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*Koontz: The Very Worst Takings Decision Ever?*

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The Supreme Court's decision last term in *Koontz v. St. Johns River Water Management District*,[1] is one of the worst, if not the worst decision in the Court's pantheon of takings cases. The majority opinion conflicts with established doctrine in several respects and contradicts and even misrepresents pertinent precedent. At the same time, the majority does not explain whether or how it thinks established doctrine should be reformed to support its novel rulings. As a result, the Court not only reached a mistaken result in this particular case but has cast a pall of confusion and uncertainty over takings law as a whole, reversing to some extent the recent successful work by the Court to improve upon the coherence and predictability of takings doctrine.[2]

The defects of the Court's opinion in *Koontz* undoubtedly partly reflect the challenges Justice Samuel Alito, the author of the opinion, encountered in creating a 5 to 4 majority willing to overrule the decision of the Florida Supreme Court and join in a single opinion for the Court. This surmise is supported by the fact that it took the Court over five months from the date of the oral argument in mid-January 2013, to release the decision in late June, making the deliberations in this case more time-consuming than in all but a handful of other cases in the 2012-13 term.[3] Justice Elena Kagan's dissent, joined by three other justices, contains the kind of cogent critique of the Court's opinion that a cobbled together majority opinion sometimes invites.

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

[2] *See, e .g. Lingle v. Chevron USA, Inc*. 544 U.S. 528 (2005) (unanimously repudiating the "substantially advance" takings theory, and articulating a coherent framework for analyzing claims under the Takings Clause). Cf. John Paul Stevens, Tribute to Justice O'Connor, 31 *Journal of Supreme Court History* ___ (2006) (referring to Justice O'Connor's "lucid and honest opinion in *Lingle v. Chevron USA, Inc*., . . .which, if not the very best, was surely one of the best opinions announced last term").

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

The decision in *Koontz* includes two major doctrinal innovations. First, the Court ruled that the stringent standards the Court established in *Nollan v. California Coastal Commission*[4] and *Dolan v. City of Tigard*[5] for the review of land use exactions also govern constitutional challenges to government decisions to deny development permits after a land owner has rejected a government "demand" for an exaction. Second, the Court ruled that the *Nollan/Dolan* standards apply not only to permit conditions requiring property owners to accept physical takings of their property, but also to conditions requiring owners to pay fees to the government or otherwise expend money at the public's behest. For different reasons, neither of these rulings can be explained or justified in light of pre-existing law, none of which the Court purported to modify or overrule.

Apart from its doctrinal failings, the Court's decision will have negative practical effects on local governments and developers seeking to obtain development approvals. The decision will create a perverse, wasteful incentive for local officials to decline to work cooperatively with developers to design projects that make business sense and protect the interests of the community. The decision also will make the land use regulatory process more cumbersome, expensive and time-consuming, and will lead to the rejection of some development proposals that previously would have been approved. Ultimately, the health, vitality and diversity of American cities and towns will suffer. Justice Kagan predicted the Court will come to "rue" its decision in *Koontz*. [6] If she is correct, one can only hope that a future Court may chart a different, better course.

This article is organized as follows. Section one provides a thumbnail sketch of the facts of the case, the lower court rulings, and the Supreme Court decision. Section two describes several prior Supreme Court takings decisions to provide the necessary background for a critical analysis of *Koontz,* including *Nollan, Dolan, City of Monterey v. Del Monte Dunes at Monterey,*[7] and *Lingle v. Chevron USA, Inc*.[8] Section three discusses the doctrinal problems with the Court's ruling that *Nollan/Dolan* standards govern a constitutional challenge to a permit denial. Section four discusses the doctrinal problems with the Court's ruling that *Nollan* and *Dolan* apply to permit conditions imposing fees or otherwise requiring expenditures of money Section five describes the numerous negative practical implications of the Court's rulings. Section six discusses the significance of *Koontz* for the current state and potential future direction of takings

[4] 483 U.S. 825 (1987).

[5] 512 U.S. 374 (1994).

[6] 133 S.Ct. at 2607.

[7] 526 U.S. 687 (1999).

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

doctrine, assesses the prospects that the Court will reverse course in part or in whole in the future, and offers some suggestions on how litigants and lower courts might cabin the damage the rulings in *Koontz* may otherwise inflict. The article ends with a brief conclusion.

## I. Factual Background and Court Rulings

In 1972, Coy Koontz, Sr., purchased a 14.9-acre parcel of land east of Orlando, Florida for approximately $95,000.[9] The land abutted Florida State Road 50, near the intersection with Florida State Road 408.[10] Like a large part of Florida, most of the land consisted of wetlands.[11] In 1987, the transportation agency responsible for State Road 50 acquired 0.7 acres of Koontz's parcel through eminent domain, paying $402,000 in compensation for the area seized as well as "severance" damages.[12] Although the record is not clear on this point, the severance damages may have been awarded to reflect the fact that the seized land was mostly upland, leaving Koontz with mostly hard-to-develop wetlands. In 1994, Koontz filed an application with the St Johns River Water Management District for permits to develop 3.7 acres of his remaining property, including 3.4 acres of wetlands, as a retail shopping center.[13] This application triggered the District's requirement -- the validity of which was not contested in this litigation -- that an applicant seeking permission to develop wetlands "offset" the environmental damage.[14] To address this requirement, Koontz proposed to place a conservation easement on the approximately 11 acres of his remaining land he did not plan to develop.[15]

The District responded that Koontz's offer was inadequate.[16] Under District policy, developers seeking to mitigate wetlands destruction by placing an easement on other wetlands were generally required to preserve at least 10 acres of wetlands for each wetland acre destroyed,

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[9] See Proposed Final Judgment for Defendant, at 45, *Koontz v. St Johns Water Management District,* CI-94-5673.

[10] 133 S.Ct. at 2592.

[11] *Id.*

[12] Stipulated Final Judgment, in *Orlando/Orange County Expressway Authority v. Koontz*, No CI87-9182 (Fl. Cir. Ct., March 24, 1989).

[13] 133 S.Ct. at 2592.

[14] *Id.*

[15] *Id.* at 2592-93.

[16] *Id*. at 2593.

a standard Koontz's offer did not satisfy.[17] The District suggested several alternatives that would allow Koontz to obtain a permit. First, the District proposed that Koontz consider reducing the project site to one acre, in which case the easement proposed by Koontz would provide adequate mitigation.[18] Second, the District suggested that Koontz proceed with the larger project but agree, in addition to restricting the eleven acres, to finance wetland restoration work on District-owned lands within the basin.[19] In addition, the District made clear that it was willing to consider other mitigation measures Koontz might propose.[20] However, Koontz refused to go beyond his original offer. As a result, the District issued an order denying the applications, reciting in detail its prior discussions with Koontz about mitigation measures and ultimately concluding that, without further mitigation, the application failed to meet the standards for project approval.[21]

In 1994, Koontz filed suit in Florida Circuit Court alleging that the permit denial constituted a regulatory taking of his private property.[22] Koontz asserted that the District's denial of the permits constituted a taking because the decision failed to "substantially advance" a legitimate government interest and because it deprived him of the "economically viable use "of his property.[23] During the course of the litigation, the U.S. Supreme Court issued its decision in *Lingle v. Chevron USA, Inc.,*[24] repudiating the "substantially advance" takings theory, Accordingly, this theory of liability quietly fell out of the case, along with the claim of denial of all economically viable use. After considerable preliminary litigation over the issue of ripeness,[25] Koontz proceeded with this case on the new theory that the permit denial failed the "essential

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[17] See Brief for Respondent, at 12, *Koontz v. St Johns Water Management District*, No. 11-1447 (U.S., Dec., 2012)

[18] 133 S.Ct. at 2593.

[19] *Id.*

[20] *Id.*

[21] Final Order, in Re Coy Koontz, St Johns Water Management District (June 9, 1994)

[22] 133 S.Ct. at 2593. Coy Koontz Sr. died in 2000, and his son, Coy Koontz, Jr., carried on the litigation from that point forward as executor of his father's estate.

[23] Amended Complaint, *Koontz v. St Johns Water Management District*, Florida Circuit Court, Case No.: CI-94-5673 dated June 9, 1994).

[24] 544 U.S. 528 (2005).

[25] *See Koontz v. St Johns Water Management District*, 720 So.2d 560 (1998) (reversing dismissal of suit for lack of a ripe claim).

nexus" and" rough proportionality" tests established in *Nollan v. California Coastal Commission*,[26] and *Dolan v. City of Tigard*.[27] In 2002, the Circuit Court ruled that the permit denials constituted a taking under *Nollan* and *Dolan*.[28] In response to this order, the District issued Koontz the permits he requested, subject to the deed restrictions he originally proposed.[29] With regulatory approval in hand, Koontz sold the property to Floridel, LLC for $1,200,000.[30] Floridel never developed the property and in 2013 filed a Chapter 11 bankruptcy petition.[31]

The case proceeded on the issue of whether Koontz was entitled to just compensation for a "temporary" regulatory taking of the property. The Circuit Court ultimately awarded Koontz $376,154 in compensation.[32] On appeal, the Florida District Court of Appeals, in a 2 to 1 decision, affirmed the finding of a taking.[33] Exercising its discretionary authority to review the case, the Florida Supreme Court granted review to address two questions: whether *Nollan* and *Dolan* apply (1) "where there is no compelled dedication of any interest in real property to the public" or (2) when "the alleged exaction is a non-land use monetary condition for permit approval."[34] The Florida Supreme Court answered both of these questions in the negative and reversed.[35] Two members of the Court concurred in the result, contending that Koontz was required to exhaust available administrative remedies before prosecuting the regulatory takings suit, and failed to satisfy this requirement.[36]

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[26] 483 U.S. 825 (1987).

[27] 512 U.S. 374 (1994).

[28] Final Judgment, *Koontz v. St Johns Water Management District*, No, CI-94-5673 (Cir. Ct., Oct 30, 2002).

[29] Final Judgment, *Koontz v. St Johns Water Management District,* No. CI 94-5673 (Cir. Ct., June, 2004).

[30] Parcel Report for 312223000000046.

[31] *See* http://business-bankruptcies.com/cases/floridel-llc.

[32] *See St. Johns River Water Management District v. Koontz*, 77 So.3d 1220, 1225 (Fl. 2011)

[33] *St. John's Water Management District v. Koontz*, 5 So3d 8 (Fla. Dist. Ct. 2009).

[34] *See St. Johns River Water Management District v. Koontz*, 77 So.3d 1220, 1222 (Fl. 2011)

[35] *Id.* at 1230.

[36] *Id.* at 1230-31

In a decision issued on June 25, 2013, the U.S. Supreme Court reversed on both issues.[37] Justice Samuel Alito wrote the opinion for the Court, joined by four other members of the Court, and Justice Elena Kagan, joined by three other justices, filed a dissenting opinion. On the first issue, the Court ruled that the standards established in *Nollan* and *Dolan* for evaluating whether permit "exactions" constitute takings also apply in the context of permit denials based on an owner's rejection of a government "demand" that an owner accede to an exaction.[38] The Court conceded that no "taking" of any property occurs when a permit is denied and no condition is imposed.[39] But it ruled that, under the doctrine of unconstitutional conditions, *Koontz* was nonetheless entitled to challenge the permit denials based on the *Nollan* and *Dolan* standards.

