denials.<sup>87</sup> They also expressed concern about the difficulty of ascertaining the specific reasons a locality denies a permit and appeared sympathetic to the Management District's suggestion that a rule requiring application of *Nollan* and *Dolan* might discourage regulators from engaging in socially constructive dialogue with developers.<sup>88</sup> Surprisingly, even Justice Scalia—who authored the *Nollan* opinion—seemed confused about how the nexus test could apply when a permit is denied.<sup>89</sup>

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 Lucas* test.<sup>90</sup> To be sure, Mr. Koontz was never affirmatively required to expend money or do anything—he was simply forced to submit a new permit application if he wanted to attain approval to build.<sup>91</sup> Thus, the Management District maintained that Mr. Koontz could only invoke the Takings Clause to challenge the permit denial—not to challenge the alleged 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

<sup>&</sup>lt;sup>86</sup> As cantankerous as the bench may have been during oral argument, even the dissenting Justices stated that they thought the Court was ultimately correct in applying *Nollan* and *Dolan* to permit denials. *Koontz*, 133 S. Ct. at 2603 (J. Kagan dissenting) ("I think the Court gets the first question it addresses right.").

<sup>&</sup>lt;sup>8/</sup> Transcript of Oral Argument, *Koontz v. St. Johns River Management District*, Case. No. 11-1447 (Jan. 15, 2013) available online at <u>http://www.supremecourt.gov/oral\_arguments/argument\_transcripts/11-1447.pdf</u> (last visited Feb. 19., 2013).

<sup>&</sup>lt;sup>88</sup> *Id.* at 7-8 (Justice Ginsberg suggested that there could be no basis for applying an exactions test where the permitting authority simply suggests one option for mitigating a perceived harm to the public, while leaving the owner "free to come up with some other" proposal for satisfying that concern).

<sup>&</sup>lt;sup>89</sup> *Id.* at 5 (Justice Scalia: "You are... posing a situation in which [the landowner] never came forward with any suggest[ed] [mitigation]. You say he still has a cause of action for a taking? ... A taking of what?").

<sup>&</sup>lt;sup>90</sup> *Koontz*, 133 S. Ct. at 2596.

<sup>&</sup>lt;sup>91</sup> See St. Johns River Management District 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).

allow permitting authorities to subvert *Nollan* and *Dolan* by requiring landowners to agree to questionable permitting requirements as a condition precedent to permit approval.<sup>92</sup> Thus, despite the fact that Mr. Koontz had not actually given up any property interest, the Court held that *Nollan* and *Dolan* must apply.<sup>93</sup> In walking to this conclusion, Justice Alito looked to the doctrinal foundations of *Nollan* and *Dolan*.

Recognizing that *Nollan* and *Dolan* are rooted in the unconstitutionalconditions doctrine, *Koontz* held that permitting authorities cannot evade the nexus and rough proportionality tests by denying a permit application.<sup>94</sup> *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.<sup>95</sup> As such, there is no requirement that a landowner must first waive constitutional rights to invoke the doctrine.<sup>96</sup>

4. Unanswered Questions and Scholarly Reactions.

The scholarly reaction to the Supreme Court's *Koontz* decision range from extreme anger<sup>97</sup> to complaints that it did not go further.<sup>98</sup> Commentators have, however, offered little insight about the application of legislative exactions after *Koontz*.

<sup>&</sup>lt;sup>92</sup> *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.").

 $<sup>^{93}</sup>$  *Id.* at 2595-97.

 $<sup>^{94}</sup>$  *Id*.

<sup>&</sup>lt;sup>95</sup> Id.

 $<sup>^{96}</sup>$  *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.").

<sup>&</sup>lt;sup>97</sup> See generally Echeverria, John D., Koontz: The Very Worst Takings Decision Ever?, Vermont Law School, Faculty Working Paper No. 28-13, February 4, 2014 (forthcoming in the New York University Environmental Law Journal), available at http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2316406; see also Tappendorf, Julie A. and DiCianni, Matthew T., 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.").

<sup>&</sup>lt;sup>98</sup> Epstein, Richard A., *Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles*, 37 HARV. J. L. & PUB. POL'Y 23, 37 (Winter 2014) (arguing that the *Koontz* attorneys should have challenged the doctrine of environmental mitigation).

#### i. *Koontz's* Harshest Critic.

The harshest academic criticism so far has come from John D. Echeverria. In an article with a title that doesn't 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."<sup>99</sup> He does, however, acknowledge the challenges of the opinion's author, Justice Samuel Alito, of holding a 5 to 4 majority for a decision that took over five months from oral argument to release.<sup>100</sup>

Echeverria challenged what he described 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," at least his interpretation of prior law.<sup>101</sup>

First, with regard to applying exactions doctrine to permit denials, Echeverria argues<sup>102</sup> 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."<sup>103</sup> Echeverria argues that the Court erred in allowing Koontz a *Nollan/Dolan* remedy here; instead, he could have brought a Due Process challenge on the theory that the permit denial was arbitrary and unreasonable in these circumstances.<sup>104</sup> Or he could have brought a regulatory takings claim.<sup>105</sup> Of course, litigants rarely win either of these types of challenges.<sup>106</sup> Indeed, the poor hand that the law

<sup>105</sup> *Id*.

<sup>&</sup>lt;sup>99</sup> Echeverria, *supra* note 97, at 1.

<sup>&</sup>lt;sup>100</sup> *Id.* at 1-2.

 $<sup>^{101}</sup>$  *Id.* at 3.

<sup>&</sup>lt;sup>102</sup> *Id.* at 19.

<sup>&</sup>lt;sup>103</sup> 526 U.S. 687, 703 (1999). But see 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, Pacific Legal Foundation, Program for Public Awareness, Working Paper Series, No. 13-512, November 31, 2013, 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.").

<sup>&</sup>lt;sup>104</sup> Echeverria, *supra* note 97, at 20.

