THE REMEDY FOR A "*NOLLAN*/*DOLAN* UNCONSTITUTIONAL CONDITIONS VIOLATION"

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INTRODUCTION

The so-called "unconstitutional conditions" doctrine prohibits the government from conditioning the receipt of a discretionary benefit on the waiver of a constitutionally protected right.[1] The general context of this Article is the interface between the unconstitutional conditions doctrine and the Takings Clause of the Fifth Amendment[2] in the context of land-use permitting decisions. When the government and property owners bargain for development rights, it is common practice for a permitting authority to grant the development permit on the condition that the property owner offset the project's harmful impacts, usually through dedicating property or paying fees.[3] Development often affects vital natural resources, for example, destroying wetlands or decreasing the amount of open space. More often, however, development increases the demand on important public infrastructure, such as roads, bridges, sewage, and emergency services. But there is a limit to how far a permitting authority can go in setting permit conditions. The combination of the unconstitutional conditions doctrine and the Takings Clause[4] acts as a check-and-balance on the breadth and scope of the conditions local governments may impose within a development permit.

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1. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ."

Id.

2. U.S. CONST. amend. V.

3. *See, e.g.*, FLA. STAT. ANN. § 373.414 (West 2012) (requiring mitigation to prevent harmful effects of development on surface waters and wetlands); VT. STAT. ANN. tit. 10, § 6093 (2011) (requiring mitigation for destruction of primary agricultural soils); WASH. REV. CODE ANN. § 82.02.050 (2) (West 2014) (authorizing impact fees for improvements and infrastructure related to development).

4. Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

This Article addresses the relief available to a property owner claiming a violation of the Takings Clause from the imposition of an unconstitutional condition, but a violation that does not rise to the level of an actual taking of private property. The inherent tension underlying this issue is that the Takings Clause generally only allows for payment of compensation for a taking. For the moment, there is no guaranteed remedy, equitable or compensatory, for a constitutional violation that amounts to anything other than an actual taking but nonetheless burdens property rights protected by the Fifth Amendment by constricting the ability of property owners to develop land. In general, permit conditions become suspect to constitutional scrutiny when the cost to obtain the permit appears to be unrelated or too high relative to the objective and value of the permit itself.[5]

The *Nollan*/*Dolan* standard embodies the unconstitutional conditions doctrine in the land-use context. In *Lingle v. Chevron USA, Inc.*, the United States Supreme Court declared that the *Nollan*/*Dolan* standard is a "special application" of the unconstitutional conditions doctrine involving land-use exactions and that a violation will generally result in a taking under the Takings Clause of the Fifth Amendment because a property owner cannot be coerced into waiving the right to just compensation.[6] The recent decision in *Koontz v. St. Johns River Water Management District*[7] dramatically increased the scope of the *Nollan*/*Dolan* standard to include permit denials and monetary exactions. The *Koontz* decision leaves no doubt that the unconstitutional conditions doctrine will remain an integral part of takings law for the foreseeable future.

But, *Koontz* resurrects old questions and creates new ones. The underlying purpose of the *Nollan*/*Dolan* standard is in question more so now than ever, and it is anyone's guess as to what the remedy is for what the Court in *Koontz* coined as a "*Nollan*/*Dolan* unconstitutional conditions violation."[8] What is possible subsequent to *Koontz* is that the *Nollan*/*Dolan* standard does not actually identify a taking.[9] A permit denial including an unconstitutional condition does not result in a taking, and a permit approval with an unconstitutional condition might, but does not necessarily, result in a taking.[10] The unconstitutional conditions doctrine may shore up the

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5. *See, e.g.*, Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 360–61 (1999) (arguing that unrelated and/or disproportionate conditions go beyond "harmonizing public and private interests").

6. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547 (2005) (citing Dolan v. City of Tigard, 512 U.S 374, 385 (1994)).

7. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591, 2599 (2013).

8. *Id.* at 2597.

9. *See infra* Part III.

10. *See infra* Part V.

inherent protections of the Takings Clause, but it does not in and of itself identify a taking. If the *Nollan*/*Dolan* standard does not identify a taking, it begs the question whether the standard is a unique component of takings law, or is a free-standing touchstone that can be imported into takings law as necessary, and is applied the same way as the unconstitutional conditions doctrine is in other contexts. In other words, the *Nollan*/*Dolan* standard may not be all that "special," and if it is not, then the Court should strive to put the *Nollan*/*Dolan* standard where it belongs. The Supreme Court's exaction jurisprudence is bewildering in large part because it is impossible to discern whether an underlying condition that violates the *Nollan*/*Dolan* standard is substantively (1) a legitimate, but merely unreasonable, exercise of government power that is allowed to go forward so long as just compensation is provided, or (2) an illegitimate exercise of government power that is therefore unconstitutional and may not go forward as an exaction.[11] The tone and tenor of the *Koontz* majority opinion intimates the latter.[12] A definitive answer on that issue would go a long way towards resolving the remedy question.

This Article suggests that the *Nollan*/*Dolan* standard is functionally no different from other applications of the unconstitutional conditions doctrine and as such is more properly viewed as a means to invalidate a permit condition, whether or not that condition results in an actual taking. Perhaps the true purpose of the *Nollan*/*Dolan* standard, beyond identifying an unconstitutional, and therefore impermissible, permit condition, is to cause a permitting authority to consider whether it wants to independently exercise its eminent domain power or otherwise modify the condition to become constitutional. If so, then the *Nollan*/*Dolan* standard is really more of a prophylactic standard than a remedial standard. There is an abundance of Supreme Court precedent that demonstrates that the unconstitutional conditions doctrine is primarily designed to prevent a constitutional infringement from happening in the first place and there is no good reason why the *Nollan*/*Dolan* standard should hew to a different angle. Indeed, the weight of authority demonstrates that this is how lower courts generally apply the *Nollan*/*Dolan* standard, and it is how the Supreme Court indirectly applied it in both *Nollan v. California Coastal Commission* and

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11. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) ("Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context, [exacting an unrelated easement] is not one of them."). *But see id.* (noting that a condition that violates the "essential nexus" test may be legitimate, but it does not pass "constitutional muster").

12. *See Koontz*, 133 S. Ct. at 2595–97 (including multiple references to "extortion" and variations of "impermissible" and that the unconstitutional conditions doctrine "prohibits" such government activity).

Dolan v. City of Tigard. The problem with this supposition is that it conflicts with the "basic understanding" of the Takings Clause because the sole remedy for a taking is just compensation.[13] The Court has repeatedly stated that injunctive relief is inappropriate to block an alleged taking.[14]

Under the now defunct *Agins* standard,[15] it was perfectly logical that if a regulation did not "substantially advance legitimate state interests" it was substantively void and should be enjoined; payment of just compensation could not authorize an invalid government action to continue, and the public should not be required to pay for an invalid action.[16] But after *Lingle*, the substantive validity of a regulation has no bearing on the takings inquiry.[17] If the purpose of the Takings Clause were to block the government from engaging in illegitimate conduct, then an injunction would be an appropriate remedy. But an injunction is not an appropriate remedy precisely because, as explained in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, the purpose of the Takings Clause is not to block illegitimate action, but rather to provide compensation for burdensome, but "otherwise proper," government action that results in a taking.[18]

However, *First English* only addresses the remedy available under the Takings Clause.[19] It leaves room for the possibility that a court could invalidate a regulation under an independent theory such as the unconstitutional conditions doctrine. There is intuitive appeal to the notion that any exaction that violates the *Nollan*/*Dolan* standard could be substantively void because, according to Justice Antonin Scalia, the author of the *Nollan* opinion, "*Nollan* and *Dolan* . . . protect against the State's

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13. First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 315 (1987) ("[The] basic understanding of the [Takings Clause] . . . [is] that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.").

14. *E.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 697 n.18 (1949) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."); *accord* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11 (1990) (holding injunctive relief is inappropriate to block an alleged taking).

15. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that "[t]he determination that governmental action constitutes a taking" effectively compels "the public at large" to absorb the cost of state action in the public interest).

16. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540–43 (2005) (quoting *Agins*, 447 U.S. at 260 (1980)).

17. *Id.* at 545.

18. *First English*, 482 U.S. at 315.

19. *Id.* at 321.

cloaking within the permit process 'an out-and-out plan of extortion.'"[20] In fact, lower courts have generally held that a violation of the *Nollan*/*Dolan* standard involves the exercise of illegitimate power, and as such invalidation is the appropriate remedy.[21] The *Nollan*/*Dolan* standard did not arise from, and is therefore not grounded in, takings law.[22] There is thus no reason why the remedy should necessarily be grounded in the Takings Clause. The question is not whether the Takings Clause includes an invalidation remedy, but rather whether it precludes equitable relief emanating from elsewhere in the Constitution. The state and federal cases discussed within this Article suggest it does not, but the United States Supreme Court has yet to resolve the remedy question head on.

Even if the premise of this Article is correct, it does not mean that there is no role whatsoever for just compensation. Where a taking has in fact occurred, a plaintiff should be entitled to permanent damages when the government fully consummates a taking or to damages for a temporary taking when the government abandons the condition or the condition is judicially invalidated.[23] If, however, the premise of this Article is completely wrong and the *Nollan*/*Dolan* standard *does* identify takings, whether actual or constructive, then the Supreme Court should take the next opportunity to say so and reemphasize that the sole remedy for a taking is just compensation.

Parts I and II of this Article set the backdrop for the importance of the remedy question for unconstitutional conditions violations in the context of land-use decisions. Part I explains the basic components of the *Nollan*/*Dolan* standard and its relationship to the unconstitutional conditions doctrine. Part II describes the expansion of that standard in *Koontz* and how it now applies to circumstances that fall short of an actual taking. Part III offers an overview of the typical remedy for an unconstitutional conditions violation outside of land-use permitting decisions. Part IV details how lower courts, both state and federal, have decided the remedy question for a *Nollan*/*Dolan* violation. Taken together, Parts III and IV demonstrate that context should make little difference in the remedy available for a violation of the unconstitutional conditions

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20. Lambert v. City and Cnty. of San Francisco, 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting) (denying certiorari) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

21. *See infra* Part IV.

22. *Nollan*, 483 U.S. at 836–37.

23. There is no functional difference between rescission and invalidation. When a permitting authority rescinds a condition or when it is judicially invalidated there is still a requirement to pay just compensation for a temporary taking, if it is due. *First English*, 482 U.S. at 322 ("[W]e hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.").

doctrine in any context. Finally, Part V describes the doctrinal and practical reasons why invalidation is the proper remedy for a *Nollan*/*Dolan* violation.