> "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.[40]

Justice Kagan, in dissent, conceded that the *Nollan* and *Dolan* tests should apply when the government has denied a permit because an owner has refused to accede to an exaction demand.[41] However, she did not join in Justice Alito's unconstitutional conditions rationale and indeed offered no explanation for her agreement with the majority on this legal issue. She argued that the claim should fail on the merits because the District made no "demand" for an

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[37] 133 S.Ct. 2586 (2013).

[38] *Id.* at 2595. Counsel for the United States, as *amicus curiae*, conceded that a permit denial based on the owner's refusal to accept a condition proposed by the government should be evaluated in the same fashion as a an exaction attached to an issued permit. Oral Argument Transcript, at 51-52. Counsel for the District arguably did as well. See id. at 33-34. *See* 133 S.Ct. at 2597 (asserting that "respondent conceded [at oral argument] that the denial of a permit could give rise to a valid claim under *Nollan* and *Dolan*"). *But see* Brief Amicus Curiae of National Governors Association et al, at 3, in *Koontz v. St Johns Water Management District*, No 11-1447 (arguing that *Nollan* and *Dolan* do not apply when the government denies a permit rather than granting a permit with exactions).

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

[40] 133 S.Ct. at 2596.

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

exaction but merely offered various "suggestions" for mitigation and ultimately denied the applications because they failed to meet "the relevant permitting criteria."[42]

On the second issue the majority ruled that the *Nollan* and *Dolan* standards apply not only to exactions requiring dedications of interests in land to the public, but also to permit conditions requiring applicants to spend money for public benefit or pay money to the government.[43] On the one hand, Justice Alito stated, "Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."[44] On the other hand, he set forth an expanded version of the *Nollan/Dolan* standards that will make it more difficult to compel developers to internalize their externalities through monetary exactions. He did not dispute the general understanding, based on the Court's splintered rulings in *Eastern Enterprises v. Apfel,*[45] that government mandates imposing generalized financial liabilities on private parties do not constitute takings of private property. He nonetheless ruled that a monetary exaction in the land use permitting context can give rise to a takings claim because the requirement to pay money is "linked to a specific, identifiable property interest such as a . . . parcel of real property."[46] Justice Kagan dissented on the ground that this outcome contradicted *Eastern Enterprises* and the framework established by *Nollan* and *Dolan*.[47] She also objected that expanding the scope of *Nollan* and *Dolan*'s heightened scrutiny "threatens the heartland of local land-use regulation and service delivery,"[48] and that it would create serious practical challenges for courts seeking to distinguish between property taxes (which are not takings, apparently) and monetary exactions (which commonly may be takings after *Koontz*).[49] Challenges to monetary exactions, she concluded, should be evaluated under regulatory takings doctrine or as a potential violation of some other provision of the Constitution, such as the Due Process Clause.

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[42] *Id.* at 2609-11 (Kagan, J., dissenting).

[43] *Id*. at 2599.

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

[45] 524 U.S. 498 (1998).

[46] 133 S.Ct. at 600.

[47] *Id.* at 2604-07 (Kagan, J., dissenting).

[48] *Id.* at 2607 (Kagan, J., dissenting).

[49] *Id.* at 2607-08 (Kagan, J., dissenting).

Having determined that the Florida Supreme Court erred in its legal analysis, the Court remanded the case to the Florida Supreme Court to reexamine the merits of Koontz's case.[50]

The Court said little about the appropriate remedies for a successful claim under either of the Court's two rulings. Because the District issued a permit to *Koontz* with conditions acceptable to him, the Court had no reason to decide whether a plaintiff who established what the Court termed a "*Nollan/Dolan* unconstitutional conditions violation."[51] would be entitled to equitable relief, though language in the opinion appears to suggest that equitable relief might be appropriate.[52] With respect to monetary relief, all of the justices agreed that since there was no taking of property an award of "just compensation" under the Takings Clause was not possible.[53] However, the Court said that monetary damages might be available based on the Florida statute under which the suit was brought, but left the issue for resolution by the Florida courts.[54] With respect to monetary exactions, again the court did not address the remedy issue explicitly, but I surmise that if the Court sticks to its conclusion that *Nollan/Dolan* apply to permit conditions requiring the payment of money, it will conclude that an injunction is the appropriate remedy for this type of *Koontz* claim.[55]

## II. The Supreme Court Prequels to *Koontz*.

To appreciate both the significance and problematic nature of *Koontz*'s extensions of *Nollan* and *Dolan* it is necessary to understand how *Nollan* and *Dolan* relate to – and are derived from – prior takings rulings and principles.

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[50] *Id.* at 2603

[51] Id. at 2597.

[52] *See id.* at 2597 (referring to a permit denial in violation of the *Nollan/Dolan* standards in a *Koontz*-type case as "impermissibl[e]."

[53] *See id*. at 2597; *id*. at 2603 (Kagan, J., dissenting).

[54] *See id.* at 2597; *but see id.* at 2612 (arguing that even under the majority's theory of the case Koontz would not be entitled to damages because the Florida statute only authorizes an award of compensation for a taking, which all agreed did not occur). The Court's comments on remedy appear to leave open the question of whether 42 U.S.C. §1983, might support an award of monetary damages in this type of case.

[55] *See Eastern Enterprises*, 524 U.S. at 521 (plurality opinion) ("the presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds" mandated by the Government;" otherwise the Takings Clause would have the "utterly pointless" effect of requiring claimants to demand financial compensation from the government for monetary payments they are required to make to the government) (internal quotations omitted).

On the one hand, the Supreme Court has long recognized that direct appropriations of private property (such as government seizure of a factory,[56] or taking over of a leasehold[57]) necessarily are takings of private property under the Takings Clause. In addition, the Court has recognized that permanent physical occupations of private property (such as government flooding of land behind a dam,[58] or forcing a landlord to accept a cable television company's equipment on her building[59]) are invariably takings. These quintessential takings are said to be governed by *per se* rules.[60]

On the other hand, the Court has said that regulatory restrictions on the use of private property are subject to a more forgiving standard and may well not be takings. Most takings claims based on regulations are evaluated under the three-part analytic framework established thirty-five years ago in *Penn Central Transp. Co. v. New York City.*[61] This analysis focuses on the economic impact of the restriction, the degree of interference with investment-backed expectations, and the character of the regulation.[62] In addition, in the extraordinary situation where a regulation deprives the owner of "all value,"[63] the Court has said, the regulation should be treated as a *per se* taking.[64] In all events, awards of compensation under the Takings Clause based on regulatory restrictions on the use of property are reserved for "extreme circumstances."[65]

The *Nollan* and *Dolan* cases arose at the intersection of these two distinct lines of authority. In *Nollan,* the California Coastal Commission permitted the owners to construct a new

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[56] *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

[57] *See Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).

[58] *Pumpelly v. Green Bay Co.,* 20 L.Ed. 557 (1872).

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

[60] *See Arkansas Game & Fish Commission v. United States,* 133 S.Ct. 511, 518 (2012).

[61] 438 U.S. 104 (1978).

[62] *See Lingle v. Chevron USA, Inc*. 544 U.S. 528, 538-39 (2005), citing *Penn Central*, 438 U.S. 104, 124 (1978).

[63] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002).

[64] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)

[65] *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126 (1985).

house on their coastal property, but on the condition that they grant the public lateral access across their private beach in front of the building.[66] In *Dolan*, the City of Tigard granted Mrs. Dolan permission to build a larger hardware story on her property, but on the condition that she grant the public easements for a bike path and a public greenway along the edge of her land.[67] The Court indicated in both cases that, if the government had denied the development applications outright, the owners, under the regulatory takings standards, would not have had viable claims.[68] At the same time, the Court observed that the exactions in each case, if they had been imposed directly and outside the context of the regulatory processes, would have constituted *per se* takings because they involved permanent physical occupations.[69] Thus, the question presented in *Nollan* and *Dolan* was how to evaluate a takings challenge to an exaction when the government has granted development approval (which it could have *denied* without risk of takings liability) but the exaction, outside of the regulatory context, would have constituted a *per se* taking.

The Court's answer to this puzzle was the unique, relatively demanding "essential nexus" and "rough proportionality" tests. An exaction will not result in a taking, the Court ruled in *Nollan*, if there is a logical relationship, or "essential nexus," between the purposes served by the

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[66] 483 U.S. at 828.

[67] 512 U.S. at 382

[68] *See Nollan*, 483 U.S. at 835-36 (assuming "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches" are "permissible" government purposes, "the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking."). The Court makes the point more elliptically in *Dolan*. *See* 512 U.S. at 384-85 & n. 6; *cf. id.* at 396 (Stevens, J., dissenting) ("The enlargement of the Tigard unit in Dolan's chain of hardware stores will have an adverse impact on the city's legitimate and substantial interests in controlling drainage in Fanno Creek and minimizing traffic congestion in Tigard's business district. That impact is sufficient to justify an outright denial of her application for approval of the expansion").

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

condition and the purposes that would have been served by an outright permit denial.[70] The Court ruled that the exaction in *Nollan* was a taking because there was no logical connection, in the Court's view, between providing lateral pedestrian access along the beach and the Commission's stated goal of preserving views of the ocean.[71] In *Dolan* the Court ruled that, even if the essential nexus test is satisfied, there must also be a "rough proportionality" between the magnitude of the project impacts and the magnitude of the burden imposed by the exaction.[72] The Court vacated and remanded the case to the Oregon Supreme Court to evaluate whether the exactions imposed by the city were roughly proportional to the projected increases in traffic and storm water flows from the expanded store.[73]

*Nollan* and *Dolan* plainly establish a distinctive, heightened standard for the review of land use exactions under the Takings Clause.[74] They require a unique, particularized analysis,

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

[71] *Id*. at 838-42.

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

[73] *Id.* at 396.