<sup>&</sup>lt;sup>106</sup> See F. Patrick Hubbard et al., Do Owners Have a Fair Chance of Prvailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?, 14 DUKE

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."<sup>107</sup>

Second, Echeverria argues that "Justice Alito used convoluted, illogical thinking to support" the Court's extension of *Nollan* and *Dolan* to permit conditions involving money.<sup>108</sup> 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."<sup>109</sup> Thus, a monetary taking, in Echeverria's view, cannot properly be subject to *Nollan* and *Dolan*.<sup>110</sup>

Finally, Echeverria outlined some practical objections to the Court's decision in *Koontz* and looked ahead to potential issues for the lower courts.<sup>111</sup> 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."<sup>112</sup> 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.<sup>113</sup>

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 did issue 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*.

ENV. L. & POL'Y 121, 141-42 (2003) (finding that property owners prevail in fewer than 10 percent of *Penn Central* cases).

<sup>&</sup>lt;sup>107</sup> *Id.* at 19.

 $<sup>^{108}</sup>$  *Id.* at 32.

<sup>&</sup>lt;sup>109</sup> *Id.* at 34.

<sup>&</sup>lt;sup>110</sup> Id.

<sup>&</sup>lt;sup>111</sup> *Id.* at 39-45.

<sup>&</sup>lt;sup>112</sup> *Id.* at 49.

<sup>&</sup>lt;sup>113</sup> *Id.* at 49-50. 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." 512 U.S. at 385. And in *Lingle*, the Court states that *Nollan* and *Dolan* "involved Fifth Amendment takings challenges to *adjudicative* land-use exactions." *Lingle*, 544 U.S. at 546.

#### ii. Other Commentators Support the Court's Decision in Koontz

Ilya Somin 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."<sup>114</sup>

He specifically responds to the permit-denial criticisms by Echeverria, who Somin describes as "a leading critic of judicial enforcement of restrictions on land-use regulation and eminent domain," by explaining that Echeverria's complaints prove too much as they would apply to any unconstitutional condition case.<sup>115</sup> 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 the government couples them with adequate compensation.<sup>116</sup>

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 by state and local government action."<sup>117</sup> Somin acknowledges, however, that more litigation could result.<sup>118</sup> 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."<sup>119</sup> 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 Government from forcing some people alone to bear public burdens which, in all fairness and justice,

<sup>&</sup>lt;sup>114</sup> Ilya Somin, Two Steps Forward for the "Poor Relation" of Constitutional Law: Koontz, Arkansas Game & Fish, and the Future of the Takings Clause, 2012-2013 Cato Sup. Ct. Rev. 215, 216 (2013).

<sup>&</sup>lt;sup>115</sup> *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.").

<sup>&</sup>lt;sup>116</sup> Id.

<sup>&</sup>lt;sup>117</sup> *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.

<sup>&</sup>lt;sup>118</sup> *Id.* at 232.

<sup>&</sup>lt;sup>119</sup> *Id*.

should be borne by the public as a whole."<sup>120</sup> So, although the precise line may elusive, the distinction is informed by the answer to the question whether the exaction applies to all property owners or whether they are more narrowly targeted to individual landowners or small groups.<sup>121</sup>

In defending the *Koontz* decision, Christina Martin briefly addressed the question whether legislatively imposed exactions, as opposed to caseby-case and discretionary exactions, implicate *Nollan* and *Dolan* following the Court's decision.<sup>122</sup> She explained 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."<sup>123</sup> But *Dolan* itself involved a legislatively mandated exaction codified under state law.<sup>124</sup> 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 the government."<sup>125</sup> The dividing line was not, in fact, ad hoc v. legislative.<sup>126</sup>

Another commentator complained that the Court in *Koontz* did not go far enough. Richard A. Epstein, for example, offered a philosophical defense for the theory underlying the Court's decision in *Koontz*.<sup>127</sup> 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."<sup>128</sup> 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

<sup>&</sup>lt;sup>120</sup> *Id.* at 239.

<sup>&</sup>lt;sup>121</sup> Id.

<sup>&</sup>lt;sup>122</sup> Martin, *supra* note 2 at 18-19.

<sup>&</sup>lt;sup>123</sup> Id.; see, e.g., Town of Flower v. Stafford Estates Ltd. Partnership, 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).

<sup>&</sup>lt;sup>124</sup> Martin, *supra* note 2 at 19.

<sup>&</sup>lt;sup>125</sup> Id.

<sup>&</sup>lt;sup>126</sup> *Cf.* Cohen, Molly and May, Rachel Proctor, *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.* 

<sup>&</sup>lt;sup>127</sup> 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).

<sup>&</sup>lt;sup>128</sup> *Id.* at 291.

than its value in private hands."<sup>129</sup> But to fulfill that purpose, the government has to make the right comparison and it can only do so when it must internalize the cost of its demands.<sup>130</sup>

Epstein then, in a subsequent article, complained 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.<sup>131</sup> Epstein criticized 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."<sup>132</sup> The Court in *Koontz*, of course, decided the case, taking for granted that the government can require mitigation related to environmental impacts. The point, however, is that when the exactions, monetary or otherwise, are neither related to nor proportionate to the environmental or other externality, the government must pay compensation in exchange for the requirement.

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

#### A. The Nuisance Doctrine as the Historical Limitation on Private Land Use

At common law there were no building codes to worry about, nor zoning boards to appease.<sup>133</sup> If a landowner wanted to build a barn or house, the owner was free to carry out his or her plans without permission from the authorities.<sup>134</sup> This was because ownership of title entailed the right to make

<sup>&</sup>lt;sup>129</sup> *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.").

<sup>&</sup>lt;sup>130</sup> *Id.; see also* Somin, *supra* note 114 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.").

<sup>&</sup>lt;sup>131</sup> Epstein, *supra note* 98 [3] at 37.

 $<sup>^{132}</sup>$  *Id*.

<sup>&</sup>lt;sup>133</sup> 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. 351, 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).

