LAND-USE REGULATION AFTER *KOONTZ*: WILL WE "RUE" THE COURT'S DECISION?

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INTRODUCTION

Land-use regulation has become critical in the twenty-first century, and the need for flexibility in land-use decisions is more pressing now than ever before.[1] Not only are local governments trying to remediate the reckless land-use planning of the past sixty years, they are facing a host of growing issues from climate change, resource conservation, and historic preservation to affordable housing, traffic congestion, and overburdened and aging infrastructure.[2] While attempting to contend with these social, environmental, and economic issues, local governments face increasing pressure from large-scale developers.[3] In many areas, particularly at the exurban fringe of metropolitan areas, population growth is rapidly outpacing housing availability.[4] City councils, planning commissions, and other governmental bodies often find themselves at the bargaining table with prospective developers, and the allure of taxes, job growth, and economic development can give developers significant leverage in these negotiations.[5] To respond, local governments have adopted a wide range of land-use planning tools they can use to direct development in a manner that

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1. *See* Douglas M. Hershman, *Quality of Life Issues in Relation to the Homebuilding Industry*, 18 DEL. LAW. 19, 20 (2000) (emphasizing that sprawl is "one of the nation's most pressing concerns" of the twenty-first century).

2. *See* Edward J. Sullivan & Jessica Yeh, *Smart Growth: State Strategies in Managing Sprawl*, 45 URB. LAW. 349, 350–51 (2013) (discussing the environmental, economic, and social effects of sprawl); Lesley R. Attkisson, Note, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 VAND. L. REV. 979, 981 (2009) (noting that suburbs grew exponentially over the past sixty years, resulting in the proliferation of sprawl).

3. *See* Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperers*, 6 VT. J. ENVTL. L. 7, 12–13 (2005) (noting that market forces are powerful drivers of development and that "the market and the political and economic power of property owners in the development community can sometimes overpower the best designed and most broadly supported efforts to control growth").

4. *See* Robert H. Freilich & Neil M. Popowitz, *The Umbrella of Sustainability: Smart Growth, New Urbanism, Renewable Energy and Green Development in the 21st Century*, 42 URB. LAW. 1, 2–3 (2010) (highlighting the need for new housing to accommodate the population explosion).

5. *See* Justin Shoemake, Note, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891, 900 (1999) (noting that towns are often lured by the promise of jobs and taxes when faced with commercial development opportunities).

is sensitive to the individualized needs of their communities.[6] Governments have succeeded in tailoring development with the imposition of development fees (also called impact fees), special assessments, and land-use exactions—conditions that a government places on a land-use permit to help mitigate the negative impacts of the proposed development.[7]

Recognizing the need for local governments to address land-use issues in an individualized manner, courts have taken a step back from interfering too heavily with this localized decision-making. As early as 1926, the United States Supreme Court, in *Village of Euclid v. Ambler Realty Co.*, upheld zoning ordinances as a valid exercise of a city's police power and set a standard of deference to the localized land-use decisions of municipalities.[8] Over the past century, courts have largely abided this deferential view, refusing to substitute their own judgment for that of the legislature.[9] Recently, however, in *Koontz v. St. Johns River Water Management District*, the Supreme Court severely circumscribed the authority of local governments to address these important land-use issues, and took a decidedly more active role in assessing the legitimacy of local land-use regulation.[10]

This Comment proposes that *Koontz* was wrongly decided based on both legal precedent and public policy, and that this decision may have serious ramifications for local governments in affecting flexible land-use planning decisions that address important social and environmental ills. Part I summarizes the procedural history from the state trial court through the Florida Supreme Court and then details the majority and dissenting opinions of the United States Supreme Court. Part II presents a history of takings jurisprudence in the realm of land-use exactions, focusing on the

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6. *See* Patricia E. Salkin, *From* Euclid *to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 117 (2002) (discussing the "smart growth" movement and the desire of local governments "to promote better local land use planning and decision-making").

7. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. REV. 177, 181–82 (2006) (discussing how local governments are increasingly using exaction to fund the costs associated with sprawling population growth).

8. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395, 397 (1926) (holding that an ordinance is unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" (citing Jacobsen v. Massachusetts, 197 U.S. 11, 30–31 (1905)).

9. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 483 (2005) ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

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

Nollan/*Dolan* test[11] and subsequent interpretations and applications of the test in both the federal and state courts. Part III analyzes the Supreme Court's reasoning and discusses how the Court erred in light of the prevailing precedent and public policy. Finally, Part IV assesses the potential impacts to local land-use planning.

I. PROCEDURAL HISTORY

A. Background

Koontz v. St. Johns River Water Management District involved a landowner's challenge to the St. Johns River Water Management District's (District) denial of a permit to develop a 3.7-acre parcel.[12] The landowner, Coy Koontz, purchased a 14.9-acre tract of predominantly wetlands in Orlando, Florida in 1972.[13] In 1994, Koontz applied for a permit to develop the 3.7-acre parcel of the larger tract.[14] The tract was subject to permitting under Florida's Water Resources Act and the Warren S. Henderson Wetlands Protection Act, which gave the District the authority to impose reasonable conditions on development permits to ensure that construction does not harm water resources and is "not contrary to the public interest."[15] Applicants seeking to develop wetlands in the District are required to "offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."[16]

Koontz initially proposed a mitigation plan in the form of a conservation easement to offset the impacts of development, but the District rejected this plan and requested additional conditions.[17] The District offered Koontz two alternative plans: (1) the opportunity to reduce the size of his development to one acre and deed the additional acreage as a conservation easement or (2) to proceed with the 3.7-acre development and hire

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11. The *Nollan/Dolan* test requires that permit conditions that implicate constitutional rights, specifically protected property interests under the Fifth Amendment, satisfy a two-part test. Under *Nollan v. California Coastal Commission*, there must be an essential nexus between the reason the government is denying the permit and the condition it is imposing. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987). Under *Dolan v. City of Tigard*, the burden shifts to the government to show that the condition imposed is roughly proportional to the project's adverse impact. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

12. *Koontz*, 133 S. Ct. at 2592–93.

13. *Id.* at 2591–92.

14. *Id.* at 2592.

15. *Id.* (quoting FLA. STAT. ANN. § 373.414(1) (West 2012)).

16. *Id.*

17. *Id.* at 2593.

contractors to improve District-owned land several miles away.[18] Koontz rejected these alternatives, and his application was denied.[19] He subsequently sued for just compensation, alleging a "taking" under Florida law.[20] The trial and intermediate appellate courts found for Koontz, concluding that his proposed mitigation plan was sufficient and that any further conditions the District imposed failed the *Nollan*/*Dolan* test.[21] The Florida Supreme Court reversed, distinguishing *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* on two grounds: (1) the landowner's application was not *approved* with conditions but was *denied* because he refused to make concessions and (2) the District demanded money and not an interest in real property.[22] The United States Supreme Court granted certiorari and reversed.[23]

B. Florida Circuit Court

The Ninth Judicial Circuit Court of Florida initially granted the District's motion to dismiss on the grounds that Koontz's takings claim was not ripe for review.[24] The Florida District Court of Appeal for the Fifth Circuit reversed and remanded back to the trial court to consider the merits of Koontz's claim.[25] The trial court applied *Nollan*'s and *Dolan*'s "essential nexus" and "rough proportionality" tests and invalidated the District's permit denial as an unconstitutional exaction.[26] The trial court found that the District's off-site mitigation proposal lacked an "essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to the relief requested by Mr. Koontz."[27]

C. Florida District Court of Appeal

In a very brief opinion, the Florida District Court of Appeal for the Fifth Circuit affirmed the trial court.[28] The appellate court rejected the

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18. *Id.*
19. *Id.*
20. *Id.*
21. St. Johns River Water Mgmt. Dist. v. Koontz, 5. So. 3d 8, 10–12 (Fla. Dist. Ct. App. 2009), *quashed*, 77 So. 3d 1220 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013).
22. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d. 1220, 1230–31 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013).
23. *Koontz*, 133 S. Ct. at 2594.
24. *Id.* at 2593.
25. *Id.*
26. *Koontz*, 5 So. 3d at 10.
27. *Id.*
28. *Id.* at 12.