[74] In my view, *Nollan* and *Dolan* should unquestionably be regarded as takings cases. This conclusion is supported by the fact that the plaintiffs in both cases explicitly invoked the Takings Clause as the basis for their claims and the Court approached each case by asking whether the exactions at issue constituted takings. *See Nollan*, 483 U.S. at 827, 837 (commencing the opinion by observing that "[t]he California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment," and concluding that "the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was," that is "quite simply, the obtaining [i.e. taking] of an easement to serve some valid governmental purpose, but without payment of compensation"); *Dolan*, 512 U.S. at 382, 391 (stating that the plaintiff initially challenged the City of Tigard's conditions "on the ground that the[y] . . . constituted an uncompensated taking of her property under the Fifth Amendment," and concluding that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment"). It is appropriate to view *Nollan* and *Dolan* as takings cases notwithstanding the fact that Justice Stevens was surely correct in asserting that the heightened standard of review established in these cases represented "resurrection of a species of substantive due process analysis that . . . [the Court] firmly rejected decades ago." *Dolan*, 512 U.S. 405 (Stevens, J. dissenting; *see also Nollan*, 483 U.S. at 842 (Brennan, J. dissenting) ("the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century"). *See also Lingle*, 438 U.S. at 538 (charactering takings claims in the "special context of land-use exactions" as involving a species of "regulatory takings" analysis). The Court's opinion in *Koontz* muddies

involving what the Supreme Court in *Lingle* called a "special application of the 'doctrine of "unconstitutional conditions.'"[75] The decisions assign the ultimate burden of proof to government to demonstrate that the standards are satisfied,[76] departing from the Court's usual practice of assigning the burden of proof to the plaintiff in takings and other constitutional challenges to property regulations.[77] Not surprisingly, therefore, both *Nollan* and *Dolan* were hotly contested and controversial cases, with each decided over the objections of four dissenting justices.[78] The relatively heightened standard of review established by these decisions surely has resulted in more searching judicial review of local land use decisions; a survey I recently conducted of the published appellate decisions applying the "rough proportionality" test, generally regarded as the more demanding of the two tests, shows that government flunks the test about half the time,[79] a significant figure.[80] In sum, *Nollan* and *Dolan* represented significant

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the waters somewhat (without actually altering the fact that *Nollan* and *Dolan* are takings cases) by not explicitly reaffirming that *Nollan* and *Dolan* are takings cases and instead characterizing them as involving application of the unconstitutional conditions doctrine "that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." 133 S. Ct. at 2594.

[75] *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 547 (2005).

[76] *Id*. at 391 n. 8

[77] *See Eastern Enterprises*, 524 U.S. at 524 (plurality) ("Of course, a party challenging governmental action as an unconstitutional taking bears a substantial burden."), citing *United States v. Sperry Corp.,* 493 U.S. 52, 60 (1989); *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1, 15 (1976) ("the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way").

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

[79] The cases in which the government passed the rough proportionality test include: *Trimen Development Company v. King County,* 124 Wash.2d 261, 877 P.2d 187 (1994); *Joy Builders, Inc. v. Town of Clarkstown*, 54 A.D.3d 761, 864 N.Y.S.2d 86 (2008); *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 160 Wash.App. 250, 255 P.3d 696 (2011); *Sparks v. Douglas County*, 127 Wash.2d 901, 904 P.2d 738 (1995); *Curtis v. Town of South Thomaston*, 708 A.2d 657 (1998); *Dowerk v. Charter Township of Oxford*, 233 Mich.App. 62, 592 N.W.2d 724 (1999); *Grogan v. Zoning Board of Appeals Of the Town Of East Hampton*, 221 A.D.2d 441, 633 N.Y.S.2d 809 (1995); *Twin Lakes Development Corp. v. Town of Monroe*, 300 A.D.2d 573, 752 N.Y.S.2d 546 (2002);*Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 165 Ill.2d 25, 649 N.E.2d 384, 208 Ill.Dec.328 (1995); *Home Builders Association of Dayton And The Miami Valley v. City of Beavercreek*, 89 Ohio St.3d 121, 729 N.E.2d 349 (2000); *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 193

new protection for the interests of property owners under the Takings Clause.[81] Small wonder that Coy Koontz, Jr. celebrated his victory in the Supreme Court by asserting that the expanded

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Or.App. 24, 88 P.3d 284 (2004); *Kottschade v. City of Rochester*, 537 N.W.2d 301 (1995); *State Route 4 Bypass Authority v. The Superior Court of Contra Costa County*, 153 Cal.App.4th 1546, 64 Cal.Rptr.3d 286 (2007); *Ocean Harbor House Homeowners Association v. California Coastal Commission*, 163 Cal.App.4th 215, 77 Cal.Rptr.3d 432 (2009); *B.A.M. Development, L.L.C. v. Salt Lake County*, 282 P.3d 41 (2012); *Twin Lakes Development Corp. v. Town of Monroe*, 1 N.Y.3d 98, 801 N.E.2d 821, 769 N.Y.S.2d 445 (2003); *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 840 N.E.2d 68, 806 N.Y.S. 2d 99 (2005). The cases in which the government flunked the rough proportionality test include: *J.C. Reeves Corporation v. Clackamas County*, 131 Or.App. 615, 887 P.2d 360 (1994); *Burton v. Clark County*, 91 Wash.App. 505, 958 P.2d 343 (1998); *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 911 P.2d 429, 50 Cal.Rptr.2d 242 (1996); *Clark v. City of Albany*, 137 Or.App. 293, 904 P.2d 185 (1995); *Schultz v. City of Grants Pass*, 131 Or.App. 220, 884 P.2d 569 (1994); *City of Carrollton v. RIHR Incorporated*, 308 S.W.3d 444 (2010); *Goss v. City of Little Rock, Arkansas*, 151 F.3d 861 (1998); *McClure v. City of Springfield*, 175 Or.App. 425, 28 P.3d 1222 (2001); *Art Piculell Group v. Clackamas County*, 142 Or.App. 327, 922 P.2d 1227 (1996); *Amoco Oil Company v. Village of Schaumburg*, 277 Ill.App.3d 926, 661 N.E.2d 380, 214 Ill.Dec. 526 (1996); *Mira Mar Development Corporation v. City of Coppell*, 364 S.W.3d 366 (2012); *Benchmark Land Company v. City of Battle Ground*, 94 Wash. App. 537, 972 P.2d 944 (1999); *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*, 84 A.D.3d 819, 921 N.Y.S.2d 867 (2011); *City of Olympia v. Drebick*, 119 Wash.App. 774, 83 P.3d 443 (2004); *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (2004).

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

[81] While there is some conflict and uncertainty about the issue, it appears that the appropriate remedy for a successful *Nollan/Dolan* claim is an award of just compensation for either a temporary taking or, if the government continues to enforce the exaction following an adverse decision, a permanent taking. This conclusion follows from the fact that *Nollan* and *Dolan* both involve application of the Takings Clause, *see* note 73, *supra*; the ordinary remedy under the Takings Clause is an award of compensation rather than an injunction, *see Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1016 (1984); and there are no special features of *Nollan/Dolan* cases that warrant a departure from the general rule favoring the compensation remedy. *Cf. Horne v. Department of Agriculture*, 133 S.Ct. 2053, 2063 (2013) (suit for equitable relief against government officials under the Takings Clause is appropriate when jurisdiction to award just compensation pursuant to the Tucker Act has been withdrawn). *Nollan* and *Dolan* themselves created unfortunate confusion about the remedy issue because in both cases the plaintiffs sought equitable relief and the Court decided the cases without explicitly commenting

application of *Nollan* and *Dolan* will mean that developers have a 'bigger stick" to wield in their dealings with local governments.[82]

Two other preliminary observations about the Supreme Court's takings jurisprudence prior to *Koontz* are in order to set the stage for discussion of this case. First, in 1999, just a few years after *Dolan*, in *City of Monterey v. Del Monte Dunes at Monterey,*[83] the Court addressed whether a property owner could invoke the *Dolan* rough proportionality test to challenge the denial of a land use permit. The Ninth Circuit had affirmed a jury verdict for the plaintiff in part on the ground that the city's denial of a land use permit failed the *Dolan* rough proportionality test.[84] The Supreme Court granted the city's petition for *certiorari* to address, among other issues, "whether the Court of Appeals erred in assuming that the rough-proportionality standard

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on the remedy issue. Also, *Nollan* was decided later in the same month that the Court issued its seminal decision on remedies in takings cases, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), but the Court's opinion in *Nollan* does not even cite *First English*. Subsequent Court decisions offer little additional guidance on the issue. See *Lingle,* 438 U.S. at 546-47 ("The question [in both *Nollan* and *Dolan*] was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." ), *Wilkie v. Robbins*, 551 U.S. 537, 583-84 (2007) (Ginsburg, J. concurring in part, dissenting in part) (stating that *Nollan* and *Dolan* "invalidat[ed]' permit conditions "that would have constituted a taking"). Thus, it is hardly surprising that the lower federal and state courts are all over the map on whether the appropriate remedy in *Nollan/Dolan* cases is an award of just compensation, equitable relief, or both. See Scott Woodward, "The Remedy for a Nollan/Dolan Unconstitutional Conditions Violation," Vermont Law Review (forthcoming) (collecting cases). Consistently with its characterization of *Nollan* and *Dolan* as unconstitutional conditions cases, *see* note ___, supra, the Court's opinion in *Koontz* hints that equitable relief might be appropriate in *Nollan/Dolan* cases. *See* 133 S.Ct. at 2595 (characterizing *Nollan* and *Dolan* "as *forbidding* the government from engaging in "out-and-out . . . extortion") (emphasis added).

[82] Jeremy Jacobs, Takings decision confounds experts, spurs accusations of judicial activism, Greenwire (June 26, 2013) (quoting Coy Koontz Jr., as stating: "For the folks in this country and Florida . . . , it will give them a bigger stick to take into court in the future to fight these types of cases").

[83] 526 U.S. 687 (1999).

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

of *Dolan"* applies in the context of a permit denial.[85] Justice Kennedy, speaking for a unanimous Court on this point, stated that the Ninth Circuit had erred:

> "[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. *It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development*.[86]

Ultimately the Court concluded that the Ninth Circuit's error in interpreting *Dolan* was beside the point because the jury instructions did not actually authorize the jury to find for the plaintiff based on the Dolan standard.[87] Regardless of whether Justice Kennedy's statement was strictly necessary to the decision, it is hard to imagine a clearer statement (from a unanimous Court, no less) that the *Dolan* rough proportionality test does *not* apply to a takings claim based on a permit denial.

Second, in 2005, in *Lingle v. Chevron USA, Inc.,* the Court, again in a unanimous ruling, resolved the long-festering debate about the validity of the so-called "substantially advance" takings test.[88] The Court ruled that this ostensible takings test, which numerous prior Supreme Court decisions had seemingly endorsed,[89] actually involves a potential due process claim, because it was derived from due process precedents and requires a means-ends inquiry that logically fits under the Due Process Clause, not the Takings Clause.[90] Apart from concluding

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[85] 526 U.S. at 702.

[86] *Id*. at 703 (emphasis added).

[87] The Court also observed that it was "unnecessary for the Court of Appeals to discuss rough proportionality," 526 U.S. at 703, because the Ninth Circuit also ruled that the jury could properly conclude "that that the City's denial of Del Monte's application lacked a sufficient nexus with its stated objectives." *Id*., quoting 95 F.3d at 1431–1432. As the Ninth Circuit decision makes clear, see id. at 1430, the "essential nexus" test which the Court assumed could apply to a permit denial was simply a reformulation of the "substantially advances" takings test which a unanimous court repudiated six years later in *Lingle*.

[88] 544 U.S. 528 (2005).

[89] *See, e.g., Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 485-492 (1987); *Agins v. City of Tiburon,* 447 U.S. 255, 261-62 (1980).