I. THE *NOLLAN*/*DOLAN* STANDARD

The *Nollan*/*Dolan* standard derives from a pair of cases decided in 1987 and 1994—*Nollan v. California Coastal Commission*[24] and *Dolan v. City of Tigard*.[25] In general, the *Nollan*/*Dolan* standard requires that an imposed permit condition must have an "essential nexus" and a "rough proportionality" to any harmful effects the condition is designed to offset.[26] A condition that meets the *Nollan*/*Dolan* standard is not a taking, but a condition that fails the standard is a taking.[27]

In *Nollan*, James Nollan and his wife sought a permit to tear down a small bungalow and build a new and larger three-bedroom bungalow along the California coastline in Ventura County.[28] The California Coastal Commission approved the Nollans' permit application subject to the condition that the Nollans grant an easement for lateral access along the beach behind the house (as opposed to vertical access, which would run from the street to the beach).[29] The Nollans challenged the condition, and a California superior court invalidated the permit condition because the construction of the new house would not have a "direct adverse impact on public access to the beach."[30] Following the remand, the California Coastal Commission again imposed the same condition.[31] During this second round, the superior court again invalidated the condition, but on statutory rather than constitutional grounds.[32] The Commission appealed, but in the meantime the Nollans went ahead with construction.[33] The Commission prevailed on appeal in the California Court of Appeals, and the Nollans then filed a petition for writ of certiorari with the United States Supreme Court to review the constitutional issues.[34]

On review, the United States Supreme Court held that a permit condition is a taking under the Takings Clause unless the condition "serves

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24. *See Nollan*, 483 U.S. at 837 (holding that a permit condition is unconstitutional if it lacks an "essential nexus" to the justification for the permitting system).
25. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
26. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013).
27. *Id.*
28. *Nollan*, 483 U.S. at 825, 828.
29. *See id.* at 828.
30. *Id.*
31. *Id.*
32. *Id.* at 829.
33. *Id.* at 829–30.
34. *Id.* at 831.

the same governmental purpose as the development ban, [otherwise] the [condition] is not a valid regulation of land use but an out-and-out plan of extortion."[35] The Court held that the condition was a taking because the imposition of the easement on the beach behind the house had nothing to do with mitigating interference with the public's "visual access" in the front of the house as a result of the construction of the new house.[36] The condition requiring that the Nollans dedicate a lateral public easement did not "meet even the most untailored standards."[37] In so holding, the Supreme Court reversed the California Court of Appeal's decision on constitutional grounds, thereby leaving the trial court's invalidation of the condition in place. *Nollan* is a takings case, yet the remedy was invalidation because the Court found that the condition did not serve the "same purpose" as would an outright development ban; consequently, the condition was an example of invalid regulation and an "out-and-out plan of extortion."[38] This outcome is confusing considering the modern concept of takings law under *First English*. Shortly following the *Nollan* opinion, one well-respected scholar pondered, "[b]ut if the Nollans were actually challenging a taking, why were they not compelled to accept compensation?"[39]

The outcome in *Dolan* was much the same. In *Dolan*, Florence Dolan applied for a permit to double the footprint of her A-Boy hardware store in the City of Tigard, located on the southwest edge of Portland, Oregon.[40] The local planning commission approved the permit, subject to the condition that Dolan dedicate, for public use, a portion of her property for both floodplain protection and the construction of a bicycle pathway.[41] Dolan appealed to the Oregon Land Use Board of Appeals (LUBA), arguing that the conditions were not sufficiently related to the purpose of flood protection and controlling traffic congestion.[42] The only remedy Dolan sought was judicial invalidation of the denial of her request for a variance from the dedication requirement.[43] Dolan did not prevail at any stage of the state court litigation, and the United States Supreme Court

35. *Id.* at 837 (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981)) (internal quotation marks omitted) (citing Brief for the United States as Amicus Curiae Supporting Reversal at 22 & n.20, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (No. 86–133); Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 439 n.17 (1982)).

36. *Id.* at 838–39.

37. *Id.* at 838.

38. *Id.* at 837 (quoting *J.E.D. Assocs.*, 432 A.2d at 14–15 (internal quotation marks omitted)).

39. John Echeverria, *The Takings Issue and The Due Process Clause: A Way Out of Doctrinal Confusion*, 17 VT. L. REV. 695, 707 (1993).

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

41. *Id.* at 379–80.

42. *Id.* at 382–83.

43. *Id.* at 380–81.

granted certiorari to address potential conflicts with how the Oregon Supreme Court applied *Nollan*.[44]

On review, the United States Supreme Court ruled that while the conditions met *Nollan*'s "essential nexus" test they were not "roughly proportional" to the harm purportedly caused by Dolan's doubling of the size of her store.[45] The Court's "rough proportionality" test required the permitting authority to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[46] The City failed to explain why public access to the greenway would mitigate storm runoff, and it also failed to make any effort to quantify the effects of a bicycle pathway on traffic congestion.[47] Consequently, the Court reversed and remanded the case back to the Oregon Supreme Court for reconsideration, which, in turn, sent the issue directly back to the City of Tigard to resolve.[48] The City of Tigard withdrew the original permit condition and fashioned a new "Remand Condition One" that it believed would pass the "rough proportionality" test developed in *Dolan*.[49] The instrumental change made in the new condition was that the dedication would no longer be open to the public and that the Dolans were free to fence it in. That condition ultimately came to fruition, but only after Florence Dolan initiated settlement negotiations.[50]

Although the Court in *Nollan* and *Dolan* did not directly address the remedy question, both cases are more supportive of an invalidation remedy than a just compensation remedy. In fact, the Court stated in the *Nollan*:

> The Commission may well be right that it is a good idea [to have a strip of beach open to public access], but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," . . . .[51]

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44. *Id.* at 383.
45. *Id.* at 386–87, 391, 394–95.
46. *Id.* at 391.
47. *Id.* at 393–95.
48. Dolan v. City of Tigard, 877 P.2d 1201, 1201 (Or. 1994) (per curiam).
49. Tigard, Or., Resolution 95-61, at 24 (Nov. 14, 1995).
50. *Id.* at 39, 67.
51. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987).

This quote can be interpreted in one of two ways: (1) that imposition of an unconstitutional condition requires payment of just compensation; or (2) that an unconstitutional condition is invalid, but once invalidated the objective of the condition should be achieved by formal exercise of eminent domain power. In *Dolan*, the Court, referring to *Nollan*, said that the "authority to exact [an unconstitutional condition] was *circumscribed* by the Fifth and Fourteenth Amendments."[52] The Court also said,

> [T]he government *may not require* a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.[53]

This suggests that an unconstitutional condition is never permissible, and there is no mention that payment of just compensation makes it permissible. Thus it is more likely that the second interpretation above is correct.

While there are disputes about whether *Nollan* and *Dolan* offer anything definitive about the appropriate constitutional remedy,[54] the reality is that, as this Article will show, lower courts have generally followed a pattern of invalidating permit conditions that violate the unconstitutional conditions doctrine, regardless of whether a taking occurred. Moreover, other Supreme Court cases suggest that *Nollan* and *Dolan* were cases of invalidation where no actual takings ever occurred,[55] and various treatises

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52. *Dolan*, 512 U.S. at 385 (emphasis added).

53. *Id.* (emphasis added) (citing Perry v. Sindermann, 408 U.S. 593, 598 (1972); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

54. *See, e.g.*, Alto Eldorado Partners v. City of Sante Fe, 644 F. Supp. 2d 1313, 1347 (D.N.M. 2009) ("It is thus not clear that the cases involved *invalidating* conditions that would have amounted to takings. Rather, the Supreme Court appears to have been exercising its power to review constitutional issues arising in state court proceedings and finding that the challenged administrative actions would be takings without compensation.").

55. Wilkie v. Robbins, 551 U.S. 537, 583–84 (2007) (Ginsburg, J., concurring in part, dissenting in part) (noting in dictum that both *Nollan* and *Dolan* were cases where the conditions were invalidated); *Dolan*, 512 U.S. at 408 (Stevens, J., dissenting) ("Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation." (citing Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11–17 (1990)); *Preseault*, 494 U.S. at 24 ("We recently concluded in [*Nollan*] that a taking would occur if the Government appropriated a public easement."); *see also* Lambert v. City and Cnty. of S.F., 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting) (denying certiorari) (assuming a taking occurred in *Nollan* and that *Dolan* involved "at least a threatened taking").

also say that *Nollan* and *Dolan* are generally viewed as supportive of an invalidation remedy.[56]

II. EXPANSION OF THE *NOLLAN*/*DOLAN* STANDARD IN *KOONTZ*

The Court's close decision in *Koontz v. St. Johns River Water Management District* arose from an order issued by Florida's St. Johns River Water Management District denying a 1994 dredge-and-fill permit application by Coy Koontz, Sr. to fill about three acres worth of wetlands to create a site for commercial development.[57] The District was willing to grant the permit if Koontz agreed to reduce the size of the development project or spend money on one of a few wetlands restoration projects designed to mitigate the effects of the planned development and wetlands destruction.[58] Because Koontz refused any of the proposed options and offered none of his own, the District denied the permit.[59]

Koontz sued claiming that the permit denial and the condition to fund off-site mitigation constituted a taking under the *Nollan*/*Dolan* standard and that the condition did not "substantially advance a legitimate government purpose" under the now defunct *Agins* standard.[60] The Florida Supreme Court rejected Koontz's takings argument for two reasons. First, it reasoned that *Nollan* and *Dolan* involved only permit approvals, not denials.[61] Second, it thought that *Nollan* and *Dolan* were limited to the situation where the condition involved some tangible property interest and did not

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56. *See, e.g.*, 1 JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 6:43 (2d ed. 2013), *available at* Westlaw SUBLAWG; 2 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 16:8 n.9 (5th ed. 2013), *available at* Westlaw AMLZONING; *c.f.* 36 AM. JUR. PROOF OF FACTS 3d 417 § 13 (2013) (characterizing *Dolan* as "disapproving" the permit conditions at issue); 1 ARDEN RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 7:47 (4th ed. 2013), *available at* Westlaw RLZPN.

57. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1224 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013). This case has a long litigation history going back to 1998 when the first appellate decision was issued in *Koontz v. St. Johns River Water Mgmt. Dist*., 720 So. 2d 560 (Fla. Dist. Ct. App. 1998) (*Koontz I*), determining that the takings claim was ripe for adjudication.

58. *Koontz*, 77 So. 3d at 1224.

59. *Id.*

60. St. Johns River Water Mgmt. Dist. v. Koontz, 861 So. 2d 1267, 1268 (Fla. Dist. Ct. App. 2003) (*Koontz II*) (Pleus, J., concurring) (arguing that the conditions violated *Nollan* and *Dolan* and also did not "substantially advance legitimate state interests" under *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)). The original 1995 complaint stated, in part: "The acts of [St. Johns River Water Management District], in mandating the conveyance of a conservation easement and other onerous mitigation conditions as a condition to any use of [Koontz's] property, render further efforts to permit the property impossible and constitutes a taking of the property." First Amended Complaint at 20, Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673, 1995 WL 17966771 (Fla. Cir. Ct. March 1, 1995) (emphasis added).