<sup>&</sup>lt;sup>134</sup> William Blackstone, 1 Bl. Comm. The Rights of Persons Ehrlich Ed. P. 41 (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

any reasonable use of the land.<sup>135</sup>

This did not, however, allow the owner complete liberty to use his or her property in any conceivable manner. The nuisance doctrine was predicated upon a general principle of natural law theory—the idea that no man has the right to inflict affirmative harm upon another.<sup>136</sup> As such, a landowner has no right use his property in a manner that causes injury to his neighbor.<sup>137</sup> The corollary principle at common law is the overarching rule that an individual has a duty to conduct any activity with reasonable care to avoid causing injury to others.<sup>138</sup>

Accordingly, even without a zoning regime, a landowner cannot substantially interfere with another's use and enjoyment of his or her property.<sup>139</sup> This standard assumes that each landowner retains wide discretion to put his or her 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.<sup>140</sup>

<sup>136</sup> See EAGLE, Supra note 27 at § 2-1.

<sup>137</sup> See State v. Schweda, 2007 WI 100 (Wisc. 2007) (noting that "modern environmental law finds its roots in common law nuisance.").

<sup>138</sup> See Natalia M. Bartels & M. Stuart Madden, A Comparative Analysis of United States and Colombian Tort Law: Duty, Breach, and Damages, 13 Pace Int'l L. Rev. 59, 63 (2001) (quoting Justice Holmes' summation of "the general purpose of the law of torts [as] ... secur[ing] a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors...") (citing 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)).

<sup>139</sup> See Milwaukee II, 451 U.S., at 314, 101 S.Ct. 1784 (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).

<sup>140</sup> 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, 668–669, 8 S.Ct. 273, 301, 31 L.Ed. 205 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the

adopted the Constitution, the common law protected an owner's right to decide how best to use his own property.").

<sup>&</sup>lt;sup>135</sup> See 1 EDWARD COKE, THE INSTITUTES OF LAWS OF ENGLAND, ch. 1 sec. 1 (1797) (1st Am. Ed. 1812) ("What is the land but the profit thereof?"); see also Bove v. Donner-Hanna Coke Corp., 236 A.D. 37, 39 (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.").

While modern zoning regimes greatly constrain the landowner's common law liberties, the nuisance doctrine remains a background principle of property law today.<sup>141</sup> This necessarily means that, in a permitting regime, a landowner has no basis to object to a condition that prevents him from interfering with another's common law property rights.<sup>142</sup> But, at the same time, permitting regimes conflict with the common law's presumption of liberty when they require the landowner to affirmatively seek approval before building on private property.<sup>143</sup>

### 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.<sup>144</sup> Yet this was not an open-ended power to enact any conceivable restraint on human behavior.<sup>145</sup> The English common law has always recognized the powers of the sovereign to be constrained by natural law principles—in a way that continental monarchies

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, 36 S.Ct. 143, 146, 60 L.Ed. 348 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced)).

<sup>&</sup>lt;sup>141</sup> 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.").

<sup>&</sup>lt;sup>142</sup> Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1031 (1992).

<sup>&</sup>lt;sup>143</sup> Baily v. United States, 78 Fed. Cl. 239, 271 (2007) ("[B]oth [the Nollan and Palazzolo v. Rhode Island, 533 U.S. 606 (2001)] opinions underscore the right of owners to make reasonable use of their property, and to pass this same right of use to successors.") (citing Nollan, 483 U.S. at 834 n. 2; Palazzolo, 533 U.S. at 627); see also Blackstone Supra note 98.

note 98. <sup>144</sup> The power of the state to enact positive law was understood as a derivative of the common law. *See* Kevin Ryan, Esq., *Lex et Ratio Coke, the Rule of Law, and Executive Power*, 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 98.

<sup>&</sup>lt;sup>145</sup> 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].").

were not.<sup>146</sup> Thus, whereas the nuisance doctrine recognized a rule of reasonableness that prevents a landowner from invading the rights of another in the absence of positive enactments, the police powerauthorizing 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 the rights of others.<sup>147</sup>

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.<sup>148</sup> Of course the power to enforce law assumes the existence of background principles of law even in the absence of positive enactments. Thus, the common law nuisance doctrine and the principles upon which it stood also served as the basis for assuming the sovereign's power to enact positive laws. As explained by other commentators, "[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 or her property to the detriment of another."<sup>149</sup> Accordingly, the state has 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

<sup>146</sup> 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."); Rvan, Vt. B.J. at 9-12 (quoting Lord Coke: "[T]he king cannot create any offense by his prohibition or proclamation, which was not an offense before...") (citing 12 COKES'S REPORTS 75, 74-76); see also

Ryan, Supra note 108 at 9, 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].").

<sup>148</sup> Justice 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); William Blackstone, 4 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). <sup>149</sup> EAGLE, *Supra* note 27 at § 2-1.

justified to the extent it was reasonably crafted to prevent a landowner from invading the rights, or prerogatives, of another.<sup>150</sup> The modern conception of the police power is, however, much more expansive.<sup>151</sup> Today courts view most land use restrictions as legitimate exercises of police power, so long as the enactment advances some legitimate public purpose.<sup>152</sup>

# C. Expansion of Police Powers 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.<sup>153</sup> Whereas height and use limitations, set-back restrictions and aesthetic requirements are practically ubiquitous today, these forms of regulation were uncommon if not unknown in the 19th century.<sup>154</sup> But in the early 20th century, there was a growing sense in academic circles, in legislative bodies, and in the courts, that the police powers should be understood as more flexible, and in a less dogmatic light.<sup>155</sup> The progressive movement was aggressive, and ultimately

<sup>151</sup> Barros, 58 U. Miami L. Rev. at 478 ("The practical scope of police regulation, however, has evolved throughout American history.").

<sup>152</sup> See Lingle v. Chevron U.S.A., 544 U.S. 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.") (citing *Village of Euclid*, 272 U.S. 365).

<sup>153</sup> 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.").

<sup>154</sup> 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.").* 

<sup>155</sup> Once scholars began to conceive of the police power as the residuary power to

<sup>&</sup>lt;sup>150</sup> The state's permitting power is derived from its police powers, which allows government to impose restrictions in order to prevent reasonably anticipated harms to the public. *See Nollan*, 483 U.S. at 836. 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.

successful, in advancing the idea that the police power is a malleable tool—giving effect to the popular will of the people.<sup>156</sup>

Progressivism embraced the philosophy of legal positivism, which rejects classical theories of natural law that had previously served as the foundation of American legal theory and English common law.<sup>157</sup> 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 positive enactments of law declare what is permissible or impermissible.<sup>158</sup> 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.<sup>159</sup> In this vein, legal

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. *See e.g.*, Walter Wheeler Cook, *What is the Police Power?*, 7 Colum. L. Rev. 322 (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 all 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.").