[90] 544 U.S. at 540-43

that this putative takings test was "doctrinally untenable," the Court observed that it created "serious practical difficulties" because it "can be read to demand heightened means-ends review of virtually any regulation of private property."[91] This heightened standard "would require courts to scrutinize the efficacy of a vast array of state and federal regulations -- a task for which courts are not well suited. Moreover, it would empower -- and might often require -- courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[92] The Court concluded: "The reasons for deference to legislative judgments about the need for, and likely effectiveness of regulatory actions are by now well established and we think they are no less applicable here."[93] Because the Court made this statement in the context of explaining why it was rejecting the substantially advances *takings* test, while invoking *due process* precedents to make the case for deferential judicial review of government regulation,[94] this statement is properly read as condemning heightened scrutiny under both the Due Process Clause and the Takings Clause. As noted above, Justice John Paul Stevens praised Justice O'Connor's "lucid and honest opinion" in *Lingle*, stating that it was, "if not the very best," then "surely one of the best opinions announced" in the 2004-2005 term.[95]

The Court in *Lingle* recognized the tension between its call for judicial restraint and the relatively heightened standard of judicial review established for exactions in *Nollan* and *Dolan*. It resolved this tension by concluding that the "substantially advances" test is "entirely distinct" from the standards established in *Nollan* and *Dolan*.[96] The substantially advances test is "unconcerned with the degree or type of burden" that a regulation places on private property.[97] By contrast, *Nollan* and *Dolan* "involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* takings."[98] The Court also observed that the substantially advances test asks whether a government regulation "advance[s] *some* legitimate

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[91] *Id.* at 544.

[92] *Id*.

[93] *Id*. at 545.

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

[95] *See* note 2, *supra*.

[96] 544 U.S. at 547.

[97] *Id.*

[98] *Id.*

state interest."[99] By contrast, the *Nollan* and *Dolan* standards ask whether a citizen can be required to give up the right to be compensated for an exaction because it serves the *same* public purpose as the permitting program.[100] Despite the obvious relevance of the *Lingle* decision to the issues addressed in *Koontz*, Justice Alito cited *Lingle* only once, in incidental fashion, in his opinion for the Court in.[101]

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

> Although our regulatory takings jurisprudence cannot be characterized as unified, [the major regulatory takings tests] share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.[102]

The fact that *Lingle* was issued by a unanimous Court[103] provided additional reason to hope that the Court had settled on a more coherent and predictable law of takings. Sadly, those hopes have been dashed by *Koontz*, though by how much remains to be seen.

## III. Applying Exactions Doctrine to Permit Denials.

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

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

[100] *Id.*

[101] 133 S.Ct. at 2594.

[102] 544 U.S. at 549.

[103] *But cf. id.* at 548-49 (Kennedy, J., concurring ) (observing "that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process")

Roy Koontz's position that he is entitled to claim an impairment of some constitutional right at the hands of the District has a self-evident intuitive appeal. If the District had imposed the exaction to which he objected, and assuming the exaction was within the scope of the *Nollan/Dolan* framework, he could have challenged the exaction as a taking. If the exaction failed either the essential nexus or rough proportionality tests, he would have been entitled to relief. It would admittedly be anomalous for Koontz to refuse to accept an exaction as unconstitutional, and for the District to then respond by rejecting his development application altogether, and for Koontz to end up without any constitutional basis to complain about losing the opportunity to develop property he could have exercised but for his refusal to accept an allegedly unconstitutional exaction. But Koontz was not without a constitutional remedy; he could and should have challenged the permit as a violation of the Due Process Clause. On the other hand, the Court was dead wrong in concluding that Koontz was entitled to challenge the permit by invoking the *Nollan* and *Dolan* takings tests.

The Court quite properly did not contend that Koontz could bring his challenge to the permit denial directly under *Nollan* and *Dolan*. These cases involved situations where the government approved a development project but attached exactions as conditions of the approvals. These decisions establish that if the exaction fails either the essential nexus test or the rough proportionality test, the exacted property interest will be deemed to have been taken under the Fifth Amendment. But if, as in *Koontz*, the permit is denied and no exaction is imposed, "nothing has been taken." [104] *Nollan* and *Dolan* are takings cases, and if a claimant cannot point to any taking, these cases simply do not apply.

*Nollan* and *Dolan* do not provide an appropriate framework for challenging a permit denial in this context for another reason. As discussed, the Court said in both *Nollan* and *Dolan* that the exactions at issue in those cases, if imposed independently, would have constituted *per se* takings. At the same time, the Court said the government could have rejected the development applications outright and any claim that the permit denials constituted a taking of the real estate would have failed under regulatory takings standards.[105] The Court relied on these two premises to construct the unique essential nexus and rough proportionality tests. If the these tests are met, then the government exaction serves the same purpose that the government

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[104] *See* note 38, *supra*.

[105] Although Koontz initially asserted that he had been denied all economically viable use of the property, see p. __ , he subsequently abandoned any argument that the regulatory restrictions on use of the land rose to the level of a taking. *See* Brief for Respondent at 33, in *Koontz v. St Johns Water Management District*, Supreme Court, No. 11-1147 (observing that in a pre-trial stipulation "petitioner specifically admitted that he was 'not proceeding upon a theory that the two District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property").

could have (permissibly) achieved by denying approval and, therefore, there is no taking.[106] If the exaction fails either test, there is a taking.

Given this analytical framework, when government chooses to exercise the option of denying a development permit, the ordinary regulatory takings standard provides the appropriate test for determining whether there has been a taking, not the *Nollan/Dolan* tests. The premise that government can choose to deny a development application instead of imposing an exaction, along with the premise that the regulatory takings standard will apply to a takings claim based on a decision to deny a permit, are essential building blocks of the *Nollan/Dolan* framework. It follows from this logical framework that if a government regulator actually chooses to deny a permit rather than impose an exaction, the regulatory takings standard should apply. Within the *Nollan* and *Dolan* framework, it is beside the point whether government regulators decide to reject the development proposal from the outset or, as in *Koontz*, after contemplating the option of imposing an exaction instead. The substance of the doctrine does not vary depending on the facts to which it is applied and, in any event, from a takings law standpoint, the impact of the government's decision to deny development approval on the owner's interest in his land is the same under either scenario.

It is therefore understandable that the majority in *Koontz* did not contend that *Nollan* and *Dolan* directly support the conclusion that the *Nollan/Dolan* standards should apply to permit denials and exactions in the same way. Instead, the majority sought to justify this conclusion by invoking the doctrine of unconstitutional conditions.[107] The Court's resort to the unconstitutional conditions doctrine had some natural appeal because the Court previously referred to this doctrine in its *Dolan* opinion.[108] But upon analysis, the unconstitutional conditions doctrine does not justify the Court's ruling that the *Nollan* and *Dolan* standards should govern challenges to permit denials.

The unconstitutional conditions doctrine stands for the proposition that, if a government requirement infringes upon a constitutional right, the right is also impaired if the government denies a benefit because a citizen refuses to comply with the requirement, even if the government could have permissibly denied the benefit for some other reason. As Justice Alito put it, "we

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[106] As Justice Scalia put it in *Nollan*, the California Coastal Commission "argue[d] that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." His response: "We agree." *See* 483 U.S. at 836

[107] While the dissenters agreed (without explanation) with the majority that *Nollan/Dolan* should apply to permit denials, they did not endorse the majority's reliance on unconstitutional conditions doctrine.

[108] 512 U.S. at 385.

have repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up the constitutional right." The *Koontz* case, he asserted, fits the pattern of unconstitutional conditions cases 'in which someone refuses to cede a constitutional right in the face of coercive pressure," and "the impermissible denial of government benefit is a constitutional injury."[109]

The Court's invocation of the unconstitutional does not justify applying *Nollan/Dolan* to permit denials because it does not solve the problem discussed above that nothing has been exacted and therefore nothing has been taken if the permit has been denied. Under the Court's unconstitutional conditions precedents, application of the doctrine requires identification of some provision of the constitution that has been violated by the condition, regardless of whether the condition is attached to the grant of a benefit or a benefit is denied because the condition has been rejected.[110] In *Koontz* no property was taken and Koontz has no viable takings claim. Absent some constitutional violation, Koontz has no claim based on the unconstitutional conditions doctrine either.

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

This theory has no place in the unconstitutional conditions doctrine as it has traditionally been understood.[111] As Professor Kathleen Sullivan explains in her major article on

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[109] *Id.*

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

[111] While conservative commentators have applauded the Court's invocation of the unconstitutional conditions doctrine they have not, by my lights, attempted to make a convincing case for how the Court's ruling makes any sense in light of prior legal doctrine. *See, e g*., Christan M., Martin, "*Nollan* and *Dolan* and *Koontz* – Oh My, The Exactions Trilogy Requites Developers to Cover the Full Costs of Their projects, But No More," PLF Program for Judicial Awareness, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348844; Ilya Somin, "Two

unconstitutional conditions, the doctrine "cannot define the content of constitutional liberties rank their importance, or set the level of state justification demanded for their infringement."[112] Rather, starting from the premise that the Constitution already protects certain liberties, and that "burdens on those liberties require especially strong justification," the doctrine simply "identifies *a characteristic technique* by which government appears not to, but in fact does burden those liberties, triggering a demand for especially strong justification by the state."[113] The majority in *Koontz* departs from this understanding of the doctrine, as well as its application in past cases, by presuming that the doctrine creates substantive constitutional protections above and beyond those created by specific constitutional provisions. Justice Alito appears to be suggesting that the unconstitutional conditions doctrine creates a kind of penumbral aura surrounding the Takings Clause, and that courts can invoke the doctrine to protect against "burdens" on property even in the absence of actual takings. Under this view, the District could be held to have "run afoul" of the Takings Clause by virtue of the unconstitutional conditions doctrine even in the absence of an actual taking. This is a dramatic and deeply unsettling legal innovation because it portends potentially unlimited expansion of the unconstitutional conditions doctrine.

Justice Alito cites several decisions in an attempt justify this expansive unconstitutional conditions theory, but they merely serve to demonstrate that it lacks support. He points to several cases in which the Court ruled that a denial of benefits based on an exercise of the right to free speech violated the First Amendment, even though the claimant had no entitlement to receive the benefits.[114] The Court reasoned in these cases that the denial of the benefits in violation of the First Amendment was equivalent, for constitutional purposes, to enforcing a requirement that directly infringes on First Amendment rights.[115] These rulings are surely in the mainstream, but they do not support the idea that one can manufacture a viable claim using the unconstitutional conditions doctrine in the absence of a constitutional violation. Justice Alito also cites *Memorial Hospital v. Maricopa County*,[116] to support the proposition that the

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Steps Forward for the 'Poor Relation' of Constitutional Law: Koontz, Arkansas Game & Fish, and The Future of the Takings Clause," Cato Supreme Court Review, 2012-13.

[112] Kathleen M. Sullivan, Unconstitutional Conditions," 102 Harvard Law Review1413, 1419 (1989).

[113] Id. (emphasis added).