61. *Koontz*, 77 So. 3d at 1230.

simply impose a generalized liability to expend money.[62] The latter ruling, prior to *Koontz*, appeared to be supported by a 1998 Supreme Court case in which Justice Anthony Kennedy and four other justices concluded that the Takings Clause does not apply to generalized government liabilities.[63] The United States Supreme Court reversed the Florida Supreme Court on both points.[64] The Court ruled that applying *Nollan* and *Dolan* to denials in the land-use context is consistent with the application of the unconstitutional conditions doctrine in other situations where a benefit had similarly been denied, and that the requirement to spend money had a direct link to the property in question and was therefore not a generalized monetary liability.[65] What is less clear in *Koontz* is the theory of liability for a so-called "*Nollan*/*Dolan* unconstitutional conditions violation."

The liability rule that seems to result from *Koontz* now consists of four elements. *Nollan* and *Dolan* provide the first three elements: (1) *Nollan*'s "essential nexus" requirement, (2) *Dolan*'s "roughly proportionate" requirement, and (3) *Nollan* and *Dolan*'s requirement that a demand would be a *per se* taking if executed outside of the permitting process.[66] *Koontz* adds a fourth element that "a demand [must be] of sufficient concreteness to trigger" liability.[67] It is this last element that expands the scope of *Nollan*/*Dolan* to include permit denials. There is no requirement that an actual taking must occur. Logically, the *Nollan*/*Dolan* standard cannot possibly identify a taking if an actual taking is not required to establish liability.

In *Koontz*, the Court explicitly stated that "[e]xtortionate 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."[68] Here, the Court appears to say that a property owner can be coerced out of her right to just compensation even if a taking never actually occurs, including instances where a permit application has been denied. The logical implication is that the *Nollan*/*Dolan* standard, unlike other takings standards, forestalls threatened takings instead of ensuring compensation

62. *Id.*

63. E. Enters. v. Apfel, 524 U.S. 498, 539–41 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

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

65. *Id.* at 2595 (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974)).

66. Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

67. *Koontz*, 133 S. Ct. at 2598.

68. *Id.* at 2596 (emphasis added).

for actual takings. Referring to earlier unconstitutional conditions cases, the Court stated that "we have recognized that *regardless of whether the government ultimately succeeds* in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."[69] From a practical standpoint, it may seem illogical to conclude that there is ongoing coercion after a permit has been denied, but that ignores the fact that the property owner still has not obtained the benefit sought.

The Court rejected the idea that a community can say "no" to a development project where the only reason for doing so is that the property owner has refused to cede a constitutional right.[70] Whether that is what actually happened in *Koontz* is an open question and will only be resolved on remand. This means that the *Nollan*/*Dolan* standard now not only insures against actual infringements, but also threatened infringements, and this is consistent with application of the unconstitutional conditions doctrine in other contexts.

After having resolved the liability issue, the Court had less to say about what the remedy might be for such a violation and what it did say is confusing. While the post-*Koontz Nollan*/*Dolan* standard makes the issue of whether a taking actually occurred irrelevant for liability purposes, the issue still seems to matter in terms of the available remedy. Both the majority and the dissent in *Koontz* agreed that the remedy for a taking is just compensation and that a permit denial does not result in a taking.[71] Accordingly, there must be two kinds of *Nollan*/*Dolan* unconstitutional conditions violations—one that results in a taking and one that does not. This supposed distinction, if it exists, is important because it determines what remedy will be available to a claimant. On the one hand, *Koontz* says that just compensation is available only for a *Nollan*/*Dolan* violation that amounts to a taking (permit approvals);[72] but, *Koontz* also says that it would be up to state courts to determine the remedy for a *Nollan*/*Dolan* violation that does not amount to a taking (permit denials).[73] In her dissent, Justice Elena Kagan suggested that in the latter instance a property owner is entitled to have the unconstitutional condition invalidated, but she cites no authority or basis for that proposition.[74] The collective position of the

69. *Id.* at 2595 (emphasis added).
70. *Id.* at 2596.
71. *Id.* at 2597; *Id.* at 2603 (Kagan, J., dissenting).
72. *Id.* at 2597.
73. *Id.*
74. *Id.* at 2603, 2611 (Kagan, J., dissenting).

majority and dissent is wholly unsatisfying if, as both seem to agree, permit denials and approvals stand on equal footing in terms of the degree of constitutional infringement. It seems unfair that a *Nollan*/*Dolan* violation that involves a permit approval guarantees a remedy under the Takings Clause, but a *Nollan*/*Dolan* violation that involves a permit denial might not.[75]

There are also other problems with the Court's remedy discussion. First, the remedy turns not on the substance of the condition but, rather, on whether the permit is approved or denied. This is an overly simplistic approach because a permit approval does not necessarily result in a taking. Additionally, this approach to remedies does not comport, as Part III will show, with the typical operation of the unconstitutional conditions doctrine, and, as Part IV shows, lower courts have not considered the distinction between approvals and denials as the lynchpin for determining the proper remedy. From a practical and doctrinal standpoint, it makes no sense to have two different remedies for what amounts to the same application of the *Nollan*/*Dolan* standard to potentially the same offensive condition and the same resulting violation.

Although technically dictum, if the Court had actually gotten to the remedy question, it might have found the correct answer in Judge Jacqueline Griffin's dissent in the 2009 *Koontz* appellate opinion (*Koontz IV*). Judge Griffin's dissent is perhaps the most forceful and accurate statement regarding the remedy for an unconstitutional conditions violation as demonstrated by the cases described in Parts III and IV.[76] Judge Griffin minced no words when she wrote that "[t]here is very little of the law important to this case that is settled law, and if the outcome in this case is dictated by the law of exaction, then somebody needs to get it fixed."[77] On the question of remedy for a *Nollan*/*Dolan* violation, Judge Griffin is convincing—she too made no distinction between approvals and denials:

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75. Although the remedy issue was not one the Court needed to address, it still punted on a very challenging problem that lower courts have to deal with until the next opportunity arises for the Court to resolve it. State courts have been the incubators for what later becomes incorporated into the Federal Constitution. Dolan v. City of Tigard, 512 U.S. 374, 389 (1994). *See also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987) ("Our [holding] . . . is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts.").

76. *Cf.* St. Johns River Water Mgmt. Dist. v. Koontz, 5 So. 3d 8, 18 (Fla. Dist. Ct. App., 2009) (Griffin, J., dissenting) (distinguishing unconstitutional conditions that result in the taking of an interest in land from those that do not and stating that while invalidation of the condition is appropriate in both cases, compensation is warranted only in cases where there has been an actual taking of an interest in land); *see also infra* Part III (describing remedies available under the unconstitutional conditions doctrine); *infra* Part IV (detailing remedies awarded by lower courts for violations of the *Nollan*/*Dolan* standard).

77. *Id.*

> If [a] condition does not meet the "nexus" and "rough proportionality" tests of *Nollan*/*Dolan*, it is invalid. As *Nollan* and *Dolan* make clear, such an "exaction" may constitute a "taking"; it is not, however, necessarily a "taking." . . . If it is, whether temporarily or permanently, the landowner is entitled to compensation as set forth in the "taking" cases.[78]

Judge Griffin went on to describe the typical remedy for an unconstitutional conditions violation in other contexts:

> In [*Perry* and *Pickering*], the litigation simply invalidated the condition. To say that an agency's imposition of a condition on the discretionary grant of a permit to develop real property necessarily "takes" the property until the condition is removed is illogical. If an agency imposes an unconstitutional condition on public employment that deprives a person of his right of free association or free speech, the invalidation of the condition does not require that the government employ, or continue in employment, anyone who was burdened by the condition. The unconstitutional condition is simply removed and the individual may or may not be hired or continued in employment based on constitutional criteria. By imposing an unconstitutional condition, the agency did not "take" the job.[79]

The best argument is that any violation of the *Nollan*/*Dolan* standard results in a "*Nollan*/*Dolan* unconstitutional conditions violation," not just those that involve permit denials. The remainder of this Article attempts to prove that Judge Griffin is correct.

III. THE GENERAL REMEDY FOR UNCONSTITUTIONAL CONDITIONS VIOLATIONS

In general, the remedy for an unconstitutional conditions violation is invalidation of the condition, even if there is merely a threatened constitutional infringement.[80] The principle of the so-called unconstitutional

78. *Id.* at 18.

79. *Id.* at 18–19 (citing Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Bd. of Educ., 391 U.S. 563, 570 (1968)).

80. *See, e.g.*, Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2327 (2013); Lebron v. Sec'y, Fla. Dept. of Children & Families, 710 F.3d 1202, 1206–08 (11th Cir. 2013) (invalidating a law that required grant recipients to adopt a policy opposing prostitution and sex trafficking as a condition of funding); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 468 (1995); Forsyth v. Nationalist Movement, 505 U.S. 123, 127–29 (1992). These cases all involve instances where the government imposed what would be considered under *Koontz* conditions of

conditions doctrine is that the government may not condition the grant of a discretionary benefit on the waiver of a constitutionally protected right.[81] The Supreme Court stated in *Western Union Telegraph Co. v. Foster* that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result."[82] The unconstitutional conditions doctrine operates to remove barriers to obtaining important public benefits, but it does not guarantee their acquisition.

A. The Origins of the Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine has a rich history stretching from the mid-to-late nineteenth century[83] to more recent times with *Nollan* and *Dolan*, and now to a pair of cases decided in the 2013 United States Supreme Court term: a First Amendment case issued a few days before the

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"sufficient concreteness," but the plaintiffs refused to be subjected to the condition or the condition had not yet been enforced.

81. *Perry*, 408 U.S. at 597.

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .

Id.

82. W. Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918) (citations omitted).

83. A number of Dormant Commerce Cause cases were decided throughout the nineteenth and early twentieth centuries. *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. 519, 523 (1839); Lafayette Ins. Co. v. French, 59 U.S. 404, 407 (1855).

> A corporation . . . can transact business in [another state] only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as [the latter State] may think fit to impose; and these conditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution or laws of the United States . . . .

Id.; Home Ins. Co. of N.Y. v. Morse, 87 U.S. 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights."); Doyle v. Cont'l Ins. Co., 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions [which violate the Commerce Clause] upon their doing so."); Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 592 (1926) (imposing certification requirements for private carriers converting them to common carriers); United States v. Chicago, Milwa., St. Paul. & Pac. R.R. Co., 282 U.S. 311, 328–30 (1931) (validating a fee on re-organization of railroad under Interstate Commerce Act); Atlantic Ref. Co. v. Virginia, 302 U.S. 22, 32 (1937) (citing Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 510–11 (1945)) (validating a fee on foreign corporations for entrance into state for purposes of conducting intrastate business).