<sup>&</sup>lt;sup>156</sup> Barros, *Supra* note 112 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.").

today."). <sup>157</sup> 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...").

<sup>&</sup>lt;sup>158</sup> See Ofer Raban, The Supreme Court's Endorsement of A Politicized Judiciary: A Philosophical Critique, 8 J. L. Society 114, 121 (2007) ("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'etre, 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, Vol. 1, 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 Morality 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]."

<sup>&</sup>lt;sup>159</sup> Raban, 8 J. L. Society at 122.

positivism rejects the very concept of inherent rights—instead viewing 'rights' as mere positive entitlements, or discretionary benefits, conferred from the sovereign.<sup>160</sup>

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 19th century. 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.<sup>161</sup> By contrast, the modern view of popular governance—embracing the precepts of legal positivism and utilitarian thought—was inherently majoritarian.<sup>162</sup> 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.<sup>163</sup>

This culminated in a series of decisions that simultaneously expanded our understanding of the police power and lowered the standard for

<sup>&</sup>lt;sup>160</sup> 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, 153, n. 4 (1938) (bifurcating individual rights into fundamental and non-fundamental categories).

<sup>&</sup>lt;sup>161</sup> 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 this view of republicanism was tempered by the founding generation's predominant views on natural law and natural rights, which they incorporated into the Constitution and the Bill of Rights to restrain the powers of the federal government. *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).

<sup>&</sup>lt;sup>162</sup> Alan B. Handler, *Judicial Jurisprudence*, 205-OCT N.J. Law. 22, 23 (2000) ("Legal positivism is founded on the belief that law expresses majoritarian views and law is positive only as it is expressed; beyond its expression, therefore, law has no intrinsic moral or ethical content.").

<sup>&</sup>lt;sup>163</sup> William D. Graves, *Evolution, the Supreme Court, and the Destruction of Constitutional Jurisprudence*, 13 Regent U. L. Rev. 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 Darwanism); *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.").

reviewing contested land-use restrictions.<sup>164</sup> 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.<sup>165</sup> Yet the Court later backed away from these decisions, holding that restrictions on economic liberties will survive unless they lack any conceivable rational basis, <sup>166</sup> and they will uphold restrictions on property rights if there is a substantial relation between the restriction and the public good.<sup>167</sup>

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.<sup>168</sup> Despite the fact that this proposal posed no affirmative 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.<sup>169</sup> This decision and its progeny make clear that due process challenges to zoning restrictions will usually fail. Indeed, *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.<sup>170</sup>

<sup>166</sup> 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).

<sup>167</sup> *Id.* at 624 ("After 1937, the end of the Lochner era, federal constitutional protection of property interests nearly disappeared.").

<sup>168</sup> *Euclid*, 272 U.S. at 388.

 $^{169}$  *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...").

<sup>170</sup> See Lingle, 544 U.S. at 540-41 (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

<sup>&</sup>lt;sup>164</sup> *Euclid*, 272 U.S. at 388 (stating that "[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).

<sup>&</sup>lt;sup>165</sup> See e.g., Lochner v. New York, 198 U.S. 45 (1905); Chas. Wolff Packing Co. v. Court of Industrial 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).

Of course, 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.<sup>171</sup> This suggests the authorities still bear at least some minimal burden to demonstrate that a restriction does something to advance the public good. In any event, modern courts seem to treat *Nectow* as an anomaly, and almost inevitably reject due process challenges to zoning restrictions.<sup>172</sup>

### D. The Interplay Between Common Law Principles and the Takings Clause

Notwithstanding the fact that courts reject most due process challenges to land use restrictions, our takings jurisprudence holds that such restrictions might still raise a constitutional problem under the Takings Clause.<sup>173</sup> The courts, however, have set an exceedingly difficult standard to demonstrate that a regulatory restriction is a taking.<sup>174</sup> In *Pennsylvania Coal v. Mahon*, Justice Holmes posited, for example, that a regulatory restriction amounts to a taking if it "goes too far."<sup>175</sup>

Decades later, the Court boiled this tautology down to the multifactor

the general welfare.").

<sup>171</sup> 277 U.S. 183 (1928).

<sup>173</sup> See Lingle, 544 U.S. at 537, 542 (recounting that, since *Mahon*, "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[,]" but 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.").

<sup>174</sup> See R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in Penn Central*, 38 Ecology L.Q. 731, 738 (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).

 $^{175}$  260 U.S. 393 (1922).

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<sup>&</sup>lt;sup>172</sup> See J. Peter Bryne, *Due Process Land Use Claims After* Lingle, 34 Ecology L.Q. 471, 477 (2007) (observing that "[m]ost federal courts have adopted standards of review even more deferential ... than arbitrary and unreasonable."); Nisha Ramachandranal, *Realizing Judicial Substantive Due Process in Land Use Claims*, 36 Ecology L.Q. 381, 393 (2009) (noting that it is "unclear if the Supreme Court intended for the 'shocks the conscience' standard announced in *County of Sacramento v. Lewis*, 523 U.S. 833 (1989)" to apply in zoning cases); *Coniston Corp. v. Village of Hoffman Estate*, 844 F.2d 461(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, 1280-81 (2014) (upholding an assailed restriction, notwithstanding a complete absence of facts supporting the assumption that the ordinance advanced the cited public goals).