[114] 133 S.Ct. at 2594, citing, inter alia, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47 (2006); *Rutan v. Republican Party of Ill.,* 497 U.S. 62 (1990); *Perry v. Sindermann,* 408 U.S. 593 (1972).

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

[116] 415 U.S. 250 (1974).

"unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."[117] That case involved a challenge to an Arizona statute requiring an indigent seeking medical care at a county hospital to demonstrate a year's residence in the county in order to receive care at public expense. However, the Court ruled that the statute violated the Equal Protection Clause because it created a classification impinging on the right of interstate travel. Thus, this decision also does not support the notion that a "burdening" of a constitutional right, absent some actual violation, can be unconstitutional under the unconstitutional conditions doctrine.

Justice Alito's reliance on the unconstitutional conditions fails because it overlooks the fact that *Nollan* and *Dolan* involve a distinctive version, or as the Supreme Court has put it, a "special application," of the unconstitutional conditions doctrine.[118] In an ordinary unconstitutional conditions case, if the condition infringes on a constitutional right the government defendant is liable for infringing upon the right, regardless of whether the condition is attached to the grant of a benefit or the government denies a benefit because the plaintiff refuses to accept the condition. However, in the *Nollan/Dolan* context, imposing an exaction on the recipient of a land use permit will not necessarily result in a taking. An exaction results in a taking under *Nollan* and *Dolan only* if the government cannot satisfy the essential nexus and rough proportionality tests. The Court adopted this special, more forgiving version of the unconstitutional conditions doctrine in this context because it began with the premise that the government has the power, without offending the Takings Clause, to address the concerns raised by the development proposal by denying the requested permit instead. Thus, under the "special" application of the unconstitutional conditions doctrine in *Nollan* and Dolan, unlike in the usual unconstitutional conditions case, the standards for evaluating the constitutionality of the denial of the benefit (the permit) are not the same as the standard that applies when the condition is attached to the benefit. According to *Nollan* and *Dolan*, if the government decides to address the same public concerns through regulation that it might have addressed by imposing an exaction, a taking claim based on the regulatory restrictions should be assessed using ordinary regulatory takings standards, not the *Nollan/Dolan* standard. It follows, given the "special" version of the unconstitutional conditions doctrine adopted in *Nollan* and *Dolan*, that this doctrine cannot be invoked to justify applying the *Nolan/Dolan* standards to a permit denial.[119]

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[117] 133 S.Ct. at 2594.

[118] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005).

[119] Justice Alito acknowledges that there would be no justification for applying the *Nollan/Dolan* standards to evaluate the constitutionality of a permit denial "for some other reason" than the reason that would have been advanced to justify an exaction. *See* 133 S.Ct. 2596. That position is surely correct, but the fact that a permit denial may serve the *same* purposes that would be served by imposing an exaction does not make the denial more suspect

The novelty of the ruling in *Koontz* that *Nolan* and *Dolan* should govern challenges to permit denials is demonstrated by the patent conflict between this ruling and Justice Kennedy's statement for a unanimous Court in *City of Monterey v. Del Monte Dunes at Monterey,*[120] that the *Dolan* rough proportionality test does *not* apply to permit denials. In Justice Kennedy's words, the *Dolan* 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." Despite the fact that the Florida Supreme Court relied heavily on the Court's statement in *City of Monterey* to support its decision,[121] Justice Alito's opinion in *Koontz* does not even cite *City of Monterey*. In my view, Justice Kennedy got it right in *City of Monterey* and Justice Alito got it wrong in *Koontz*. One of the enduring mysteries of *Koontz* is why, assuming Justice Kennedy personally focused on the issue, he decided to abandon his prior position in *City of Monterey* and support the opposite viewpoint in *Koontz*. One can only hope that Justice Kennedy will have second thoughts about joining in the *Koontz* majority opinion.

While the Court's primary argument rests on the unconstitutional conditions theory, the Court's opinion hints at a different theory for why the denial of Koontz's application constituted a taking, a theory which is at least as problematic as the first theory, but for different reasons. This theory is that Koontz can claim a taking on the ground that the permit denial arbitrarily or unreasonably interfered with his interest in developing his land. At one point, the Court states that "the 'evident constitutional propriety' of prohibiting a land use 'disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[122] At another point the Court restates the same basic point in asserting that "the central concern" of *Nollan* and *Dolan* "is "the risk that the government may

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under the *Nollan/Dolan* framework. As discussed, the assumed power of the government to deny a development permit to serve the same purposes that would be served by an exaction (subject only to a possible regulatory takings claim) is a basic premise of the *Nollan/Dolan* doctrine.

[120] 526 U.S. 687 (1999).

[121] *See St. Johns River Water Management Dist. v. Koontz*,77 So.3d 1220, 1228-30 (Fl. 2011).

[122] 133 S. Ct. at 2597, quoting *Nollan*, 483 U.S. at 836-37. The quoted language misquotes the language from *Nollan*, which reads, "The evident constitutional propriety disappears, however, if *the condition* substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." (emphasis added). Justice Alito's misquotation of *Nollan* suggests that *Nollan* addressed the standards that should govern challenges to permit denials whereas, in fact, the Court was addressing the standards that should govern challenges to permit conditions. The mistake was important in a case raising the question of whether the standards that have been developed for review of certain permit conditions should be extended to permit denials,.

use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property."[123] While the Court does not spell out how this alternative test might have been applied in *Koontz*, the theory would presumably be that the permit denial "took" Koontz's land because the District denied the permit because Koontz refused to accept an exaction that would have violated *Nollan/Dolan* standards.

The fundamental problem with this possible alternative theory is that it is indistinguishable from the "substantially advances" theory of takings liability which the Supreme Court unanimously repudiated in its 2005 decision in *Lingle v. Chevron USA*, declaring that allegations of this type sound in due process, not takings. The claim that a permit denial is a taking because it was motivated by the government's inability to impose an exaction that would have failed either or both of the essential nexus and rough proportionality tests simply represents a particular application of the more general theory that a government action effects a taking if it fails to substantially advance a legitimate state interest. It is hardly surprising that Justice Alito was tempted to see the *Koontz* case through the lens of the substantially advances inquiry; as discussed, Koontz himself had the same thought, initially advancing a substantially advances claim but then abandoning it following the decision in *Lingle*. While these hints at a revival of the substantially advances test are tantalizing, it would be too much to conclude, given the clarity of the relatively recent holding in *Lingle*, and the cryptic nature of the *dictum* in *Koontz*, that Justice Alito is actually contemplating a revival of the substantially advance theory and a repudiation of *Lingle*.

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

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

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

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[123] *Id*. at 2600.

The only theory that can plausibly support *Koontz's* claim that he suffered a constitutional violation as a result of the permit denials is that he suffered a deprivation of property under the Due Process Clause of the Fourteenth Amendments.[124] The substantive branch of due process analysis proscribes arbitrary and irrational government deprivations of interests in private property.[125] In *Koontz*, the District's denial of the permit presented facts that supported at least a colorable due process claim. The claim would have been weak, but it least it would not have been doctrinally incoherent (like the unconstitutional conditions claim) or precluded by precedent by (like the potential substantially advances claim). However, a due process claim faced multiple obstacles in this litigation. Koontz never presented a due process claim based on the permit denial and therefore the claim was waived.[126] In addition, under traditional due process review, a governmental action will be upheld so long as it rationally related to a conceivable public purpose.[127] Koontz almost certainly could not have carried the burden of demonstrating an unconstitutional deprivation of his property under that standard. [128] Finally, the five justice majority in *Koontz* probably could not have agreed that the Due Process Clause can properly be invoked in this type of case. Justice Kennedy has expressed the view that the Due Process Clause does provide an appropriate avenue for challenging government land use

[124] *See* Mark Fenster, "Substantive Due Process By Another Name: *Koontz*, Exactions, and the Regulatory Takings Doctrine" (draft paper) (suggesting that a *Nollan/Dolan* unconstitutional conditions violation should be viewed as involving a substantive due process issue); Lee Anne Fennell & Eduardo Penalver, "Exactions Creep," Supreme Court Review (forthcoming) ("Relying on due process review to police improper bargains would fit better with the Court's prior pronouncements about the division of labor between the Takings Clause and the Due Process Clauses.").

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

[126] During the oral Justice Kennedy asked, "Assume that, when we look at this record, assume we think there is a due process violation, not a taking violation. That is not before us here, is it?" Counsel for petitioner responded, "no." Tr. at 27.

[127] *See County of Sacramento v. Lewis*, 523 U.S. at 846 (noting that in evaluations of "abusive executive action," the Supreme Court has held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' ").

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

regulations.[129] By contrast, Justice Scalia has adopted a narrow view of substantive due process, taking the position that the Due Process Clause is not an appropriate vehicle for challenging government regulation as arbitrary or unreasonable.[130] Thus, the potential due process claim was, for many reasons, a non-starter in the *Koontz* case. However, over the long term, if there is any hope of making sense of a *Koontz*-type claim, it lies in applying the Due Process Clause.

As Justice Alito's opinion made clear, he was motivated to push the limits of current doctrine out of concern that not applying *Nollan* and *Dolan* to permit denials would permit governmental officials to evade the strictures of *Nollan* and *Dolan*. "A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply be rephrasing its demands for property as conditions precedent."[131] To allow that, he asserted, "would effectively render *Nollan* and *Dolan* a dead letter."[132] These assertions are overblown in light of the relevant legal principles.

It is entirely plausible that local government officials might "threaten" to deny a development application if a developer were unwilling to agree to exactions proposed by the community. (Or to make the point in more neutral terms, that government officials might express their intention to address the negative externalities associated with a proposed development by denying a permit if it cannot obtain the owner's agreement to address the externalities through permit conditions.) If the developer prefers to obtain a permit and accepts the conditions, there can be objection to this process under *Nollan* and *Dolan*. If the government imposes the conditions and they trigger *Nollan/Dolan* scrutiny, the developer can challenge the conditions under those standards and, if successful, obtain just compensation or possibly get the conditions lifted. The only fashion in which this type of "coercion" could be viewed as unreasonable within the *Nollan/Dolan* framework is if a developer who "accepted" imposition of such a condition were deemed to have waived the right to challenge the conditions. But there is no just basis for finding a waiver in these circumstances, precisely because it would authorize the kind of cost-free coercion Justice Alito fears, and therefore the right of the developer to

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[129] *See Lingle v. Chevron, USA, Inc.,* 544 U.S. at 548 (Kennedy, J., concurring) (writing concurring opinion "to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.").

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

[131] *Id.* at 2595.

[132] *Id*. at 2596

challenge an exaction in these circumstances should be preserved.[133] If the right to challenge an exaction under *Nollan* and *Dolan* is preserved, the claim that the owner was "coerced" into accepting the condition does not subtract from his robust legal rights to challenge the exactions.

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

It is certainly true that when a permit denial follows on the heels of a government effort to impose permit conditions the owner views as unreasonable the developer is entitled to argue not only that he has suffered an economic loss as a result of the permit denial (and possibly suffered a taking), but that he has also been the victim of arbitrary or unreasonable government decision-making. The *reasons* for the government denial potentially raise an additional constitutional issue apart from the potential taking claim based on the burden imposed by the government's decision. But since the government has not imposed an exaction that, viewed independently, would constitute a *per se* taking, there is no warrant for applying the stringent *Nollan/Dolan* framework. The proper avenue for seeking relief is provided by the Due Process Clause.