Koontz decision[84] and then *Koontz*.[85] The doctrine seems to be enjoying somewhat a revival as of late.[86] In *Nollan*, Justice Scalia drew upon an earlier First Amendment case[87] to describe how the unconstitutional conditions doctrine operates in any context, including land-use decisions:

> [Imposing an easement condition in exchange for a development permit] becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the *unrelated condition* alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, *requiring a $100 tax contribution* in order to shout fire is a lesser restriction on speech than an outright ban, it *would not pass constitutional muster*.[88]

Implicit and central to this example is that the government may not achieve indirectly what it cannot accomplish directly.[89] Justice Scalia's *Nollan* example sets forth a clear justification for invalidating the "unrelated condition" because it, not the underlying ban, does not "pass constitutional muster."[90] Quite often, statutes or administrative decisions

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84. *Alliance*, 133 S. Ct. at 2332 (invalidating a policy requirement imposed to receive federal funding to combat the spread of HIV/AIDS).

85. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2596 (2013).

86. *See, e.g.*, Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202, 1217 (11th Cir. 2013) (enjoining Florida's new law requiring drug testing before receipt of welfare benefits). A more recent United States Supreme Court case upheld the Solomon Act, which conditioned the receipt of federal funding on allowing military recruiters on campus. *See* Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47, 51, 70 (2006) (reversing the lower court's grant of a preliminary injunction because the Solomon Amendment likely did not violate universities' First Amendment rights of expression). Before the 2013 term, the last United States Supreme Court case invalidating government action was *Board of Commissioners v. Umbehr*, 518 U.S. 668, 684–85 (1996). It is important to note that prison cases generally involve "unconstitutional conditions," but are not unconstitutional conditions doctrine cases in the sense that there is an exchange for a benefit or privilege. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1922–23 (2011) (holding that overcrowding in California prisons is an unconstitutional condition and that a remedial order requiring the state to reduce overcrowding is necessary to remedy the constitutional violation).

87. Speiser v. Randall, 357 U.S. 513, 514–15, 529 (1958) (invalidating a California requirement that World War II veterans applying for a tax exemption pledge to refrain from speech advocating the overthrow of the government).

88. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (emphasis added).

89. *Speiser*, 357 U.S. at 526 (citing Bailey v. Alabama, 219 U.S. 219, 239 (1911)).

90. *See* Romero, *supra* note 5, at 360 n.43.

are invalidated in total, but that is simply a by-product of the inability to sever and invalidate the unconstitutional condition.[91] Indeed, the unconstitutional conditions doctrine has been applied to invalidate the kind of improper leveraging of government power described by *Nollan* in a number of circumstances, vindicating a variety of constitutionally protected rights.[92] A few concrete examples are helpful to further explain how unconstitutional conditions are invalidated.

B. Application of the Unconstitutional Conditions Doctrine

One of the most widely cited unconstitutional conditions doctrine cases is *Perry v. Sindermann*.[93] Robert Sindermann taught in the Texas college system from 1959 to 1969, and, during the 1968–1969 school term, Sindermann became embroiled in public disputes with the university

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> Justice Scalia suggests that the condition, rather than the underlying ban, would not 'pass constitutional muster.' Maybe Justice Scalia was just not being precise, but the last quoted sentence nonetheless supports those who perceive *Nollan* as an unconstitutional conditions case, since that would be the only theory to invalidate the condition rather than the underlying regulation.

Id. (citations omitted).

91. *See generally* Free Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (explaining the so-called severance doctrine); *see also* Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952) (holding that the D.C. circuit "usurped the administrative function" when it altered a public lands permit, in which the permit condition was not severable from the whole). These cases support the notion that the remedy for unconstitutional conditions violations is generally invalidation of the permit because it is consistent with both the severance doctrine and the separation of powers doctrine.

92. *See, e.g.*, Fed. Commc'n Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (invalidating § 399 of the Public Broadcasting Act because it imposed the condition to refrain from "editorializing" on non-commercial educational broadcasters in exchange for public grants); Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18, 720 (1981) (invalidating a denial of unemployment benefits conditioned on foregoing religious exercise); Sherbert v. Verner, 374 U.S. 398, 404–406 (1963) (invalidating a denial of unemployment benefits conditioned on foregoing religious exercise); Lefkowitz v. Turley, 414 U.S. 70, 84–85 (1973) (invalidating a New York law conditioning continuance and renewal of state contracts on requirement to surrender right to refuse self-incrimination in proceedings related to state contracts); Shapiro v. Thompson, 394 U.S. 618, 631 (1969) (invalidating one year residency condition imposed on welfare recipients before being able to apply for benefits); Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960) (invalidating under the Fifteenth Amendment state redistricting that effectively made it a condition to be white in order vote within the boundaries of Tuskegee); Wieman v. Updegraff, 344 U.S. 183, 18 & n.1, 191 (1952) (invalidating an Oklahoma law requiring state employees to take an oath that the employee was not or had not been a member of the Communist Party on condition of state employment); *c.f.* Bailey v. Alabama, 219 U.S. 219, 244–45 (1911) (invalidating an Alabama statute imposing what amounted to indentured servitude in violation of the Thirteenth Amendment where a debtor failed to pay a debt on a labor contract).

93. *Cf.* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)).

system's board of regents.[94] Citing insubordination and without further explanation, the board declined to renew Sindermann's contract for the following year.[95] Among the positions the board opposed was Sindermann's advocacy for making Odessa Junior College a four-year institution (which it now is today). Sindermann subsequently brought a federal action claiming a violation of his First Amendment right to free speech and a denial of procedural due process.[96]

The gravamen of Sindermann's claim was that the board, in exchange for continued employment, had imposed a condition on him to be silent and compliant. Because the district court had rendered summary judgment in favor of the board, the Supreme Court did not have a complete record to determine whether the board's condition was "invalid."[97] The Court held that Sindermann was entitled to a full hearing on remand, and the board was then presumably on notice that it could not justify a decision not to rehire Sindermann on the condition that he refrain from speaking his mind on matters of which the board disapproved.[98]

In a similar case some five years later, *Mount Healthy City School District Board of Education v. Doyle*,[99] the Supreme Court clarified that even if a teacher were dismissed for an impermissible reason that violates a constitutionally protected right, the teacher may not necessarily be entitled to the claimed benefit.[100] The district could have demonstrated that it had an independent and lawful reason for denying continued employment.[101]

The lesson of these two cases is that the unconstitutional condition does not vanish simply because the benefit sought has been denied. Rather, the condition must be invalidated regardless of whether the benefit has been denied or granted; but, once invalidated, the grantor may justify a denial on alternative grounds or grant approval with new conditions that, in the words of Justice Scalia, pass "constitutional muster."[102]

In another significant case, *Boddie v. Connecticut*,[103] the Supreme Court invalidated a Connecticut statute that imposed a fee to file and perform service of process in divorce proceedings.[104] For both filing and

94. *Perry*, 408 U.S. at 594–95.
95. *Id.* at 595.
96. *Id.*
97. *Id.* at 598.
98. *Id.* at 603.
99. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).
100. *Id.* at 285.
101. *Id.* at 287.
102. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).
103. Boddie v. Connecticut, 401 U.S. 371 (1971).
104. *Id.* at 372, 380–81.

service, the fees totaled an average of $60 in 1968 dollars[105] (roughly $400 in 2013 dollars[106]). An indigent couple brought divorce proceedings, but the clerk of the local superior court denied their filing for failure to pay the fees.[107] The couple did not refuse to pay; they simply could not afford it.

After unsuccessfully obtaining a waiver, the couple filed an Equal Protection claim in federal court alleging that the fees "as a condition precedent to obtaining court relief [are] unconstitutional [as] applied to these indigent [appellants] and all other members of the class which they represent."[108] The couple merely sought a court ordered waiver of the fee, but—citing the importance of marriage as an institution and the State's monopoly over its proceedings—Justice John Marshall Harlan invalidated the fee statute, reasoning that Connecticut law had created a situation where "divorces may be *denied or granted* solely on the basis of wealth."[109] The State argued that the fees were rational and necessary to prevent frivolous filings and to allocate scarce resources,[110] but the Court rejected the State's defense in a passage eerily similar to *Nollan*'s "essential nexus" test.[111] The Court found that "there [is] no *necessary connection* between a litigant's assets and the seriousness of his motives in bringing suit."[112] Returning to Justice Scalia's example in *Nollan*, "[t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[113] In other words, if the State were somehow able to place an outright ban on divorce proceedings because it wanted to prevent frivolous filings and conserve scarce resources, any fee imposed would be invalid if it did not further that objective. The Court reasoned that the State could have employed a number of alternatives to achieve the same objective, for example, imposing penalties for false pleadings or affidavits.[114] Like *Perry* and *Mount Healthy*, *Boddie* shows that invalidation is the appropriate remedy where there has been a denial of a benefit, or, as with *Boddie*, a denial of a fundamental right to the court system, and that the unconstitutional conditions doctrine is primarily designed to remove such unconstitutional barriers.

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105. *Id.* at 372.

106. Bureau of Labor Statistics, *Databases, Tables & Calculators by Subject*, U.S. DEP'T OF LABOR, http://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 6, 2014).

107. *Boddie*, 401 U.S. at 373.

108. *Id.* (alterations in original)

109. *Id.* at 386 (Douglas, J., concurring) (emphasis added).

110. *Id.* at 381.

111. *Id.*

112. *Id.* (emphasis added).

113. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

114. Boddie v. Connecticut, 401 U.S. 371, 381–82 (1971).

While the majority of cases involve denial of benefits or rights, invalidation applies equally to instances where a benefit has been granted.[115] In a line of recent public funding cases, the Supreme Court issued its opinion in *Agency for International Development v. Alliance for Open Society International* in June 2013.[116] Here, the Court invalidated a section of the Leadership Act passed by Congress in 2003 to combat the spread of HIV/AIDS.[117] The Leadership Act contained two conditions required of funding recipients, only one of which was at issue. The law required that recipients must have "a policy explicitly opposing prostitution and sex trafficking."[118]

Respondents in this case, the Alliance for Open Society International, a non-profit organization with operations primarily in Central Asia, had already been approved for and received funding under the program since Congress imposed the condition.[119] The Court characterized the condition as "an ongoing condition on recipients' speech and activities, a ground for terminating a grant after selection is complete."[120] In a preemptive effort to ensure continued funding, the Alliance commenced action in 2005 seeking a preliminary injunction on the condition, alleging that its enforcement of it would abridge the organization's First Amendment rights to free speech.[121] Additionally, the Alliance argued that the policy condition would inhibit its ability to carry out its mission because it might "alienate certain host governments."[122]

Writing for the majority, Chief Justice John Roberts held that the policy condition was invalid because "[i]t is about compelling a grant recipient to adopt a particular belief as a condition of funding" rather than "the Government's ability to enlist the assistance of those with whom it already agrees."[123] "The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained."[124] Two conclusions can be drawn from *Alliance*: (1) that the remedy for an unconstitutional

115. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2332 (2013).

116. *Id*. at 2327.

117. *Id.* at 2324–25 (discussing various components of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003. 22 U.S.C. §§ 7601, 7611, 7631 (2006)).

118. *Id.* at 2234–35 (quoting 22 U.S.C. § 7631(f)).

119. *Id.* at 2326.