*Penn Central* balancing test, which considers (1) the character of the government's actions; (2) the economic impact of the regulation; and (3) the owner's investment-backed expectations. Virtually all takings claims are reviewed under the *Penn Central* balancing test.<sup>176</sup> The only exceptions apply when: (a) the government has physically invaded private property, (b) development restrictions prohibit all economically beneficially uses of the land, or (c) a permit is conditioned on the requirement to dedicate property to the public.<sup>177</sup>

Of course, common law principles inform the court's taking analysis under all of these tests because courts 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.<sup>178</sup> 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 the analysis requires courts to distinguish "between an appropriate exercise of the police power and an improper exercise of eminent domain...."<sup>179</sup> Accordingly, most states developed a doctrine, rooted in both the Takings Clause and common law principles, to review conditions imposed on permit applications.<sup>180</sup>

Not surprisingly, the states varied in their approach.<sup>181</sup> Some imposed a heavy burden on the authorities to demonstrate the propriety of an imposed condition.<sup>182</sup> Others imposed only a loose requirement that the government entity need only show some theoretical connection between the condition and some adverse public harm, for which the condition should be intended to mitigate.<sup>183</sup> The Supreme Court reviewed and cataloged this line of cases

<sup>&</sup>lt;sup>176</sup> Radford and Wake, 38 Ecology L.Q. at 735 (2011) (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*...").

 $<sup>^{177}</sup>$  Lingle, 544 U.S. at 538-39, 545-47 (specifically explaining that the nexus and rough proportionality tests are takings claims rooted in the unconstitutional conditions doctrine).

<sup>&</sup>lt;sup>178</sup> Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. 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 takings claim) (citing *Lucas*, 505 U.S. at 1029).

<sup>&</sup>lt;sup>179</sup> Dolan, 512 U.S. at 391 (quoting Simpson, 292 N.W.2d at 302).

<sup>&</sup>lt;sup>180</sup> *Id.* at 389-91 (surveying the development of exactions law in the various states). <sup>181</sup> *Id.* 

<sup>&</sup>lt;sup>182</sup> See e.g., Pioneer Trust & Savings Bank v. Mount Prospect, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961).

# in Dolan v. City of Tigard.<sup>184</sup>

Writing for the Court in *Dolan*, Justice Rehnquist explained that the common thread in these cases was the principle that there must be some "reasonable relation" (or in his—intentionally crafted terms—"rough proportionality") between a condition imposed on a permit and the impact that a proposed project will likely have on the public.<sup>185</sup> This "rough proportionality" standard more closely tracks the early conception of the police powers as authorizing regulation *only* for the purpose of avoiding affirmative harm to others.<sup>186</sup> Thus, it is not sufficient for a governmental defendant to point to a rational basis to defend a contested condition; the Takings Clause imposes a heightened standard of review.<sup>187</sup>

### III. UNDERLYING IMPLICATIONS AND THEORITICAL FOUNDATIONS OF *KOONTZ*

### A. Per Se Defenses Are Highly Questionable

The Koontz decision comes on the heels of Arkansas Game & Fish Commission v. United States—where the Court unanimously rejected a categorical rule immunizing government against takings liability for

<sup>185</sup> *Id.* at 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.").

<sup>186</sup> See Nollan, 483 U.S. at 836 ("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.").

<sup>187</sup> 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).

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<sup>&</sup>lt;sup>183</sup> See, e.g., Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966).

<sup>&</sup>lt;sup>184</sup> Dolan, 512 U.S. at 389-91.

temporary floods.<sup>188</sup> In that case, the Army Corp. of Engineers repeatedly flooded land owned by the State of Arkansas and eventually caused hundreds of thousands of dollars in damage to timber.<sup>189</sup> 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 since the flooding was non-permanent.<sup>190</sup> 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.<sup>191</sup>

In fact, both *Koontz* and *Arkansas Game & Fish* demonstrate an unwillingness to embrace categorical defenses.<sup>192</sup> 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 the government's liability under the Takings Clause.<sup>193</sup> The Court in *Koontz*, in fact, 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.<sup>194</sup>

Both the *Koontz* and *Arkansas Game & Fish* decisions demonstrate that the Court will not lightly accept purported exceptions limiting takings liability. This suggests that the Court—at least with its present composition—may reject the legislative exactions exception as another overly simplistic *per se* defense. The burden presumably rests on the government to offer a doctrinal basis for the legislative exception.

Moreover, in both Koontz and Arkansas Game & Fish, the Court was

<sup>191</sup> 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.").

<sup>192</sup> *Koontz*, 133 S.Ct. at 2595, 2599.

<sup>&</sup>lt;sup>188</sup> 133 S.Ct. 511 (2012).

<sup>&</sup>lt;sup>189</sup> *Id.* at 515-16.

<sup>&</sup>lt;sup>190</sup> 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 Co.*, 13 Wall. 166 (1872); *United States v. Cress*, 243 U.S. 316 (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 (2012) (holding that because the flooding "was only temporary, [it could] not constitute a taking.").

<sup>&</sup>lt;sup>193</sup> Despite her apparent repudiation of categorical rules in *Arkansas Game & Fish*, it must be noted that Justice Ginsberg dissented in *Koontz. Id.* at 2603-2612.

<sup>&</sup>lt;sup>194</sup> *Id.* at 2599.

unimpressed when the government relied—in the absence of firm doctrinal footing—on a "parade of horribles" line of argument.<sup>195</sup> The rationale in both decisions suggests 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 two cases. But the Court's refusal to reflexively accept the government's policy concerns is consistent with the well-established principle that the Takings Clause rejects utilitarian considerations.<sup>196</sup>

# B. Koontz Suggests that Courts Should Reject Any Categorical Rule that Might Allow Systematic Circumvention of Nollan & Dolan

In the merits briefing, several *amici* raised concerns that the Management District's theory would encourage abuse of the permitting authority.<sup>197</sup> Several of the Justices seemed to echo those worries during oral argument.<sup>198</sup> In particular, Justice Alito expressed concern that permitting authorities might systematically circumvent *Nollan* and *Dolan* if they could evade heightened scrutiny simply by denying a permit when a landowner refuses to submit to a demanded condition.<sup>199</sup> He then emphasized this unease in his opinion as well, suggesting that government cannot immunize itself from the strictures of the nexus and rough proportionality tests.<sup>200</sup>

<sup>&</sup>lt;sup>195</sup> Arkansas Game & Fish Comm'n, 133 S. Ct. at 521 (noting that "[t]he sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability."); *Koontz*, 133 S. Ct. at 2600 (dismissing the dissents concerns as "exaggerate[d]").

<sup>&</sup>lt;sup>196</sup> Armstrong, 364 U.S. at 49.