District's argument that a monetary fee, which requires no dedication of real property, is not subject to heightened *Nollan*/*Dolan* scrutiny.[29] With little reasoning, the appellate court concluded that the United States Supreme Court already settled the issue that conditioning a permit approval on the payment of fees rises to the level of an exaction and should be analyzed under *Nollan*/*Dolan*.[30]

D. Florida Supreme Court

The Florida Supreme Court reversed the appellate court, holding that (1) the District's permit denial was not an exaction of property and (2) the *Nollan*/*Dolan* test is only applicable when the government demands an actual dedication of real property in exchange for a permit.[31] The court's analysis turned on the language in *Nollan* and *Dolan* that seemingly limits their scope to adjudicative demands for physical dedications of real property.[32] The court also addressed subsequent decisions that have interpreted the scope of heightened *Nollan*/*Dolan* scrutiny.[33] The court acknowledged that some divide exists in how the lower courts have interpreted the reach of *Nollan*/*Dolan* over the past decade, particularly whether the heightened scrutiny reaches beyond actual dedications of real property.[34] Ultimately, however, the court adhered to the United States Supreme Court's line of reasoning in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[35] and *Lingle v. Chevron USA, Inc.*[36] and concluded:

> Absent a more limiting or expanding statement from the United States Supreme Court with regard to the scope of *Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court . . . . [T]he *Nollan*/*Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the

29. *Id.* at 13 (Orfinger, J., concurring).
30. *Id.*
31. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1230 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013).
32. *Id.* at 1228–29.
33. *Id.* at 1229–30.
34. *Id.* at 1229.
35. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 694 (1999).
36. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

> owner's interest in the real property subject to the dedication imposed.[37]

E. United States Supreme Court

1. Majority Opinion

In a 5-4 split, the United States Supreme Court reversed the Florida Supreme Court, holding that (1) the unconstitutional conditions doctrine prohibits the District from conditioning Koontz's permit on his agreement to fund an off-site mitigation project on public lands and (2) monetary exactions must satisfy the heightened *Nollan*/*Dolan* scrutiny.[38]

First, the majority emphasized the importance of the unconstitutional conditions doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[39] The majority found that the doctrine is implicated in *Koontz*—and many other land-use exactions cases—because the District is conditioning Koontz's receipt of a permit on payment of fees to improve off-site wetlands.[40] This doctrine, the majority stated, is necessary, particularly in the land-use context, to prevent "[e]xtortionate demands for property" and coercive pressure to accede to unreasonable conditions.[41]

In support of its application of the unconstitutional conditions doctrine, the majority found that the payment demanded in the off-site mitigation proposal was a cognizable and compensable property interest that the District had extinguished or "taken."[42] The majority drew from the language of *Eastern Enterprises v. Apfel* to support its reasoning,[43] while also distinguishing the facts of *Koontz* from *Apfel* and other Supreme Court precedent that has held taxes and other monetary payments are not takings.[44] As such, the majority made clear that taxes and user fees still do not rise to the level of takings but failed to indicate where courts should draw the line between a valid tax and an unconstitutional taking.[45]

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37. *Koontz*, 77 So. 3d at 1230.
38. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013).
39. *Id.* at 2594.
40. *Id.* at 2594.
41. *Id.* at 2596.
42. *See id.* at 2605 (Kagan, J., dissenting) (arguing that the majority impliedly held the payment was a taking).
43. E. Enters. v. Apfel, 524 U.S. 498 (1998).
44. *Koontz*, 133 S. Ct. at 2599.
45. *Id.* at 2600–01 (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 243 n.3 (2003)).

Next, the majority rejected the Florida Supreme Court's reasoning that a permit denial cannot rise to the level of taking because "no property of any kind was ever taken."[46] The majority succinctly explained that "[e]xtortionate demands for property in 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."[47] The majority found the unconstitutional conditions doctrine implicated regardless of the method by which the government conditions the permit—whether by condition precedent or condition subsequent.[48] In the same vein, the majority rejected the notion that heightened scrutiny should not apply when the permit could have been denied outright without giving the landowner an opportunity to mitigate the development impacts.[49] Again, the majority returned to the unconstitutional conditions doctrine and addressed longstanding Supreme Court precedent that holds that a "government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . [rights] *even if he has no entitlement to that benefit*."[50]

Next, the majority rejected the District's claim that the Court need not decide whether the off-site mitigation plan satisfies *Nollan* and *Dolan* because the District gave Koontz multiple avenues for obtaining permit approval.[51] If at least one alternative, reasoned the majority, satisfied *Nollan* and *Dolan*, then Koontz would not have suffered an unconstitutional taking.[52] However, the majority found both options equally objectionable and, thus, subjected them to heightened scrutiny.[53]

Finally, the majority squarely rejected the Florida Supreme Court's holding that exactions that do not require physical dedications of land are *not* subject to *Nollan*/*Dolan* scrutiny.[54] Without addressing any precedent or any language from either *Nollan* or *Dolan*, the Court emphasized that monetary exactions are no different than any other type of physical land-use exaction.[55] Specifically, the majority addressed "in lieu of fees," which give developers a choice between dedicating an easement, or taking some other

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46. *Id.* at 2596 (quoting St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1225 (Fla. 2011), *rev'd*, 133 S. Ct. 2586 (2013)).