120. *Id.* at 2330.

121. *Id.* at 2326.

122. *Id.*

123. *Id.* at 2330.

124. *Id.* at 2332.

conditions violation is invalidation, even if no constitutional infringement has yet occurred, and (2) invalidation is proper even after a benefit has been granted.

IV. THE REMEDY FOR VIOLATIONS OF THE *NOLLAN*/*DOLAN* STANDARD IN LOWER COURTS

There are relatively few lower court cases where a violation of the *Nollan*/*Dolan* standard has been found and even fewer that do not implicate *Agins*' "substantially advances" test rejected in *Lingle*.[125] About fifteen state jurisdictions have cases that are on point, meaning that there was a violation of the *Nollan*/*Dolan* standard and the remedy question was directly addressed. Twelve states either firmly favor invalidation of conditions or lean in that direction.[126] A few states, Oregon among them, favor just compensation.[127] California is an invalidation jurisdiction, but it is unique because of the requirement to pursue administrative mandamus.[128] In Colorado, *Nollan*/*Dolan* claims are driven by statute and remedies include invalidation and just compensation.[129] Because of their respective distinctions from other jurisdictions, California and Colorado are not discussed here. There are even fewer federal cases than state cases, and while the cases discussed here are on point, they are not as convincing as the state cases because of their paucity. Still, even the federal cases tend to favor invalidation.[130] This Part of the Article is by no means exhaustive, but

125. Lingle v. Chevron U.S.A., Inc., 544 U.S 528, 532 (2005) (internal quotation marks omitted).

126. *See supra* note 54; *infra* notes 127, 131, 139, 154, 163, 173, 182, 190.

127. Brown v. City of Medford, 283 P.3d 367, 375 (Or. Ct. App. 2012).

128. *See generally* Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 PEPP. L. REV. 99, 104 (1994) (arguing that California's requirement to first seek judicial invalidation of permitting conditions, before seeking compensation, frustrates property owners' ability to keep local government land-use decisions in check).

129. *See generally* COL. REV. STAT. ANN. §§ 29-20-201, 203-204 (West 2013) (legislating remedies for takings in Colorado, specifically, section 29-20-201 provides a general proscription against takings, section 29-20-203 provides for proscription against exactions, including monetary exactions, and section 29-20-204 provides a list of the procedural steps and remedies available for a violation of section 29-20-203 which includes the modification of the offending permit conditions or payment of just compensation (it also provides explicit exception for legislatively imposed fees)); *see also* Wolf Ranch, L.L.C. v. City of Colorado Springs, 220 P.3d 559, 562–63 (Colo. 2009) (holding that a city's decision to condition a land-use permit on drainage fees fell outside of a state statute which was enacted to provide an additional safeguard against the taking of private property for public use without just compensation).

130. *See, e.g.*, City of Portsmouth v. Schlesinger, 57 F.3d 12, 14 (1st Cir. 1995) (invalidating a fee imposed by a city to offset the loss of low income housing as a condition of receiving zoning permits to build condominiums).

it does provide ample support for the premise that Judge Griffin's theory on the remedy in *Koontz IV* is correct.

A. State Court Decisions

1. New York

Two recent New York appellate opinions succinctly declared that invalidation is the appropriate remedy for a violation of the *Nollan*/*Dolan* standard: *Dobbs Ferry Development Ass'n v. Board of Trustees*[131] and *Pulte Homes of New York, LLC v. Town of Carmel Planning Board*. [132] In *Dobbs Ferry*, the village ordered a developer to pay a fee in lieu of parkland dedication as a condition to site plan approval.[133] The trial court held that the record did not support the village's claim of an "individualized consideration" (as required by *Dolan*); nor, according to the court, did the fee meet the "essential nexus" test because the development of a single-family unit was found to have no relationship to the need for enhancing recreation.[134] The trial court subsequently invalidated the condition, ordering the village to approve the site plan without further consideration.[135] The appellate court affirmed the invalidation but held that the trial court "should have remitted the matter to the [village] for further consideration as to whether a recreation fee is appropriate, the amount, if any, and the specific findings which support such a fee."[136]

In *Pulte*, decided about a month after *Dobbs Ferry*, the same New York trial court invalidated a recreation fee for a developer seeking approval for development of a senior citizen housing development.[137] The reasoning in *Pulte* was identical to that in *Dobbs Ferry*. The court held that the planning board failed to make an individualized determination and that the fee lacked the relationship to the development project as required by the *Nollan*/*Dolan* standard.[138] The *Pulte* opinion used the identical language in *Dobbs Ferry* to find that the proper remedy is invalidation and remanded to the planning board for reconsideration.[139]

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131. Dobbs Ferry Dev. Assoc. v. Bd. of Trustees, 81 A.D.3d 945 (N.Y. App. Div. 2011).

132. Pulte Homes of N.Y., L.L.C. v. Town of Carmel Planning Bd., 84 A.D.3d 819, 819–20 (N.Y. App. Div. 2011).

133. *Dobbs*, 81 A.D.3d at 945.

134. *Id.* at 945–46.

135. *Id.* at 946.

136. *Id.*

137. *Pulte*, 84 A.D.3d at 819.

138. *Id.*

139. *Id.* at 820.

2. Massachusetts

A 2010 Massachusetts appellate court decision reached a similar conclusion. In *Collings v. Planning Board*,[140] a case much like *Nollan*, Stow's planning board granted approval to a married couple to subdivide their property, but the approval imposed a condition requiring a dedication of 10% of their lot (5.68 acres) to be used as public open space in exchange for a waiver to a street length rule that required streets on a cul-de-sac to be no longer than 500 feet.[141] The property owners challenged the condition in the Massachusetts Land Court, alleging the condition was unrelated to waiving the cul-de-sac regulation, but the trial court affirmed the planning board's decision.[142] The appellate court agreed with the property owners and held that the open space requirement violated both the "essential nexus" requirement of *Nollan* and the requirement to pay just compensation.[143] Instrumental to the outcome of the case was the fact that the planning board, similar to the Court in *Dolan*, had required the dedication be used for public access instead of simply requiring the property owners to leave the land as open space.[144] Even supposing that the dedication requirement had a tighter relationship to the waiver, absent payment of just compensation, the planning board could not require that a dedication be made for public access.[145] Accordingly, the appeals court, relying in part on *Nollan*, invalidated the condition and remanded the case to the planning board for reconsideration—presumably to reconsider whether it should simply require the property owner to leave the land as open space, or to come up with a new condition altogether.[146]

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140. Collings v. Planning Bd. 947 N.E.2d 78 (Mass. App. Ct. 2011).

141. *Id.* at 80–81.

142. *Id.* at 79.

143. *Id.* at 83 ("The prohibition of [Mass. Gen. Laws. ch. 41, § 81Q] applies where a planning board requires a subdivision applicant to grant land for a public purpose unrelated to adequate access and safety of the subdivision." (internal quotation marks omitted)).

144. *Id.* at 84.

> [A]n open space requirement may be acceptable and is not challenged here, but the dedication of the open space for public use, and the transfer to the town, have no relation to the waiver of the dead-end street length rule and, in fact, would exacerbate safety issues related to the dead-end street length rule.

Id.

145. *Id.*

146. *Id.* at 87.

3. Pennsylvania

In *Board of Supervisors v. Fiechter*,[147] the property owner sought subdivision of a 25.5-acre lot into two equal pieces.[148] The town imposed a condition requiring the property owner to dedicate 1/5 of an acre for a right of way to satisfy the town's street width ordinance.[149] The property owner rejected the condition, and the town consequently denied the subdivision request.[150] The trial court found in favor of the property owner, and the town then appealed.[151] The appellate court held that while the town had the power to impose development standards that could require property owners to leave space for future street widening efforts, it did not have the power to require actual dedication without payment of just compensation.[152] Relying on *Nollan*, the court held that the easement requirement in this case constituted a taking.[153] The court invalidated the condition, concluding that "the landowners' subdivision approval cannot be conditioned on the dedication of a public right-of-way," reversing the town's denial of the property owner's subdivision application.[154]

A second Pennsylvania case some ten years later involved a zoning enforcement action that also resulted in the invalidation of a permit condition. *Paulson v. Zoning Hearing Board* involved an after-the-fact special exception for a one-time fill request in an area zoned as a flood hazard.[155] The property owner, Arthur Paulson, operated a go-cart racetrack on his property and, in violation of current zoning regulations, had added stone fill to the driveway and the "pit parking" area where racers unloaded and loaded their go-carts.[156] The town commenced an enforcement action and issued a cease and desist order from any future fill activities.[157] In response, Paulson argued that the filling activity was consistent with the maintenance of an existing use or, if not, he would seek the special permit as an exception.[158] As a condition of granting the permit, the town imposed time restrictions on when the go-cart racetrack could operate, the central

147. Bd. of Supervisors v. Fiechter, 566 A.2d 370 (Pa. Commw. Ct.1989).
148. *Id.*
149. *Id.* at 371.
150. *Id.*
151. *Id.*
152. *Id.* at 373.
153. *Id.*
154. *Id.*
155. Paulson v. Zoning Hearing Bd., 712 A.2d 785, 786 (Pa. Cmmw. Ct. 1998).
156. *Id.* at 787.
157. *Id.* at 786–87.
158. *Id.* at 787.

issue in this case ("Condition No. 4").[159] Paulson sued, relying on *Nollan*'s "essential nexus" test, arguing that the hours of operation limitations had no relationship to fill activities.[160] The trial court rejected Paulson's argument and affirmed the imposition of the time restrictions, finding that the town's conditions were proper because of nuisance complaints neighbors had made about the loudness of the go-carts.[161] On appeal, the reviewing court reversed and found that "[t]he stones on the driveway, the item for which the special exception was sought, obviously did not cause any injury to neighbors."[162] Holding that the town had not met its burden under *Nollan*, the court invalidated Condition No. 4.[163]

4. Kentucky

In Kentucky's leading case *Lexington-Fayette Urban County Government v. Schneider*,[164] a developer sought a zoning change from urban-agricultural to single-family residential so that the property owner could further develop eighteen acres of an eighty-five-acre tract.[165] The Fayette planning commission imposed three conditions on the developer to approve the zoning change: (1) dedicate land, (2) absorb the costs of building a collector road, and (3) construct a bridge that would cost anywhere from $130,000 to $252,000.[166] During the negotiation process, the developer argued that the planning commission's requirements were out of proportion to the scale of the proposed development.[167] The developer counter-offered with conditions that it thought were reasonable, including contributing a *pro rata* share of the cost to build the bridge, but the planning commission did not move from its original position.[168] The developer's primary argument was that it should not be entirely responsible for construction of the bridge just because the creek over which the bridge would cross was on the developer's property.[169] The trial court invalidated the condition and the appellate court affirmed.[170] Focusing on the bridge as