## IV. Extending *Nollan* and *Dolan* to Permit Conditions Involving Money.

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

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

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

In *Eastern Enterprises v. Apfel*, a majority of the justices reached the conclusion that a government mandate to pay money, far from constituting a *per se* taking, cannot constitute a taking at all.[134] The case involved due process and takings challenges to federal legislation imposing a retroactive obligation on companies formerly engaged in the coal business to pay the healthcare costs of their past employees. There was no opinion for the Court, but a majority of the justices struck down the legislation, with four justices concluding there was a taking[135] and Justice Kennedy, in a concurring opinion, concluding that the legislation violated the Due Process Clause.[136] At the same time, a majority of the Justices (Justice Kennedy and the four dissenters) agreed, in separate opinions, that the Takings Clause did not apply to mandates to pay out money.[137]

"[O]ne constant limitation" of the Court's takings jurisprudence, Justice Kennedy stated, "has been that in all of the cases where the regulatory takings analysis has been employed, a specific property right or interest has been at stake."[138] Therefore, he concluded, the challenged legislation could not give rise to a viable takings claim:

> The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.,* a lien on a particular piece of property), a valuable interest in an

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[134] 524 U.S. 498 (1998).

[135] 524 U.S. at 538.

[136] *Id.* at 550 (Kennedy, J., concurring)

[137] *Id*. at 540-47 (Kennedy. J., concurring); *id.* at 554-58 (Breyer, J., dissenting).

[138] *Id.* at 541.

intangible (*e.g.,* intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.[139]

Justice Stephen Breyer, writing for the four justices dissenting from the Court's judgment, agreed with Justice Kennedy that the plaintiff had no viable takings claim because "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property."[140] In contrast, he said, "[t]his case involves not an interest in physical or intellectual property, but an ordinary liability to pay money."[141] In sum, if, as a majority of the justices recognized in *Eastern Enterprises*, the Takings Clause does not apply to demands for money, then *Nollan* and *Dolan* cannot logically apply to monetary exactions.

Nonetheless, in *Koontz* the Court ruled 5 to 4 that *Nollan* and *Dolan* do apply to monetary exactions.[142] Remarkably, the Court reached this result while purporting to respect the analytic framework adopted in *Nollan* and *Dolan* as well as the reasoning of the five-justice majority in *Eastern Enterprises*. Justice Alito conceded that "both *Nollan* and *Dolan* [began] by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a per se taking."[143] He also did not dispute the validity of the conclusion by the five justices in *Eastern Enterprises* that a government mandate to pay money is, generally speaking, outside the scope of the Takings Clause.[144] Nonetheless, he managed to skirt around *Nollan*, *Dolan*, as well as *Eastern Enterprises*. Justice Elena Kagan, joined by three other dissenters, objected to this unprincipled ruling.

Justice Alito's "initial" and apparently most important justification for extending *Nollan* and *Dolan* to monetary exactions was his view that if the Court rejected the plaintiff's argument "it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*."[145] He observed that monetary exactions are "commonplace" and are "functionally equivalent to other types of land use exactions."[146] Furthermore, he said: "Because the

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[139] *Id*. at 540.

[140] *Id*. at 554 (Breyer, J., dissenting).

[141] *Id.*

[142] 133 S.Ct. at 2599

[143] 133 S.Ct. at 2598-99

[144] *Id*. at 2599.

[145] *Id.* at 2599.

[146] *Id*

government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standard, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[147]

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

It is undeniable that there is a superficial appeal to the argument that permit conditions requiring property owners to grant the public an interest in the property and requiring them to pay money to the government should be evaluated in the same way. Both requirements are imposed in the same way and the two conditions might have the same or similar economic impacts on a property owner. But the Court's takings jurisprudence does not protect wealth, it protects "property." Thus, traditionally, and apparently even after *Koontz*, the Court's takings jurisprudence addresses takings of tangible property interests, not impositions of generalized financial liabilities.[148] Given this understanding of the scope of "property" for the purposes of the Takings Clause, a condition requiring the payment of money cannot be regarded as "functionally equivalent" to a condition exacting an interest in land.[149]

In addition, the prospect that government regulators might offer developers the choice of simply paying money as a condition of receiving a permit or accepting a physical occupation subject to the *Nollan* and *Dolan* standards creates no legitimate cause for alarm. If a permit requirement to pay money is not subject to *Nollan*, and the "government need only provide a

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[147] *Id*

[148] *See generally* Thomas Merrill, "The Landscape of Constitutional Property," 86 Virginia L. Rev. 885 (2000).

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

permit applicant with one alternative that satisfies" – or avoids, presumably – "the nexus and rough proportionality standard," offering a developer choices that include the option to make a monetary payment avoids *Nollan/Dolan* concerns. By expressing alarm about developers potentially being put to this choice, Justice Alito simply begged the question whether monetary conditions should be subject to *Nollan/Dolan* on the same basis as other exactions.[150]

Justice Alito sought to distinguish *Eastern Enterprises* on the ground that, unlike the financial obligation at issue in that case, the demand for money in *Koontz* "did 'operate upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment."[151] In contrast with *Eastern Enterprises*, where the government placed a financial liability on the companies, Justice Alito stated, "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."[152] He continued:

> Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan:* the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.[153]

Finally, again focusing on the "direct link" between the mandate to pay money and "a specific, identifiable property interest . . . such as a parcel of real property," Justice Alito concluded that the alleged taking of money should, in this context, be treated as a *per se* taking.[154] In sum, according to Justice Alito's argument, a monetary condition attached to a permit to use real property, just like an exaction involving a physical occupation or direct appropriation of tangible property, should necessarily be subject to *Nollan/Dolan*.

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[150] As Justice Kagan observed, these two options could be regarded as equivalent if the government, in lieu of exacting an interest in real property from a landowner, exacted money and then turned around and used the money to obtain a real property interest from the owner through eminent domain. However, as she also explained, such "a contrivance" can be dealt with directly without ruling that all monetary exactions are *per se* takings. *See* 133 S.Ct. at 2608, citing *Norwood v. Baker,* 172 U.S. 269 (1898).

[151] *Id*. at 2599.

[152] *Id*. at 2600.

[153] *Id.*

[154] *Id.*

Again, this analysis is plainly mistaken.[155] The link between a monetary condition and the real property subject to the condition cannot, by itself, justify applying *Nollan* and *Dolan,* according to the logic of these decisions. Both *Nollan* and *Dolan* involved applications for permits to use real property. If a "direct link" between a condition and the use real property justified subjecting the condition to heightened review, the Court would have concluded that the conditions in those cases warranted review under the essential nexus and rough proportionality simply because the conditions were attached to the use of real property. The Court would have had no need to consider whether the conditions would have constituted *per se* takings if they had been imposed independently from the regulatory process. The fact that the Court believed it was essential to its analysis in *Nollan and Dolan* that the conditions, considered independently, would have constituted *per se* takings demonstrates that the link between a condition and a permit to use real property, by itself, is insufficient to support applying *Nollan/Dolan*.[156]

The majority also said that the link between a monetary condition and real property also makes the condition constitutes a *per se* taking, satisfying the precondition of *Nollan* and *Dolan* analysis that the condition, apart the regulatory process, constitute a *per se* taking.[157] This leap, which the majority does not explain or justify, turns the *Nollan/Dolan* analysis for monetary conditions into utter nonsense. If the link between a monetary condition and the real property makes the condition a *per se* taking, that is the end of the takings inquiry, and there is no need to evaluate whether a monetary condition does or does not satisfy the *Nollan/Dolan* standards. Every monetary condition has now been declared to be a *per se* taking as a result of the Court's *ipse dixit.* Justice Alito's reasoning takes the Court, in Thelma and Louise-like fashion, straight over a cliff, past the notion that monetary conditions should be subject to review under the *Nollan*/*Dolan* standards, straight to the conclusion that *all* monetary conditions attached to land use permits are *per se* takings. Clearly this is not the result the Court intends because it merely rules that monetary exactions should be subject to the same *Nollan/Dolan* scrutiny as other exactions. But this is the logical outcome of the Court's reasoning that a monetary condition

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[155] Even Ilya Somin sees a "genuine difficulty" with Justice Alito's reasoning and he think the only way to "completely avoid" the difficulty is to either abandon the idea that *Nollan/Dolan* should apply to monetary fees or embrace Professor Richard Epstein's idea that all taxes should be treated as takings, which Somin consider a "radical" alternative. *See* Ilya Somin, "Two Steps Forward for the 'Poor Relation' of Constitutional Law: Koontz, Arkansas Game & Fish, and The Future of the Takings Clause," Cato Supreme Court Review, 2012-13, at 239

[156] 133 S.Ct. at 2606 (Kagan, J., dissenting) (under the analytic framework that *Nollan* and *Dolan* established, that connection alone is insufficient to trigger heightened scrutiny"); *see also id*. ("the heightened standard of *Nollan* and *Dolan* is not a freestanding protection for land-use permit applicants").

[157] *Id.* at 2599, quoting citing *Brown v. Legal Foundation of Wash.,* 538 U.S. 216, 235 (2003).

should be treated as a *per se* taking *because* it is linked to the land being developed under the permit. [158]

Finally, in what can only be characterized as rank hypocrisy, Justice Alito asserts, quoting Justice Kennedy's opinion in *Eastern Enterprises*, that applying *Nollan* and *Dolan* to a takings claim based on monetary exactions "does not implicate 'normative considerations about the wisdom of government decisions.'"[159] Of course it does. Empowering the courts to conduct intrusive review of whether government has demonstrated that a condition meets the essential nexus and rough proportionality tests obviously leads the courts into making normative judgments about the wisdom of government regulatory decisions. For better or worse, *Nollan* and *Dolan*, prior to *Koontz*, authorized courts to make essentially normative judgments within a narrowly defined sphere of exactions. By expanding *Nollan*/*Dolan* to encompass fees, *Koontz* authorizes the courts to make normative judgments in a broader set of cases. Justice Alito's quotation from Justice Kennedy's concurring opinion in *Eastern Enterprises* is painfully ironic because Justice Kennedy made this statement to scold the plurality in that case for suggesting that its invocation of the Takings Clause, in lieu of the Due Process Clause, somehow avoided a normative inquiry. As he stated, "If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events."[160] Like the plurality in *Eastern Enterprises*, the majority in *Koontz* is inviting, indeed embracing more normative decision-making by the courts.

V. Practical Objections to *Koontz*.

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

*Permit Denials*. *Koontz*'s ruling that the *Nollan/Dolan* standards apply to permit denials based on an owner's refusal to accede to an exaction may prove difficult if not impossible for courts to implement. It is already challenging for courts to determine whether a particular exaction which has been memorialized and imposed violates the *Nollan*/*Dolan* standards. But when no exaction has been imposed, the challenge for the courts will become more difficult.