47. *Id.*

48. *Id.* at 2595.

49. *Id.* at 2596.

50. *Id.* (alteration in original) (emphasis in original) (quoting United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 210 (2003)).

51. *Id.* at 2598.

52. *Id.*

53. *Id.*

54. *Id.* at 2599.

55. *Id.* at 2600.

action that physically burdens the developer's own property, or paying a fee in lieu of the physical action that the government can then use to accomplish the same goal offsite.[56] As the majority stated, "Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[57]

2. Dissenting Opinion

Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, penned a strong dissent that criticized the majority's determination that a monetary exaction is a cognizable property interest subject to heightened *Nollan*/*Dolan* scrutiny.[58] Justice Kagan found that this holding "runs roughshod over *Eastern Enterprises v. Apfel*, which held that the government may impose ordinary financial obligations without triggering the Takings Clause's protections."[59] The dissenters feared this new rule would "threaten[] to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny."[60] The dissenters relied on *Nollan* and *Dolan* and their adherence to physical dedications of land that would rise to the level of takings outside the permitting process.[61] A taking, argued the dissenters, is distinguishable from a mere "obligation to perform an act . . . that costs money."[62] Moreover, the dissenters found that the majority had muddled the exactions jurisprudence by holding that development fees constitute a taking and not clarifying when a fee is a permissible tax or an unconstitutional taking.[63]

Ultimately, the dissenters found the majority's holdings to be a "prophylaxis in search of a problem."[64] The majority attempted to rectify

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56. *Id.* at 2599.
57. *Id.*
58. *Id.* at 2603 (Kagan, J., dissenting).
59. *Id.* at 2603–04 (citation omitted).
60. *Id.* at 2604.
61. *Id.* at 2604–05.
62. *Id.* at 2606 (quoting *Apfel*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part)) (internal quotation marks omitted).
63. *Id.* at 2605, 2607 (Kagan, J., dissenting) (arguing that by subjecting "permit conditions requiring monetary payments" to the *Nollan/Dolan* test, the majority assumed these permits constituted a taking).
64. *Id.* at 2608.

what it believes is a persistent problem—extortionate land-use decisions.[65] But the dissenters found no evidence that state and local governments are routinely acting in bad faith when proposing monetary conditions on development proposals.[66] Rather, the dissenters predicted this "prophylaxis" will wreak havoc on local land-use planning decisions.[67] Justice Kagan poignantly concluded:

> The majority's errors here are consequential. The majority turns a broad array of local land-use regulations into federal constitutional questions. It deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places courts smack in the middle of the most everyday local government activity. As those consequences play out across the country, I believe the Court will rue today's decision.[68]

II. EXACTIONS JURISPRUDENCE FROM *NOLLAN* TO *KOONTZ*

A. Nollan *and the Essential Nexus Test*

The Supreme Court adopted the first prong of the exactions analysis in *Nollan v. California Coastal Commission* in 1987.[69] There, the Nollans appealed the California Coastal Commission's decision to condition the Nollans' demolition permit with the requirement that they dedicate an easement across a portion of their property to allow beachfront access to the public.[70] The Commission's concern was that the Nollans' proposed building would contribute to the "wall of residential structures that would prevent the public psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit."[71] Furthermore, the Commission was concerned that the new house would increase private use of the shore to the public's detriment.[72] As such, the Commission believed

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65. *Id.*
66. *Id.*
67. *Id.* at 2608, 2610.
68. *Id.* at 2612.
69. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (holding that the prohibition must have an "essential nexus" with the alleged harm it is attempting to redress).
70. *Id.* at 827.
71. *Id.* at 828–29 (quoting the California Coastal Commission's 1982 decision on appeal) (internal quotation marks omitted).
72. *Id.* at 829.