159. *Id.* at 786, 788.
160. *Id.* at 789.
161. *See id.* at 788, 790 (summarizing the Town's argument and noting that the lower court affirmed the Town's conditions based on the factual record).
162. *Id.* at 790.
163. *Id.* at 791.
164. Lexington-Fayette Urban Cnty. Gov't v. Schneider, 849 S.W.2d 557 (Ky. Ct. App. 1992).
165. *Id.* at 557–58.
166. *Id.* at 558.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

the central issue of the case, the appellate court agreed with the developer that the condition failed the "essential nexus" test because other surrounding neighborhoods would be the primary beneficiaries of the bridge.[171] The proposed development was expected to contribute to only 2% of the bridge's overall use.[172] Consequently, the court held the condition to build the bridge "null and void" without affirming the lower court's direction to make the zoning change without conditions.[173]

5. Florida

In the 1988 case of *Paradyne Corp. v. Florida Department of Transportation*,[174] a case with a long procedural history, the Florida appellate court affirmed the revocation of a driveway permit.[175] Specifically, the Florida Department of Transportation (FDOT) required Paradyne to construct a jointly used drive that partly encroached on its private property for the use and benefit of itself and an abutting landowner.[176] FDOT determined that traffic conditions around an access road to a public highway had changed materially and, as a result, Paradyne was required to submit a redesign plan to account for the changes in traffic.[177] Paradyne failed to complete the redesign plan, and FDOT consequently revoked Paradyne's access permit, thus denying Paradyne access to a state controlled highway.[178] FDOT then imposed its own permit conditions that Paradyne would have to satisfy in order to obtain a new

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171. *See id.* at 559 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

> But there must be a reasonable connection between the condition placed on the developer and the purpose of the condition—to convey traffic from neighborhood to neighborhood and from arterial to local streets . . . . While it is true the Planning Commission did not create the creek in that spot, the developer should not be saddled with an expense not borne by other developers in order to provide a road in which the lion's share of the use will come from the surrounding neighborhoods rather than from the entire Clemens Heights Subdivision. The trial court was correct in its ruling that the Planning Commission's conditioning the zone change on construction of the bridge was arbitrary and capricious.

Id. (internal citations omitted).

172. *Id.*

173. *Id.* at 560.

174. Paradyne Corp. v. Florida Dept. of Transp., 528 So.2d 921 (Fla. Dist. Ct. App. 1988).

175. *Id.*

176. *Id.* at 923.

177. *Id.*

178. *Id.*

permit.[179] Paradyne asked for an administrative appeal, but the Department affirmed its decision to impose the condition.

The appellate court applied *Nollan*'s "essential nexus" test, holding that the condition was a taking and an invalid exercise of the State's police power because the department could not require Paradyne to "provide a private roadway to promote the private interests of the adjoining property owners."[180] FDOT argued that the condition was necessary to further the safety of the traveling public, but the court concluded that the required nexus was absent between the stated purpose and the condition imposed and that the condition really furthered the private interests of an abutting landowner.[181] As such, the court reversed FDOT's imposition and remanded the case back to FDOT for reconsideration.[182]

6. Illinois

In an interesting case decided one year after the *Nollan* decision, Amoco Oil sued the Illinois Department of Transportation (IDOT) to prevent enforcement of a permit condition.[183] There, the Court of Appeals of Illinois held that a permit condition imposed by the Department violated the "essential nexus" test—a permit condition that had been in existence for over twenty years.[184] Amoco purchased a vacant parcel in 1965 and subsequently built a gas station and repair facility.[185] Amoco sought and obtained an access permit granting it access to public throughways, including a state-controlled highway.[186] The permit, however, contained a condition that if and when the State were to exercise its eminent domain power to take either of Amoco's two access points, any improvements would not be considered as part of fair market value calculation.[187] The court held that the IDOT could not argue against Amoco's claim of denial of just compensation based solely on Amoco's agreement to the condition and the fact that the condition had been present in the permit for several years.[188] Finding that grants of access permits related to IDOT's power to "promote the safety" and "eliminate the danger of accidents," the court

179. *Id.*
180. *Id.* at 926 (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).
181. *Id.* at 927.
182. *Id.*
183. Illinois Dep't of Transp. v. Amoco Oil Co., 528 N.E.2d 1018, 1024–25 (Ill. App. Ct. 1988).
184. *Id.*
185. *Id.* at 1020–21.
186. *Id.* at 1020.
187. *Id.* at 1020–21.
188. *Id.* at 1024.

invalidated the condition because its only purpose was to decrease the value of the property and had nothing to do with the fundamental purposes of controlling access to public roads and highways.[189] The court concluded "the condition is improper and should not be enforced."[190]

7. Washington

In *Benchmark Land Co. v. City of Battle Ground*, the Washington State Supreme Court invalidated a condition requiring a developer to make street improvements to an abutting access street in exchange for approval of the developer's subdivision application.[191] The appellate court found that the requirement to make improvements failed both the "essential nexus" and the "rough proportionality" tests and was therefore invalid.[192] The appellate court found that the record did not show that the impact of the development was significant enough to require the City to contribute to street improvements, nor were there any questions of safety.[193] In affirming the lower court's decision, the Washington Supreme Court instead chose to resolve the case on statutory rather than constitutional grounds.[194] The Court, sitting *en banc*, held that the City failed to meet its evidentiary burden and, therefore, the City's decision to impose the access road improvements was invalid.[195] Despite having decided the case on alternative grounds, the Washington Supreme Court presumably would have affirmed the invalidation of the condition even if it had decided the case on constitutional grounds.

8. New Hampshire

The case of *J.E.D. Associates v. Town of Atkinson*[196] is important in part because it played a central role in *Nollan*. One of the famous quotes in *Nollan* came from *J.E.D. Associates*: a condition that fails the "essential nexus" test is not a valid regulation, but is rather "an out-and-out plan of

189. *Id.* at 1023–24 (citing Dep't of Pub. Works & Bldgs. of Ill. v. Farina, 194 N.E.2d 209 (Ill. 1963); Nollan v. Cal. Coastal Comm'n 483 U.S. 825 (1987)).

190. *Id.* (citing Galt v. Cook Cnty., 91 N.E.2d 395 (Ill. 1950); Dep't of Pub Works & Bldgs. of Ill. v. Exch. Nat'l Bank, 334 N.E.2d 810 (Ill. 1975); *Nollan*, 483 U.S. at 825).

191. Benchmark Land Co. v. City of Battle Ground, 49 P.3d 860, 861 (Wash. 2002).

192. *Id.* at 863.

193. *Id.* at 865.

194. *Id.*

195. *Id.*

196. J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981).

extortion."[197] Here, the Town of Atkinson conditioned subdivision approval upon dedication of 7.5% of the developer's total property pursuant to a town regulation.[198] The developer questioned the need and constitutionality of the condition, but made the required dedication nonetheless.[199] This case obviously included an unconstitutional condition and an actual taking.[200] The New Hampshire Supreme Court found that the town failed to show why it needed the property, thus the Court invalidated the regulation and required the town to re-convey the property back to the developer.[201] It is difficult to imagine how this case would unfold today. Specifically, whether the dedication would stand in exchange for the payment of just compensation for the fee or whether the dedication would be invalidated and some compensation paid for a temporary taking. A more recent New Hampshire Supreme Court case suggests that invalidation would still be the remedy.[202]

B. Federal Court Decisions

1. First Circuit Court of Appeals

In *City of Portsmouth v. Schlesinger*,[203] the First Circuit Court of Appeals reviewed a case where the City imposed an impact fee to offset the loss of low-income housing that resulted from a developer's construction of condominiums.[204] The City imposed an $8,620 per unit fee for a total of about $2.5 million for all units the developer would construct in exchange for the zoning change required to build the condominiums.[205] The zoning change, which was approved and entailed a special overlay district, was conditioned on payment of the fee, regardless of whether the developer ever actually constructed all of the planned units.[206] The developer made two of

197. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (internal quotations marks omitted) (citing *J.E.D. Assocs*., 432 A.2d at 14).

198. *J.E.D. Assocs*., 432 A.2d at 13.

199. *Id.* at 13–14.

200. *See id.* at 14 (describing the Town's Regulation H as "an out-and-out plan of extortion").

201. *Id.* at 15.

202. Gonya v. Comm'r of N.H. Ins. Dep't, 899 A.2d 278, 282 (N.H. 2006) (noting that under an unconstitutional conditions analysis a condition is valid or invalid depending on whether the condition is "sufficiently related to the benefit" (internal quotation marks omitted)).

203. City of Portsmouth v. Schlesinger, 57 F.3d 12, 12–13 (1st Cir. 1995).

204. *Id.*

205. *Id.* at 13.

206. *Id.*

six payments for a total of $800,000, but defaulted on paying the remainder.[207]

The City sued to compel the developer to continue making the required installments, and in its amended answer, the developer claimed that the imposition of the fee was "illegal and ultra vires."[208] The First Circuit's primary task was to determine whether the developer's defense was time barred, but, in the process of addressing the statute of limitations issue, the court necessarily had to adopt or reject the district court's conclusion that the impact fee did not have the required nexus to the perceived harm of the development.[209] The First Circuit agreed with the district court and affirmed the conclusion that even if the impact fee bore a "rational nexus" to the loss of low-income housing—which it did not—the amount of the fee was out of proportion to that same anticipated harm.[210] Consequently, the condition to pay the impact fee was invalidated.[211] In a later opinion, the First Circuit cemented the decision by affirming the district court's ruling that the developer's defense was not time-barred.[212] Although the opinion is silent on the issue of compensation, presumably the developers were entitled to the return of the $800,000 paid before the litigation.

2. Eighth Circuit Court of Appeals

In an interesting case from Arkansas, *Goss v. City of Little Rock*,[213] the Eighth Circuit Court of Appeals held that a requirement to dedicate 22% of a property owner's land in exchange for a zoning change request from residential to commercial violated the *Nollan*/*Dolan* standard and was a taking.[214] In that case, the planning commission denied the property owner's zoning request because the owner refused to agree to the condition.[215] The planning commission's purpose in imposing the dedication condition was to alleviate future traffic congestion by potentially expanding the highway adjacent to Mr. Goss's property.[216] The trial court held that the City had not made an "individualized determination," as required by *Dolan*, and, as such, the City's dedication requirement was not

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207. *Id.*
208. *Id.*
209. *Id.* at 14.
210. *Id.*
211. *See id.* (stating that a city could not impose a fee to offset the loss of low-income housing as a condition of receiving zoning permits to build condominiums).
212. City of Portsmouth v. Schlesinger, 82 F.3d 547, 548 (1st Cir. 1996).
213. Goss v. City of Little Rock, 151 F.3d 861, 862 (8th Cir. 1998).
214. *Id.*
215. *Id.*
216. *Id.* at 863.