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[158] *See also* Lee Anne Fennell & Eduardo Penalver, "Exactions Creep," Supreme Court Review (forthcoming) (observing that if a "link" to real property is the test for determining whether a permit condition is subject to *Nollan*/*Dolan* review, many "in-kind regulatory conditions" will now be subject to these tests, including "set-back requirements, parking and landscaping requirements, limits on hours of operation, and many more").

[159] *Id.* at 2600, quoting *Eastern Enterprises,* 524 U.S. at 545 (Kennedy, J., concurring)

[160] 524 at 544 (Kennedy, J., concurring).

There may be little or no documentation of the exactions that were discussed; memories may differ on what was "demanded;" a wide range of options for exactions may have been considered; and some or all of the exactions that were discussed may never have been defined with precision. For all of these reasons, it will be difficult to determine whether exactions that a community considered but ultimately did not impose satisfied both the essential nexus and rough proportionality tests such that a court can determine that a permit denial does or does not violate *Nollan* or *Dolan*. If the community bears the ultimate burden of proof in a case involving an alleged *Nollan/Dolan* unconstitutional conditions violation (as in an ordinary *Nollan/Dolan case*), the fog of uncertainty enveloping the relevant facts will work to the significant disadvantage of government defendants.

Certainly the Circuit Court Order in the *Koontz* case offers little comfort that the *Nollan/Dolan* standards can be sensibly applied in the context of a permit denial. The Court ruled in conclusory fashion, resting heavily on the District's failure to carry its burden of proof, that the District's "required conditions of unspecified but substantial off-site mitigation resulted in a . . . taking."[161] If this application of *Nollan* and *Dolan* represents a model for other courts to follow, local communities will win few if any lawsuits claiming that permit denials based on the owner's refusal to accede to an exaction violated *Nolan/Dolan*.

This new ruling will also be difficult for local communities to implement. The new requirement that communities denying permit applications be prepared to defend possible exactions they discussed during the permit review process will prove onerous. Local officials will be required to justify a decision they did make (reject an application) by making the counter-factual case for the validity of a decision they did not make (impose one or more exactions).. Local officials (who are often part-time volunteers) have a hard enough time explaining and documenting the decisions they make. It will strain common sense and local boards' patience for local boards to have to justify options they considered but did not select. *Nollan* and *Dolan*, as now expanded upon by *Koontz*, evidently have an appealing logic to some justices (and their law clerks) with an academic bent.[162] From the standpoint of local land use officials operating in a less rarified atmosphere, judicial review of local land use decisions after *Koontz* will be like something out of Alice in Wonderland. *Koontz* and its complexities seem to reflect a woeful ignorance on the part of the justices about the practical realities of the local land use regulatory process in this country.

[161] Final Judgment, *Koontz v. St Johns Water Management District*, No, CI-94-5673 (Cir. Ct., Oct 30, 2002).

[162] The counterfactual analysis mandated by K*oontz* was in a sense prefigured by *Nollan*, which requires local officials to demonstrate that a condition attached to a permit serves "the same legitimate police-power purpose" that would have been served by a denial. 483 U.S. at 836.

The ruling that *Nollan/Dolan* apply to permit denials will also probably lead local officials to be less communicative with developers about the options they might pursue to obtain project approval. As discussed, the majority adopted the Florida courts' premise that the district had made "a demand" for an exaction from Koontz. But the majority did not resolve, as a general matter, "how concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*."[163] Justice Kagan agreed that *Nollan/Dolan* can apply when an exaction has been demanded, but argued that the demand for an exaction must be "unequivocal."[164] In her view, there had been no unequivocal demand in *Koontz* and therefore the Supreme Court should have affirmed the Florida Supreme Court.

While the impact of the Court's ruling will depend on how the term "demand" is ultimately defined in future decisions, the likely adverse effects of the Court's ruling are readily foreseeable. Even if only a specific, unequivocal demand will trigger *Nollan/Dolan*, as Justice Kagan hopes, prudent local officials will need to embrace vagueness and indirection in their conversations with developers to avoid making a "demand." If a "demand" continues to be defined loosely, prudent local officials will need to avoid even "suggesting" or expressing "ideas." As Justice Kagan put it, "if something less than a clear condition . . . triggered *Nollan/Dolan* scrutiny" then "no local official with a decent lawyer would have a conversation with a developer," because "the lawyer can give but one recommendation: Deny the permits."[165] At most, local officials may be willing to describe general concerns about the potential effects of a project, indicate that they may reject the project based on these concerns, and express a willingness to consider mitigation measures the developer might wish to present in order to secure project approval. Local officials would need to be careful not to respond to any specific proposal by a developer in a fashion that could be construed as entering into negotiations; rather, they would have to maintain a purely passive posture, at least until a developer has made an unambiguous proffer of mitigation measures that satisfies the community's goals. The vagueness and ambiguities inherent in the post-*Koontz* land use regulatory process will necessarily lead to project denials that could have been avoided if communities and developers could engage in more explicit and straightforward negotiations.

Finally, this ruling in *Koontz* is likely to make the land use regulatory review process more cumbersome, expensive and time-consuming. The category of exactions covered by *Koontz* excludes all those exactions ultimately adopted, which are already subject to challenge based *Nollan* and *Dolan*, and includes only those exactions that were merely discussed and not adopted. Local officials will presumably be required as a result of *Koontz* to apply more care in

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[163] 133 S.Ct. at 2598.

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

[165] Id. at 2611.

the formulation of potential exactions in the course of the development review process. This could yield benefits for developers if the conditions are ultimately imposed, although *Nollan* and *Dolan* already apply to these conditions. However, if the exactions are not imposed, this extra effort and care will yield no benefit for developers in the form of more favorable or more carefully considered exactions. Yet, to forestall potential challenges under *Koontz*, local officials will need to invest time and effort to assure themselves that exactions they have merely considered are defensible under *Nollan* and *Dolan.* The upshot is that local governments will be forced to adopt a more defensive posture in reviewing development proposals and the regulatory review process will become time-consuming and expensive.

Some of these additional costs will ultimately be borne by taxpayers. But some communities will try to force developers to help cover these additional costs, and since these costs are directly attributable to the filing of development applications, local officials will likely succeed in this effort in some cases. In the clear light of hindsight, it is hard to see what developer groups thought they would be accomplishing by supporting Koontz as *amici curiae* in the Supreme Court.[166]

*Fees and Other Monetary Requirements.* The ruling that *Nollan* and *Dolan* apply to "monetary exactions" will also lead to more intrusive judicial scrutiny of local land use regulation, and make the review process more cumbersome. As Justice Kagan correctly observes, because local governments "impose many kinds of permitting fees every day," the ruling injects the Takings Clause "into the very heart of local land use regulation and service delivery."[167] As she says, the ruling "threatens to subject a vast array of land-use regulations, applied daily in States localities throughout the country, to heightened constitutional scrutiny;"[168] permit conditions requiring investments in wetlands mitigation banks and low-income housing will likely be prime targets. Equipped with this new, robust legal claim, developers are now more likely to initiate lawsuits seeking to invalidate development fees. Successful litigation, or the mere threat of litigation, means that fees will be imposed less frequently and in smaller amounts, with the ultimate result that the social and environmental costs of development covered by development fees will either be shifted to the taxpayers or left unaddressed and imposed on the community as a whole. The concern that developers will file *Nollan/Dolan* claims based on monetary exactions, or even mere discussion of monetary exactions, will lead communities to reject development proposals more frequently in the future. More generally, the ruling will tend

[166] *See, e.g.,* Brief Amicus Curiae of Owners' Counsel of America in Support of the Petitioner, in *Koontz v. St Johns Water Management District*, S. Ct. No. 11-1147. Tellingly, Justice Alito offers no response to the objection that extending *Nollan/Dolan* to permit denials will create serious practical problems.

[167] 133 S. Ct. at 2607 (Kagan, J. dissenting).

[168] *Id*. at 2604.

to limit local government authority to address the various public concerns raised by development proposals.

Justice Alito attempted to rebut these criticisms by pointing out that some state courts already apply *Nollan* and *Dolan* – or "something like it" – to monetary exactions.[169] He also observed that some state statutes already "normally provide[] an independent check on excessive land use permitting fees."[170] Under these laws, he argued "the 'significant practical harm,' the dissent predicts has not come to pass."[171] By implication, applying heightened scrutiny to monetary exactions nationwide will not produce significant harm in the future either. One can only hope that Justice Alito will prove correct, but he certainly offered no evidence to support his factual assertion. His prediction about his new doctrine will work out in practice represents precisely the kind of "predictive judgment" about the efficacy of different public policies that, according to the 2005 *Lingle* decision, should be left to "elected legislatures and expert agencies."[172]

The problems created by the Court's ruling on monetary exactions are compounded by the practical difficulty of differentiating between monetary assessments subject to *Nollan/Dolan* and taxes which, according to the majority, are not takings. On the one hand, the Court said that a mandate to expend money on environmental mitigation, such as the exaction at issue in *Koontz*, constitutes a *per se* taking. On the other hand, the Court asserts, though in somewhat less than categorical fashion, that taxes and user fees are never takings.[173] Justice Alito blithely asserts that "teasing out the difference between taxes and takings is more difficult in practice than in theory," but he offers no persuasive reasons supporting this optimism.[174]

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[169] 133 S.Ct. at 2602.

[170] *Id.*

[171] *Id.*

[172] 544 U.S. at 544.

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

[174] Justice Alito suggests that the issue of whether the government is imposing a tax that is not a taking or imposing a monetary payment obligation that constitutes a taking can generally be resolved by determining whether the government agency in question has been granted the legal authority to impose a tax. *See* 133 S.Ct, at 2601-02. This suggestion is no help whatsoever. A governmental entity's lack of authority to impose a tax, which by hypothesis is not a taking, does not make it any more or less appropriate to treat other types of monetary assessments as takings.

In fact, differentiating between monetary exactions and taxes will likely prove a vexing task. As discussed, the Court says that monetary exactions should be subjected to *Nollan/Dolan* because they are "linked" to real property. But property taxes and a host of other taxes and users fees are inked to real estate in the same fashion as monetary exactions, apparently making it impossible to distinguish between the two.[175] Justice Kagan properly criticizes the majority for not saying "even a word about how to make the distinction that will now determine whether a given fee in subject to heightened scrutiny." As she also points out, the long-term significance of this issue will depend on whether the *Nollan/Dolan* standards are confined to *ad hoc* monetary assessments, as many lower courts have ruled, or whether they also apply generally applicable fees.[176] The majority in *Koontz* was conspicuously silent on this important question.