<sup>&</sup>lt;sup>197</sup> See Br. Amicus Curiae of National Fed. of Indep. Bus. Small Business Legal Cntr. in Support of Pet., *Koontz v. St. Johns River Mgmt. Dist.*, No. 11-1447, 6-8 (2012); *Amicus* Br. of Institute for Justice in Support of Pet., No. 1447 (2012); *Amicus* Br. of National Assoc. of Home Builders in Support of Pet., No. 1447 (2012).

<sup>&</sup>lt;sup>198</sup> Transcript of Oral Argument, *Koontz v. St. Johns River Management District*, Case. No. 11-1447, 29 (Jan. 15, 2013) available online at <u>http://www.supremecourt.gov/oral\_arguments/argument\_transcripts/11-1447.pdf</u> (last visited Feb. 19., 2013) (Justice Roberts: "But... there is no restraint on the agency. It can ask for the moon—before it will give a permit? ... Do you know of any case where government has lost a *Penn Central* case?").

<sup>&</sup>lt;sup>199</sup> *Id.* at 33 (Justice Alito: "I'm trying to understand what would be—what would be left of *Nollan* and *Dolan* if we agree with you.").

<sup>&</sup>lt;sup>200</sup> *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.").

Though not expressly invoking the maxim—Alito's rationale embraced the precept that no man should be able to benefit from his own wrongdoing.<sup>201</sup> 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) 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 pre-condition of permit approval.<sup>202</sup>

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.<sup>203</sup> Either way the permit applicant must choose between attaining a development permit and waiving constitutional rights.<sup>204</sup>

### 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 constituted a "special application of the unconstitutional conditions doctrine[,]" the Court did not really elucidate the theoretical underpinnings of this doctrine in the land-use-permitting context until Koontz.<sup>205</sup> In its classic formulation, the unconstitutional conditions doctrine holds that the government cannot force an individual to choose between a discretionary benefit and exercising constitutional rights.<sup>206</sup> For example, the government cannot condition an award of unemployment benefits on a requirement to

<sup>201</sup> See Messersmith v. American Fidelity Co., 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921) (Cardozo, J.) ("[N]o one shall be permitted to take advantage of his own wrong ...").

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

<sup>&</sup>lt;sup>203</sup> Lingle, 544 U.S. at 542 (emphasizing that the takings injury is in the imposition of regulatory measures that severely burden property in "magnitude or character.").

<sup>&</sup>lt;sup>204</sup> 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).  $^{205}$  *Id.* at 530.

<sup>&</sup>lt;sup>206</sup> Supra note 17 at 1415.

waive First Amendment Rights.<sup>207</sup> And for that matter, the same is true of tax benefits.<sup>208</sup>

*Koontz* made clear that an unconstitutional conditions violation occurs with the imposition of a choice between attaining a permit approval and a requirement to give up an interest in property.<sup>209</sup> Moreover, the opinion suggests that the doctrine has special force in the context of land use permitting 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.<sup>210</sup> This is because the right to make reasonable use of one's property is a constitutional right in itself—as opposed to a mere "discretionary benefit."<sup>211</sup>

Though *Koontz* did not address the potential legislative exactions exception, its rationale would seem to foreclose such an exception. If the *sine qua non* of an unconstitutional conditions violation is the government's imposed choice to an individual of attaining something the individual needs, or wants, and a requirement to give up a constitutional right, it is irrelevant whether the choice arrives by virtue of a legislative enactment or at the discretion of permitting authorities.<sup>212</sup> Still, until the Supreme Court

<sup>211</sup> 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 2956. 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 295.

<sup>212</sup> 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." *Id.* at 2095. This suggests that the unconstitutional conditions doctrine should apply with the same force—regardless of how the government styles its conduct—

<sup>&</sup>lt;sup>207</sup> Sherbert v. Verner, 374 U.S. 398 (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).

<sup>&</sup>lt;sup>208</sup> Speiser v. Randall, 357 U.S. 513 (1958).

<sup>&</sup>lt;sup>209</sup> *Koontz*, 133 S. Ct. at 2595.

<sup>&</sup>lt;sup>210</sup> 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 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).

squarely addresses the question, the lower courts will likely continue to struggle with this issue.<sup>213</sup>

# D. The Rationale in Koontz May Apply in Non-Land-Use Permitting Cases

*Koontz* was a land-use-permitting case. But its rationale may apply equally in any situation where an individual or business must obtain administrative approval before engaging in regulated conduct.<sup>214</sup> 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.<sup>215</sup> 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 highways.<sup>216</sup>

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.<sup>217</sup> Thus, for example, businesses might contest

injury. <sup>214</sup> 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...").

<sup>215</sup> 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).
 <sup>216</sup> Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 590, 593-94

(1926) (*Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 590, 593-94 (1926) (*Frost Trucking*) (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.).

companies.). <sup>217</sup> 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., Euclid*, 272 U.S. 365; *City of Cleburne*, 473 U.S. at 440.

where there is a forced choice between attaining a permit approval and satisfying an extortionate dedication requirement.

<sup>&</sup>lt;sup>213</sup> 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.

regulations requiring them to display certain notices because they condition the right to conduct lawful business operations on the condition that the business waive its right to be free from compelled speech.<sup>218</sup> 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.<sup>219</sup> 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.

### IV. APPLYING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND DEDICATION REQUIREMENTS AFTER KOONTZ

### A. Legislatively Imposed Exactions

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.

### 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*.<sup>220</sup> Setting aside *Koontz* for the moment, *Lingle* seems to lend

<sup>&</sup>lt;sup>218</sup> Nat'l Ass'n of Mfrs. v. N.L.R.B., 717 F.3d 947, 956 (D.C. Cir. 2013).

<sup>&</sup>lt;sup>219</sup> "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.

<sup>&</sup>lt;sup>220</sup> To be sure, many commentators have made this argument. *See E.g.*, For example, 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 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).

support for this proposition, at least on first blush.<sup>221</sup> Indeed, the opinion assumes that there is a relevant distinction between legislatively imposed exactions and those imposed at the discretion of an administrative body.<sup>222</sup>

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.<sup>223</sup> 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 is 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 it has been blessed by a legislative enactment—the constitutional injury is the same either way.