"roughly proportionate" to the anticipated effects of increased traffic congestion.[217] The trial court ruled that the City's justifications were too speculative.[218] The Eighth Circuit affirmed the trial court's invalidation of the dedication requirement but reversed the order to compel the City to make the zoning change.[219] The Eight Circuit's reasoning was that even though the City had violated the unconstitutional conditions doctrine, it still had a legitimate and independent justification to deny the zoning request.[220] While the court did not mention other cases that support this ruling, it is generally consistent with the application of the unconstitutional conditions doctrine remedy.[221]

3. Ninth Circuit Court of Appeals

In *Parks v. Watson*,[222] a case that preceded *Nollan* and *First English*, the Ninth Circuit Court of Appeals held that a denial of a developer's petition to vacate platted (planned) city streets violated what would have been considered the "essential nexus" requirement just four years later.[223] In fact, *Parks* is the first case cited in *Nollan* supporting the establishment of the "essential nexus" test.[224] In *Parks*, the developer proposed a few conditions it was willing to exchange for approval of its petition to vacate.[225] One of the conditions the developer proposed was an easement for a twenty-foot strip of its property, presumably for current or future road needs.[226] But the City of Klamath Falls required the developer to dedicate the strip, instead of simply providing an easement, because it wanted access to valuable geothermal wells located elsewhere on the developer's property.[227] The developer refused to agree to the dedication, and the City subsequently denied the petition request.[228]

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217. *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 319 (1994)) (internal quotation marks omitted).

218. *Id.*

219. *Id.* at 864.

220. *Id. But see* Walz v. Town of Smithtown, 46 F.3d 162, 168 (2d Cir. 1995) (discussing and approving the district court's ruling that a permit should issue when the decision is not discretionary).

221. *See supra* Part III (discussing the remedy for unconstitutional conditions violations through caselaw).

222. Parks v. Watson, 716 F.2d 646, 654 (9th Cir. 1983).

223. *Id.*

224. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987) (citing *Parks*, 716 F.2d at 651–53).

225. *Parks*, 716 F.2d at 649.

226. *Id.*

227. *Id.* at 649–50.

228. *Id.* at 650.

There are a few reasons to discount *Parks*,[229] but a close reading of the opinion suggests that Judge James R. Browning and the panel were correct in their view on remedy and the general role of the unconstitutional conditions doctrine.[230] Specifically, the court said that *Perry*[231] "must be read as limiting the government's ability to impose conditions"[232] and that, "[w]hile governmental entities may negotiate agreements aggressively, *Perry* holds that they must stop short of imposing unconstitutional conditions."[233] Also consistent with the unconstitutional conditions doctrine, the court stated that "*Perry*'s focus is on the propriety of the condition imposed."[234] The court in *Parks* goes on to say that the condition "must amount to a taking of property without due process of law."[235] A post-*First English* formulation of the unconstitutional conditions doctrine would read as "an alleged taking of property without [payment of] just compensation," but this shift does not affect the remedy because due process did not factor into the court's decision making.[236] No actual taking occurred in *Parks*.[237] The Ninth Circuit said a taking would have occurred had the developer not rejected the condition.[238] Instead, the court relied on one of the earlier unconstitutional conditions doctrine cases, *Frost & Frost Trucking Co. v. Railroad Commission of California*, to formulate what would later become the makings of the "essential nexus" test.[239] Applying that rudimentary early *Nollan* test, the court held that the requirement to give up access to the geothermal wells had nothing to do with vacating the platted streets.[240] In so holding, the court invalidated the condition because it was "improper [for the City] to condition the vacation of the street on the relinquishment of [the developer's] constitutionally guaranteed right to just compensation."[241]

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229. *See, e.g.*, Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623, 632 n.50 (2012) (noting that *Parks* relied on terms and levels of scrutiny rejected in "later decisions").

230. *Parks*, 716 F.2d at 651.

231. Perry v. Sindermann, 408 U.S. 593 (1972).

232. *Parks*, 716 F.2d at 651.

233. *Id.* at 652.

234. *Id.* at 651.

235. *Id.*

236. *Id.* at 649, 652.

237. *Id.* at 652.

238. *Id.*

239. *Id.* (citing Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 591 (1926)) (stating that a condition must be "rationally related to the benefit conferred").

240. *Id.* at 653.

241. *Id.*

V. THE *NOLLAN*/*DOLAN* STANDARD IS NOT SO "SPECIAL"

In *Lingle v. Chevron USA, Inc.*, the Supreme Court declared that the *Nollan*/*Dolan* standard represents a "special application" of the unconstitutional conditions doctrine.[242] There are only two meaningful explanations for why the *Nollan*/*Dolan* standard could be special. One reason is that, unlike any other kind of unconstitutional conditions violation, a violation of *Nollan*/*Dolan* results in a taking.[243] The second possibility is that the rules of *Nollan*/*Dolan* are wholly distinct from any other tests employed in cases claiming a violation of the unconstitutional conditions doctrine. This Article argues that neither of these explanations is true.

The liability rule in *Koontz* demonstrates that a taking may occur because of a violation of the *Nollan*/*Dolan* standard, but it is not necessarily the result.[244] Aside from the fact that the *Nollan*/*Dolan* standard is applied in situations where property owners are, in the *Koontz* majority's estimate, "especially vulnerable,"[245] (which also presumably means that a stricter level of scrutiny is required) there is little to distinguish the *Nollan*/*Dolan* standard from more typical unconstitutional conditions cases testing the validity of government decision-making. For this reason, invalidation is the correct remedy for a violation of the unconstitutional conditions doctrine in the context of land-use permits simply because there is nothing to justify a different remedy than that afforded in any other context of the unconstitutional conditions doctrine. This Part of the Article argues that there is very little that is "special" about the *Nollan*/*Dolan* standard that makes it wholly distinct from other instances where similar tests have been applied in unconstitutional conditions cases.

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242. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547 (2005) (citing Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

243. *See id.* at 547–48.

> That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today, and our decision should not be read to disturb these precedents.

Id.

244. Koontz v. St. Johns Water Mgmt. Dist., 133 S. Ct. 2586, 2597 (2013).

245. *Id.* at 2594.

A. The "Essential Nexus" and "Rough Proportionality" Tests Are Not Unique

Facsimiles of *Nollan*'s "essential nexus" test are commonly employed in a variety of unconstitutional conditions cases. For example, in *United States v. National Treasury Employees Union*, the Supreme Court reviewed the Ethics Reform Act, a congressional ban on federal employees' receipt of compensation for speeches or writings (honoraria), even when performed outside of a given employee's official duties.[246] The Ethics Reform Act swept broadly, reaching members of Congress and the Executive branch, and included civil penalties for violations.[247] Subsequent to its passage, union members and career civil servants filed a class action suit challenging the constitutionality of the ban, arguing that, as applied to them, the ban violated their First Amendment right to free speech.[248] The plaintiff class won at both trial and appeal, and the Supreme Court weighed in on the important question of defining the power of Congress to abridge the right to free speech.[249]

The Court, agreeing with the district court, characterized the ban as a condition imposed for continued employment in exchange for surrendering certain "First Amendment prerogatives."[250] While the relevant provision of the Ethics Reform Act did not impose a direct ban on speech, the Court held that the denial of remuneration imposed a "significant burden" on protected speech.[251] The validity of the ban in *National Treasury* hinged on the existence of a "nexus" between the subject matter of the speech in question and an employee's job.[252]

The Court concocted a number of "nexus" variations, including: an "obvious nexus,"[253] an "appropriate nexus,"[254] and a "proper nexus."[255]

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246. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 457 (1995).
247. *Id.* at 458–59.
248. *Id.* at 461.
249. *Id.* at 470.

> The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne. The honoraria ban imposes the kind of burden that abridges speech under the First Amendment.

Id. (internal citations omitted).

250. *Id.* at 462 (internal quotation marks omitted).
251. *Id.*
252. *Id.* at 477.
253. *Id.*

Compared to *Nollan*'s "essential nexus" variation, the logical inference is that the modifiers are somewhat interchangeable. Arguably, there is no meaningful conceptual distinction between the "nexus" requirements of *Nollan* and *National Treasury*. *Nollan*'s version of the "essential nexus" test could just as easily have been applied in *National Treasury* as it was in *Nollan*—"[t]he evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[256] In other words, the constitutionality of the condition to pay a civil penalty for having violated the honoraria ban "disappears" where there is no "nexus" between the honoraria and an employee's official job responsibilities. In *National Treasury*, the Court affirmed the lower court's invalidation of the ban, thus rejecting the Government's request to write-in a "nexus" requirement to the statute.[257]

Another Supreme Court case employed standards similar to the *Nollan*/*Dolan* standard: *Evansville-Vanderburgh Airport Authority v. Delta Airlines, Inc.*, decided about fourteen years before *Nollan*.[258] The Court fashioned a three-prong test to evaluate the constitutional validity, as it related to the right to travel under the Commerce Clause, of a use fee imposed on commercial airline passengers to fund airport maintenance and improvements.[259] Two prongs of the *Evansville* test are effectively the same as both prongs of *Nollan* and *Dolan*. The first prong of *Evansville* tests the relationship of the fee to the purpose of imposing it,[260] and the second prong tests proportionality.[261] That the *Evansville* standard falls squarely within the world of unconstitutional conditions is supported by the fact that

254. *Id.* at 479.

255. *Id.*

256. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

257. *Nat'l Treasury*, 513 U.S. at 479, 480.

258. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, (1972).

259. *Id.* at 709, 716–17 (describing a three-prong unconstitutional conditions test that considers whether a condition is fair, in that it applies only to entities who use a government resource or privilege; proportional, in the sense that it does not impose costs far in excess of the costs incurred by the government; and nondiscriminatory, in the sense that it burdens related uses or privileges in the same manner).

260. *Id.* at 717; see also *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) where an ordinance imposing a permit fee for holding demonstrations was held invalid because, similar to *Nollan*'s "essential nexus" test, it was found to be unrelated to a legitimate state interest. *Forsyth* is also noteworthy because just as in *Koontz*, the plaintiffs never paid the fee and chose instead to sue, 505 U.S. at 127, thus, no actual infringement could have occurred without payment of the fee. *Forsyth* is therefore a case of a threatened rather than actual constitutional infringement, just as *Koontz* is a case of a threatened instead of an actual taking.

261. *Evansville-Vanderburgh Airport Auth. Dist.*, 405 U.S at 719.

both the majority and dissent relied on it in *Memorial Hospital*,[262] one of the key cases cited in *Koontz*. Elements of the *Nollan*/*Dolan* standard have also logically appeared in Spending Clause cases; *Nollan*/*Dolan* could appear anywhere there is a risk of coercive government leveraging, but only if the circumstances also warrant applying the more exacting scrutiny that comes with it.