In the end, the *Koontz* decision will matter in the real world, and the nature of the consequences can be identified fairly easily, but the magnitude of the changes brought about the ruling is difficult to predict. Justice Kagan predicts that the Court's decision, particularly its ruling on fees, will inflict "significant practical harm."[177] Justice Alito, on the other hand, foresees little real change as a result of the ruling extending *Nollan* and *Dolan* to monetary fees.[178] This difference of opinion rests in part on divergent assessments of the character of the pre-existing legal regime and whether *Koontz* breaks significant new ground. It also reflects a profound philosophical split on the Court about the relative importance of safeguarding property interests from government interference, differing views on the frequency with which locals governments treat landowners unfairly, and conflicts over the value of preserving space in which local governments can operate without the threat of expensive constitutional litigation. As evidenced by its willingness to redefine the rules of the local land use system, the Court majority has abandoned, at least for the time being, any pretense of deferring to the judgments on these issues by the other branches of government at the state and local level.

## VI. Where Are We Now and Where are We Going?

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Moreover, when a government agency has both the power to tax and the power to impose other monetary assessments, the courts will still need to resolve whether there has been a taking, not based on the scope of the agency's statutory taxing authority, but as a matter of federal constitutional law.

175 *Cf. Eastern Enterprises v. Apfel*, 524 U.S. at 556 (Breyer, J., dissenting) ("If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.,* when it assesses a tax?").

176 133 S.Ct. at 2608 (Kagan, J., dissenting).

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

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

Because of all of its doctrinal failings and adverse practical implications, the *Koontz* decision is surely one of the worst, if not the worst, modern takings decision. As discussed above, it is impossible to justify either of the Court's major rulings in light of established takings principles and precedent. Thus, the majority opinion inevitably contradicts, ignores or misrepresents previously established doctrine. The majority may believe that its rulings will logically fit within some new version of takings doctrine yet to be developed, but if so the Court has not described this new doctrine or offered any justification for rejecting the established reading of the Takings Clause, painfully pieced together by the Court over the course of nearly a century since the Court first recognized the doctrine of regulatory takings in *Pennsylvania Co. v. Mahon*.[179]

The decision marks a further rightward swing in the Supreme Court's viewpoint on takings issues. Justice Samuel Alito, the author of the *Koontz* opinion, succeeded Justice Sandra Day O'Connor upon her retirement from the Court in 2006. It is difficult to imagine the author of the *Lingle* decision, with its sweeping pronouncements about the importance of judicial deference to legislative and executive branch actors on matters relating to economic regulation, joining in the *Koontz* decision. Moreover, *Koontz* was one of three takings cases decided by the Supreme Court last term, all of which were decided in favor the property owner petitioners.[180] While the rulings in the other two cases are neither particularly surprising nor significant,[181] this consistent string of victories for property rights advocates certainly reflects the values and priorities of the Court's conservative wing.

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

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[179] 260 U.S. 393 (1922).

[180] *See Horne v. Department of Agriculture*, 133 S.Ct. 2053 (2013); *Arkansas Game and Fish Com'n v. United States*, 133 S.Ct. 511 (2012).

[181] *See* John Echeverria, "Horne v. Department of Agriculture: An Invitation to Reexamine 'Ripeness' Doctrine in Takings Litigation," Environmental Law Reporter New & Analysis (September 2013) (explaining that *Horne* is a narrow decision that comports with prior precedent). The ruling in *Arkansas Game & Fish Comm'n v. United States,*133 S.Ct. 511 (2012), that temporary physical inundations can potentially give rise to viable takings claims hardly expanded the scope of takings doctrine at all. *See* John Echeverria, "Making Sense of Penn Central," 23 UCLA J. Envtl. L. & Pol'y 171, 188 (2005) (suggesting that takings claims based on temporary physical occupations should be evaluated using the three-factor Penn Central framework).

rely on this opinion frequently in future takings cases. But the decision certainly creates new uncertainties and confusion in this notoriously recondite area of law. It is not beyond the realm of possibility that one or more justices in the majority will have second thoughts about the opinion and seek in the future to limit or possibly jettison one or both rulings. Because the Court was so sharply divided in *Koontz*, a very modest change in the composition of the Court could spell the death knell for *Koontz*. There is, of course, precedent for the Court reversing course on important takings questions. For several decades the Court asserted that a taking could be established by demonstrating that a regulation fails to substantially advance a legitimate public interest, only to repudiate this theory of takings liability in the 2005 *Lingle* case. The Court has demonstrated that it is open to fixing its mistakes.

Going forward, it will be interesting to watch how the Court resolves the conflicting views of the relationship between the courts and other branches of government reflected in the *Lingle* and *Koontz* cases. *Lingle* stands for a restrained judicial role in reviewing legislative and executive branch action and endorses the need for deference to legislators and regulators on complex policy and technical issues. By contrast, *Koontz* reflects fierce suspicion about the motivations of local government officials[182] and expresses no hesitancy about encouraging judicial second guessing of regulatory decisions.[183] Koontz's expansion of *Nollan/Dolan* obviously infringes on the domain of *Lingle* and effectively limits, to a degree, the scope of that decision.[184] It is difficult to understand how several of the justices who joined in the unanimous

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[182] *See, e.g.,* 133 S.Ct. at 2603 (referring to "the special vulnerability of land use permit applicants to extortionate demands for money" by local government officials); id. at 2603 (referring to the Court being "[m]indful of the special vulnerability of land use permit applicants to extortionate demands for money").

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

[184] One of the painful ironies of the *Koontz* decision is that it calls for just the kind of judicial referring of battles of experts that the Court eschewed in *Lingle*. *See Lingle,* 544 U.S. at 544-45 ("To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. . . . We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.") After *Koontz*, to determine whether traffic or sewer impact fees have been set at an appropriate level, for example, the developer and the local community will each have hire

*Lingle* decision could reconcile themselves to joining in Justice Alito's opinion in *Koontz*. These contrasting Court opinions apparently reflect the deep tension in some "conservative" minds between support for expansive private property rights and support for a constrained judicial role in our constitutional system.

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

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

Repositioning this claim where it belongs, under the Due Process Clause, raises other issues. In a due process case the plaintiff bears the burden of proof, whereas under *Nollan* and *Dolan* the government bears the burden of proof. If a *Koontz*-type case is viewed as involving a due process issue, should the burden of proof rest on the plaintiff, even if the *Nollan/Dolan* framework helps guide resolution of the due process inquiry? In addition, in a due process case, the courts are required to accord considerable deference to the judgments of government defendants. If a *Koontz*-type case is viewed as a due process case, should the courts apply the same level of deference that would apply in the usual due process case? While the majority's opinion in *Koontz* certainly says that the *Nollan* and *Dolan* essential nexus and rough proportionality tests apply to permit denials, the majority is conspicuously silent on the issues of the burden of proof and proper level of deference in this type of case. This silence can fairly be

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experts to testify on their behalf and the courts will have to decide the case by determining which expert is "more persuasive."

read as invitation to attempt to avoid some of the damage that would be done by electing to read *Koontz* more expansively.

Another important question is whether a government defendant, even after rejecting a permit application because the owner has refused to accede to an exaction, can avoid the strictures of *Nollan* and *Dolan* by showing that the likely negative effects of the development on the community provide an independent justification for the government's regulatory decision. It will no doubt be contended that if the government demanded an exaction at any point in the regulatory review it can never reject the development application without facing a challenge under *Koontz*. However in classic unconstitutional condition cases the Supreme Court has recognized that the denial of a benefit should not be struck down based on the unconstitutional conditions doctrine if the government has a distinct, constitutionally valid basis for denying the benefit.[185] It would appear to follow *a fortiori* in a *Koontz*-type case that if the government has a valid basis for denying a permit application based on the predicted project impacts, *Nollan* and *Dolan* should not be apply, even if the government decision was also motivated in part by the owner's refusal to accede to a demand for an exaction.[186] Justice Alito stated that,"[e]ven if respondent *would have been* entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights."[187] This statement certainly does not preclude the idea that *Nollan* and *Dolan* should not apply when the government has an alternative explanation for its land use decision.

With respect to monetary fees, one issue that will preoccupy the lower courts in the years ahead is whether the *Koontz* ruling that monetary fees are subject to *Nollan/Dolan* applies to fees calculated and imposed, not in *ad hoc* proceedings, but through general legislation.[188] Many

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

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

[187] 133 S.Ct. at 2596.

[188] *See also* Justin R. Pidot, Fees, "Expenditures and the Takings Clause" (working paper 2013), available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298307(suggesting that payments directly to the government might be subject to more stringent review than requirements to spend money).

lower courts have read *Nollan* and *Dolan* to apply only to conditions imposed in *ad hoc* administrative proceedings and not to conditions imposed through general legislation,[189] and the lower courts have been especially reluctant to apply *Nollan* and *Dolan* to legislatively imposed fees.[190] The majority opinion in *Koontz* is pointedly silent on whether the ruling applies only to *ad hoc* fees or is intended to apply to fees imposed through general rules. In her dissent, Justice Elena highlighted this possible method for limiting the effect of *Koontz*: "Maybe today's majority opinion accepts that distinction; or then again, maybe not."[191] The issue is plainly teed up for future consideration.

There is language in Supreme Court decisions suggesting that *Nollan* and *Dolan* (and hence *Koontz*) should be limited to *ad hoc* fees. *Dolan* suggests such a limitation by emphasizing that "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," rather than impose an "essentially legislative determination[] classifying entire areas of the city."[192] Likewise, the decision in *Lingle* states that *Nollan* and *Dolan* "involved Fifth Amendment takings challenges to *adjudicative* land-use exactions."[193] At a minimum, the Court's language in these cases indicates that the Court has, for the present, reserved the question of whether *Nollan* and *Dolan* can or should extend beyond *ad hoc* exactions.

It is difficult to predict how this Court, in the aftermath of *Koontz*, will resolve this issue. On the one hand, legislative fees can be viewed as leveraging the government's regulatory authority in a fashion similar to *ad hoc* fees because the fees are only imposed on those seeking regulatory approval to develop land. On the other hand, legislative enactments are generally the product of more carefully considered, transparent decision making by senior government officers than permitting decisions arrived at in *ad hoc* administrative proceedings. *Nollan* and *Dolan* are arguably rooted in the Court's particular suspicions about the negotiations that occur in the course of *ad hoc* proceedings. Thus a majority of the Court may be willing not to extend *Nollan* and *Dolan* to legislative fees. Moreover, in *Dolan*, the Court said that the "rough proportionality" test requires a local government to "make some sort of *individualized*

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[189] *See, e.g.*, *Parking Association of Georgia v. City of Atlanta,* 264 Ga. 764, 450 S.E.2d 200 (1994); *Garneau v. City of Seattle,* 147 F.3d 802, 811 (9th Cir.1998).

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

[191] 133 S.Ct. at 2608.

[192] 512 U.S. at 385.

[193] 544 U.S. at 546.

determination that the required dedication is related both in nature and extent to the impact of the proposed development."[194] Because legislative measures do not, by their nature, involve individualized determinations, this description of the rough proportionality analysis seems to presume that it cannot apply to general legislation. Finally, any argument to extend *Nollan/Dolan* to legislatively imposed fees will have to confront *Lingle* and its declaration that, "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."[195]

## CONCLUSION

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

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[194] 512 U.S. at 391 (emphasis added).

[195] 133 S.Ct. at 545.