# 2. 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 apparent basis for invoking a legislative exception.<sup>224</sup> 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

<sup>&</sup>lt;sup>221</sup> 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.").

<sup>&</sup>lt;sup>222</sup> *Lingle*, 544 U.S. at 546.

<sup>&</sup>lt;sup>223</sup> *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.").

<sup>&</sup>lt;sup>224</sup> Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga., 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.").

common carriers."<sup>225</sup> 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.<sup>226</sup>

Invoking the unconstitutional conditions doctrine, the 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.<sup>227</sup> Likewise, in United States v. American Library Assosication, Inc., the court held unconstitutional a statute conditioning receipt of government funds on a restriction of First Amendment rights.<sup>228</sup>

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.<sup>229</sup> 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."<sup>229</sup>

### 3. Signs the Judicial Tides May be Turning

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. Dept. of Agriculture*, suggests that *Koontz* may have effected a sea change.<sup>231</sup> In that case, the Ninth Circuit held that the nexus and rough proportionality tests applied to review of a marketing order—which the U.S. Department of Agriculture (USDA) imposed on raisin producers under a New Deal era statute. The statute authorized USDA to confiscate a certain portion of a raisin producer's annual crop to stabilize market prices, and authorized USDA to impose fines on producers who refuse to comply.

<sup>&</sup>lt;sup>225</sup> 271 U.S. at 592.

<sup>&</sup>lt;sup>226</sup> Id.

<sup>&</sup>lt;sup>227</sup> 517 U.S. 484, 512-13 (1996)

<sup>&</sup>lt;sup>228</sup> 539 U.S. 194 (2003).

<sup>&</sup>lt;sup>229</sup> Burling and Owen, *Supra* note 17 at 437 (observing that "Not one of the Supreme Court cases applying the doctrine of unconstitutional conditions makes a distinction between legislatively imposed and adjudicatively determined conditions.").

<sup>&</sup>lt;sup>230</sup> 271 U.S. at 594.

<sup>&</sup>lt;sup>231</sup> 750 F.3d 1128 (9th Cir. 2014).

In response, several California farmers invoked the Takings Clause in challenge to this regulatory confiscation program—specifically, for the imposed fines for non-compliance. They maintained that the marketing order constituted a taking under *Loretto v. Manhattan Teleprompter*, which holds that permanent physical invasion of property constitutes a *per se* taking.<sup>232</sup> Controversially, the Ninth Circuit rejected that argument—emphasizing that "*Loretto* specifically preserves the state's "substantial authority" and "broad power to impose appropriate restrictions upon an owner's use of his property."<sup>233</sup>

But instead of then turning to the *Penn Central* balancing test, which courts have traditionally applied to review a regulatory restriction on property, the Court applied *Koontz*.<sup>234</sup> Though ultimately upholding the challenged regulatory scheme under the nexus and rough proportionality tests, it is significant that the Court applied those tests to review a legislatively imposed regulatory requirement. 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 making use of his or her property and waiving protected constitutional rights.<sup>235</sup>

And on the heels of the *Horne* decision, the Northern District of California invalidated a San Francisco ordinance under *Koontz*. In that case, *Levin v. City & Cnty. 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.<sup>236</sup> 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

<sup>236</sup> No. 3:14-CV-03352-CRB, 2014 WL 5355088, at \*5 (N.D. Cal. Oct. 21, 2014).

<sup>&</sup>lt;sup>232</sup> 458 U.S. 419 (1982).

<sup>&</sup>lt;sup>233</sup> *Horne*, 750 F.3d at 1141 (quoting *Loretto*, 458 U.S. at 441, 102 S.Ct. 3164).

<sup>&</sup>lt;sup>234</sup> 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*, 544 U.S. at 538 ("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*...").

<sup>&</sup>lt;sup>235</sup> "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.

preferred uses and paying money for an ostensible public purpose, the Court held that the ordinance is subject to review under the nexus and rough proportionality tests.<sup>237</sup>

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.<sup>238</sup> 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 revered course *sub silento*, or whether there is an unresolved doctrinal rift, which the Circuit must squarely address. In any event, the implication in 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 that doctrinal framework, there is no place for a legislative exception.<sup>239</sup>

### B. Open-Space and Aviation Dedication Requirements

1. 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?<sup>240</sup> Setting aside semantics, there may be an argument that these

<sup>&</sup>lt;sup>237</sup> Id. at \*6 (N.D. Cal. Oct. 21, 2014).

<sup>&</sup>lt;sup>238</sup> See Mead, 389 F. App'x at 638 (9th Cir. 2010) (citing *McClung*, 548 F.3d at 1225).

<sup>&</sup>lt;sup>239</sup> "[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, No. 3:14-CV-03352-CRB, 2014 WL 5355088, at \*8.

<sup>&</sup>lt;sup>240</sup> 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 (2014). This approach generally comports with the rule that the landowner must always identify a property interest that has been taken in an

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.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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 state.<sup>244</sup>

2. Narrowly Tailoring 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

<sup>241</sup> *Koontz*, 133 S.Sct. at 2594.

<sup>242</sup> See Air Pegasus, 424 F.3d at 1213.

<sup>243</sup> See Supra note 44, Town of Mendon, 822 N.E.2d 1214.

<sup>244</sup> 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 United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946).

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).

unquestionably subject to review under *Nollan* and *Dolan*.<sup>245</sup> 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 or her land.<sup>246</sup> 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.<sup>247</sup> But, in such a case, *Nollan* and *Dolan* should still apply because dedication of an easement transfers an interest in the property to the government.<sup>248</sup> 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 or her own property, and transferring a right of control to the public authority.<sup>249</sup>

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.<sup>250</sup> If so narrowly conceived, such an aviation

<sup>247</sup> 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.").

<sup>&</sup>lt;sup>245</sup> *Lingle*, 544 U.S. at 546-47.

<sup>&</sup>lt;sup>246</sup> 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.

<sup>&</sup>lt;sup>248</sup> 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").

<sup>&</sup>lt;sup>249</sup> 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 nonpossesory 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...").