In particular, the Court in *South Dakota v. Dole*,[263] decided the same term as *Nollan*, upheld a congressionally mandated requirement to increase South Dakota's drinking age from nineteen to twenty one in exchange for federal transportation funding.[264] Not unlike *Nollan*'s "nexus" requirement, the Court applied its "germaneness" (or "relatedness") test[265] to find a close enough fit between the federal government's highway safety requirements and the imposition of the age restriction.[266] There is no practical difference between the respective tests of both cases. The sole differentiation has to do with just how tight the connection needs to be. In fact, Justice Sandra Day O'Connor's dissent in *Dole* centered on an argument that the majority's application of a nexus requirement was simply too loose.[267] Justice O'Connor, part of the majority in *Nollan*, posed a more intellectually consistent argument that where Congress has specifically stated how money should be spent, any conditions imposed are limited to carrying out those specifications.[268] Justice O'Connor's definition of a "reasonable

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262. Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 281 n.5 (1974); *Id.* at 284 n.12 (Rehnquist, J., dissenting) (citing *Evansville-Vanderburgh Airport Auth. Dist*, 405 U.S. at 707).

263. South Dakota v. Dole, 483 U.S. 203 (1987). *Dole* is not the ideal unconstitutional conditions case, partially because the decision fails to acknowledge the fundamental admonishment that the government may not indirectly impose regulations that it is unable to impose directly; however, the case is relevant for demonstrating that the *Nollan*/*Dolan* standard is "special" only because it commands a stricter level of scrutiny than cases that employ a looser nexus requirement.

264. *Id.* at 205, 212.

265. *Id.* at 208 n.3 (internal quotation marks omitted).

266. *Id.* at 211–12.

267. *Id.* at 213 (O'Connor, J., dissenting).

> [T]he Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program.

Id.

268. *Id.* at 216 (quoting Brief of the Nat'l Conference of State Legislatures at 19–20, South Dakota v. Dole, 483 U.S. 203 (1987) (No. 86–260), 1987 WL 880310).

> The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent,

relationship" is logically indistinguishable from *Nollan*'s "essential nexus." In fact, Justice O'Connor would have found the imposition of a twenty-one year minimum drinking age unconstitutional because the purpose of highway safety had nothing to do with the way in which Congress had programmed highway expenditures.[269]

B. Invalidation is a Prophylactic Remedy

A prophylactic remedy is functionally a remedy designed to halt illegal action and prevent future harm.[270] Thus, invalidation of a permit condition appears to fit the textbook definition of a prophylactic remedy. The invalidation remedy fashioned under the unconstitutional conditions doctrine likely arose from the Court's exercise of its inherent equitable powers.[271] In *Missouri v. Jenkins*, the Supreme Court said this about creating equitable remedies:

> [First,] [t]he remedy must . . . be related to the *condition* alleged to offend the Constitution . . . . Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Third, the federal courts in devising a remedy must take

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> so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.

Id.

269. *Id.* at 218.

270. *See, e.g.*, Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 302 (2004) (noting that prophylactic remedies are the "remedy of choice" for "preventing harm that is otherwise difficult to address"); *see also* John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 863–78 (2013) (illustrating that the Supreme Court routinely grants specific equitable relief as a remedy in constitutional violations cases).

271. *See* Johnson v. Wells Fargo & Co., 239 U.S. 234, 244 (1915) (citing Cummings v. Nat'l Bank, 101 U.S. 153, 157–158 (1879)); Stanley v, Supervisors, 121 U.S. 535, 550 (1887); Fargo v. Hart, 193 U.S. 490, 503 (1904) ("Such continuing violation of constitutional rights might afford a ground for equitable relief."); *see also* Carlson v. Green, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established.").

> into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.[272]

Invalidation fulfills all three of these requirements, including the last one, which is discussed in the next section. If invalidation does in fact operate as a prophylactic remedy, then the natural question is whether it is appropriate to apply such a remedy to the Takings Clause, given the modern understanding of how the Takings Clause functions; i.e., takings are permissible so long as they serve a public purpose and include payment of just compensation.[273] On the other hand, if the invalidation remedy is the right remedy for any other provision of the Constitution, then why would it not be appropriate for the Takings Clause?[274] It has been argued that the Supreme Court's application of the unconstitutional conditions doctrine has been anything but consistent.[275] *Koontz* may provide the impetus to better align the Court's jurisprudence across the provisions of the Constitution instead of having nuanced variations in scrutiny. "[R]ecent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly. Just when the doctrine appears secure, new decisions arise to explode it."[276] At this stage it is hard to know whether *Koontz* makes the doctrine more secure or, instead, it is more disruptive. This is an issue the Court should ponder when it finally decides the true remedy for a "*Nollan*/*Dolan* unconstitutional conditions violation."[277]

C. Invalidation Avoids Separation of Powers Issues

Judicial intervention beyond invalidation increases the risk of encountering separation of powers issues. The case that best exemplifies

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272. Missouri v. Jenkins, 515 U.S. 70, 88 (1995) (emphasis in original) (quoting Milliken v. Bradley, 433 U.S. 267, 280–81 (1977) (*Milliken* II)) (internal quotation marks omitted).

273. First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 315 ("[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.").

274. Dolan v. City of Tigard, 512 U.S. 374, 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

275. *Id.* at 407 n.12 (Stevens, J., dissenting) (citing Home Ins. Co., v. Morse, 87 U.S. 445, 451 (1874); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B. U. L. REV. 593, 620 (1990)).

276. Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

277. Current members of the Court disfavor prophylactic approaches in general. *See* Dickerson v. United States, 530 U.S. 428, 457 (2000) (Scalia, J., dissenting) (describing prophylactic measures as a "lawless practice").

this principle is *Federal Power Commission v. Idaho Power Co*.[278] *Idaho Power* is an administrative law case, not an unconstitutional conditions case, but the idea that separation of powers issues should be avoided is equally attractive in instances where courts must decide the remedy for a *Nollan*/*Dolan* violation. The rule espoused in *Idaho Power* is that a court should not command a permitting authority to exercise its inherent powers.[279] This includes requiring a permit to be issued without conditions,[280] or it could also include requiring use of eminent domain power. "[T]he function of the reviewing court ends when an error of law is laid bare."[281] In the context of *Nollan*/*Dolan*, that "error of law" is the calling out and invalidation of an unconstitutional condition so that it can no longer be considered. Not only might requiring a permit to be issued without conditions violate the separation of powers doctrine, it might also preclude a permitting authority from presenting an alternative and justifiable reason to deny a permit application.[282]

Just compensation does not generally raise separation of powers issues, but it could now that the *Nollan*/*Dolan* standard applies to permit denials. In order for a just compensation to be awarded for a permit denial, a court might have to make one of two decisions, either of which would run up against separation of powers problems. In order to "consummate" the taking, a court might order that the permit be approved with the offending conditions. Or, a court might simply require the permitting authority to obtain an easement, for example, through initiating formal eminent domain proceedings. These are both fairly straightforward reasons why just compensation is an inappropriate remedy for a "*Nollan*/*Dolan* unconstitutional conditions violation."

D. Invalidation is the Most Plausible Choice in Remedy

This Article attempts to extract the general contours of the remedy question for unconstitutional conditions violations, but the unconstitutional conditions doctrine has problems of its own, which make the already challenging area of takings law even more difficult. There are certainly

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278. Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952).

279. *See id.* (accusing the lower court of "usurp[ing] an administrative function" when it issued the permit stripped of conditions instead of remanding the case to the Federal Power Commission).

280. *See id.* (holding that, though a court may deem permit conditions unconstitutional, it lacks the power to issue a modified permit without remanding to the agency, unless the modifications are so minor that remand would be inappropriate).

281. *Id.*

282. *See, e.g.*, Goss, v. City of Little Rock, 151 F.3d 861, 864 (8th Cir. 1998) (allowing the city to deny a permit for legitimate reasons after denying an unconstitutional condition).

good reasons to reject the premise of this Article, not the least of which is because it directly conflicts with the modern concept of takings law. Yet, the weight of legal authority favors the conclusion that invalidation is the correct remedy for any violation of the unconstitutional conditions doctrine, including a "*Nollan*/*Dolan* unconstitutional conditions violation." In the land-use context, invalidation triggers time-out that allows the permitting authority to stop and think about what it should do next: exercise eminent domain power or attempt to modify the condition.[283] While equitable in nature, it is not a severe remedy and is in fact more lenient toward a permitting authority than would be a compensation remedy.[284] Invalidation only zeroes out the offending condition, which can then be narrowed or otherwise tailored to be constitutional. Compensation, on the other hand, forces the permitting authority to go forward with a decision that it might not want to make after being put on notice that the condition it has imposed is not permissible. As demonstrated in the settlement negotiations that occurred in *Dolan*, permitting authorities can always negotiate to pay for a right instead of being commanded to do so by judicial decree.[285] Payment of compensation also raises questions about the property interest that the government obtains through that payment if the permit is denied and, as a result, the developer does not get to complete the project. Other complications arise when the property interest is money. It makes no sense for the property owner to pay the fee imposed and for the government to simply return the money after the condition is found to be impermissible.[286] And if the property owner never pays the fee in the first place, then there is no reason why compensation should be paid at all. Invalidation also preserves scarce public financial resources in these times of increasingly lower taxes and lower budgets. The *Koontz* opinion seems difficult to reconcile when viewed strictly from the vantage point of takings law. Despite any shortcomings in how the opinion was written,[287] *Koontz* makes

283. *See id.* at 863–64 (holding that although there was a rational nexus between a city's requirement that a developer dedicate part of his property to the city as a condition required to approve a rezoning request, the condition was invalid because the dedication was not proportionate to the impact the rezoning would have on the city).

284. *See id.* at 864 (affirming a lower court's decision to deny a developer compensatory damages after invalidating a city's conditional zoning requirement as unconstitutional).

285. *Supra* note 48.

286. In a recent case involving a similar predicament, *Horne v. Dep't of Agric*., 133 S. Ct. 2053 (2013), involving an administrative action, the United States Supreme Court highlighted that "it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding." *Id.* at 2063.

287. *See, e.g.*, Rick Hills, *Koontz's Unintelligible Takings Rule: Can Remedial Equivocation Save the Court from a Doctrinal Quagmire?*, PRAWFSBLAWG (Jun. 25, 2013), http://prawfsblawg.blogs.com/prawfsblawg/2013/06/koontzs-unintelligible-takings-rule-can-remedial-equivocation-make-up-for-an-incoherent-substantive-.html.

more sense when viewed through the perspective of the unconstitutional conditions doctrine and its long history. The weight of available caselaw points in one direction in terms of the proper remedy: invalidation of the condition. The United States Supreme Court should take the next opportunity to chart a path that will help lower courts make the difficult choice in remedy, especially considering the expansion of the unconstitutional conditions doctrine in the land-use context subsequent to the *Koontz* decision.

> Federal takings doctrine is the jurisprudential equivalent of a land war in Asia—a quagmire from which any aggressive initial expedition will eventually have to extricate itself with patently phoney declaration that the mission was accomplished after being bogged down in the swamps and rice paddies of mushy doctrinal distinctions and sniped at by local government guerrillas too elusive to pin down in open battle. . . . The Court's decision in *Koontz v. St. Johns River Water Management District*, handed down this morning, seems like yet another data point confirming the story above . . . .

Id.