<sup>&</sup>lt;sup>250</sup> 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.App.4.Dist., 1963) (distinguishing between an exercise of police powers 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

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.<sup>251</sup>

### 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 or her property.<sup>252</sup> Because an outright prohibition on development could achieve the same goal, a government entity might argue that a court should use the *Penn-Central* test to review an open-space dedication requirement.

But a requirement to dedicate an open-space easement does something more than a mere regulatory prohibition on development. First, zoning restrictions might be lifted as the political winds shift, but once an openspace easement is recorded the prohibition is permanent.<sup>253</sup> Second, an easement—by its very nature—grants a third party the right to enforce its terms.<sup>254</sup> This necessarily means that a negative easement grants the holder an interest in the property-i.e. an enforceable right to prevent the landowner from exercising common law property rights.<sup>255</sup>

Accordingly, Courts should review a requirement to dedicate an openspace 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.<sup>256</sup> As such, any requirement giving another party the right to preclude such reasonable uses

dedication of an interest in real property and waiver of the right to demand just compensation for that interest. See Nollan, 483 U.S. at 831 ("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.").

<sup>&</sup>lt;sup>251</sup> 505 U.S. at 1026-1032.

<sup>&</sup>lt;sup>252</sup> *Supra* note 211.

<sup>&</sup>lt;sup>253</sup> 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.").

 $<sup>^{254}</sup>$  Supra note 212.  $^{255}$  Id.

<sup>&</sup>lt;sup>256</sup> See e.g., Apartment Ass'n of Los Angeles, Inc. v. City of Los Angeles, 24 Cal.4<sup>th</sup> 830, 841 (2001) ("It is, of course, axiomatic in Anglo American law that ownership of real property in fee simple aboluste is the greatest possible estate...") (citing Edward Coke, 1 Coke (1628) Institutes of the Lawes of England (Butler & Hargrove's Notes ed.) 18a, § 11).

necessarily transfers an interest in the property to another party—*i.e.* an interest in asserting dominion over the property. For this reason, *Nollan* and *Dolan* apply to open-space dedication requirements.

## C. Affordable Housing Linkage Fees

Before *Koontz*, many jurisdictions reviewed monetary exactions under *Penn Central's* balancing test<sup>257</sup>; *Koontz*, however, unequivocally repudiated that line of cases. *Koontz* made clear that *Nollan* and *Dolan* apply to conditions requiring an applicant to pay money for public purposes.<sup>258</sup> To be sure, *Koontz* calls into question permitting regimes requiring applicants to pay into special funds—regardless of which public goals they seek to advance.<sup>259</sup> As such, our hypothetical ordinance,

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*,

<sup>&</sup>lt;sup>257</sup> 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).

<sup>&</sup>lt;sup>258</sup> Levin, No. 3:14-CV-03352-CRB, 2014 WL 5355088, at \*8.

<sup>&</sup>lt;sup>259</sup> 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 deferential, 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.

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.<sup>260</sup> 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.<sup>261</sup> 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.<sup>262</sup>

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

<sup>261</sup> *Ehrlich*, 12 Cal. 4th 854, 868 (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.").

<sup>262</sup> 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.").

No. 3:14-CV-03352-CRB, 2014 WL 5355088, at \*10 ("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.").

<sup>&</sup>lt;sup>260</sup> 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.").

supply of rental units available, potentially bringing down living costs in the community.<sup>263</sup> Yet, in other cases, there may be empirical evidence supporting a finding that new developments—perhaps those marketed to high-income earners—are adding strain on the market for affordable housing by generally driving up the community's property values.<sup>264</sup>

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.<sup>265</sup> Thus, there must be an individualized assessment of the project and an empirical justification for the specific dollar amount in question.<sup>266</sup> Of course, the more attenuated the 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's likely the permit applicant will prevail in many cases. The one thing that is clear is that the regime cannot be presumed constitutional.<sup>267</sup> 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

<sup>267</sup> *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).

<sup>&</sup>lt;sup>263</sup> *Ehrlich*, 12 Cal. 4th at 868.

<sup>&</sup>lt;sup>264</sup> Commercial Builders of N. California, 941 F.2d at 875 (finding that empirical studies may satisfy the nexus test).

<sup>&</sup>lt;sup>265</sup> Dolan, 512 U.S. at 393 (requiring an individualized assessment).

<sup>&</sup>lt;sup>266</sup> See E.g., Bldg. Indus. Ass'n of Cent. California v. City of Patterson, 171 Cal. App. 4th 886, 899, 90 Cal. Rptr. 3d 63, 73-74 (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.").

threatens negative externalities and that the remedy sought will go no further than is reasonably necessary to avoid those external harms.

#### 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 may, in some instances, serve as a tool to discourage development of areas that the community might prefer to preserve in an unblemished natural state.<sup>268</sup> Second, the ability to require landowners to make 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.<sup>269</sup> 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.<sup>270</sup>

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.<sup>271</sup> Yet the Fifth Amendment is inherently anti-utilitarian.<sup>272</sup>

<sup>271</sup> 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.").

<sup>&</sup>lt;sup>268</sup> See Br. Amicus Curiae of National Fed. of Indep. Bus. Small Business Legal Cntr. in Support of Pet., *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…").
<sup>269</sup> Id. at 8-9 ("A developer or a small business cannot afford to stall a project for too

<sup>&</sup>lt;sup>269</sup> *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).

<sup>&</sup>lt;sup>270</sup> 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 declare[ing], 'The [regime] ... saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages.").

<sup>&</sup>lt;sup>272</sup> 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* 

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."<sup>273</sup>

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.<sup>274</sup> And *Dolan* requires that the condition must be roughly proportional to the anticipated impact.<sup>275</sup>

*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 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 test should apply any time an owner's right to use his or her land has been conditioned on a requirement to give up any interest in real property or money.

\* \* \*

*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 antiutilitarian 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.* 

<sup>&</sup>lt;sup>273</sup> Armstrong v. United States, 364 U.S. 40, 49 (1960).

<sup>&</sup>lt;sup>274</sup> Nollan, 483 U.S. at 837.

<sup>&</sup>lt;sup>275</sup> Dolan, 512 U.S. at 391.