these cumulative effects would "burden the public's ability to traverse to and along the shorefront."[73]

First, the Court determined that the public easement, if required outside the permitting process, would have "no doubt" been a taking.[74] The Court further bolstered its determination by asserting that "the right to exclude [others is] one of the most essential sticks in the bundle of rights."[75] However, the Court acknowledged that a permit condition serving the same legitimate governmental purpose as the refusal to issue the permit would not be a taking if the refusal to issue the permit is also not a taking.[76] To that end, if the Commission could legitimately deny a permit in the first place to protect the public's ocean view, it could condition the approval of a permit in such a way that also would protect the public's ocean view—e.g., with height and width restrictions or public viewing areas from the property.[77] "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking," the Court reasoned, "it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not."[78] This, the Court articulated, is the "essential nexus" that must exist between the condition and the valid governmental purpose.[79] "The evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[80] Under this analysis, the Court found that the public easement would not further the interest of protecting the public's ocean view.[81]

A strong dissent in this 5-4 opinion argued that the Court should have looked at the rationality of the Commission's decision and should not require such precision in balancing the benefits and burdens.[82] As Justice William Brennan stated, "Such a narrow conception of rationality . . . has long since been discredited as a judicial arrogation of legislative authority. 'To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic

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73. *Id.* (quoting CAL. COASTAL COMM'N, *supra* note 71, at 65–66) (internal quotation marks omitted).

74. *Id.* at 831.

75. *Id.* (alteration in original) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)) (internal quotation marks omitted).

76. *Id.* at 836.

77. *Id.*

78. *Id.* at 836–37.

79. *Id.* at 837.

80. *Id.*

81. *Id.* at 839.

82. *Id.* at 846–47 (Brennan, J., dissenting).

principles of our Government.'"[83] The dissenters also argued that state and local governments require flexibility and creativity in dealing with land-use decisions.[84] Justice John Paul Stevens seemingly foresaw the whittling away of governmental power to address land-use decisions when he addressed the chilling effect such stringent judicial oversight may have on "public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare."[85]

B. Dolan *and the Rough Proportionality Test*

While the Court fashioned a useful rule in *Nollan* for determining the nexus between the condition imposed and the governmental purpose being advanced, it did not articulate a standard that would determine the magnitude of the burden placed on the property owner. Seven years later, in 1994, the Court finally outlined that standard in *Dolan v. City of Tigard*.[86] There, Dolan applied for a permit to double the size of her store and provide more parking.[87] The City approved Dolan's permit on the condition that she dedicate a portion of her property lying within the 100-year floodplain to serve as a storm drainage system and an additional strip of land adjacent to the floodplain as a pedestrian and bicycle path.[88] These combined easements encompassed roughly 10% of the property, which Dolan could use to meet the 15% open space and landscaping requirement mandated by the City's zoning ordinance.[89] The City's goal behind these conditions was twofold: (1) to reduce traffic congestion generated by the enlarged business by providing an alternative means of transportation and (2) to accommodate the increased stormwater runoff created by the additional pavement in the enlarged parking lot.[90]

First, the Court applied the *Nollan* test to determine whether the requisite nexus existed between the property dedication and the goal of reducing congestion and accommodating stormwater runoff.[91] The Court found that the City's legitimate goals were advanced by the conditions

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83. *Id.* at 846 (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932)).
84. *Id.* at 847.
85. *Id.* at 866–67 (Stevens, J., dissenting).
86. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
87. *Id.* at 379.
88. *Id.* at 380.
89. *Id.*
90. *Id.* at 381–82.
91. *Id.* at 386 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

placed on Dolan's permit.[92] The Court then went on "to determine whether the degree of the exactions demanded by the City's permit condition bears the required relationship to the projected impact of petitioner's proposed development."[93] This is where the Court fashioned its "rough proportionality" test.[94] Under this examination, the Court concluded that the City's weak findings that the easements would further the City's interest could not justify the severity of restricting Dolan's right to exclude others from her property.[95] As such, although the essential nexus existed, the exaction lacked rough proportionality and was unconstitutional.[96]

Again, a divided Court decided this case. The dissenters questioned the legitimacy of the "rough proportionality" test, finding that the Court's reasoning for rejecting the conditions on Dolan's property was more characteristic of the *Nollan* essential nexus test.[97] Furthermore, the dissenters took inventory of the state court cases the majority relied on in fashioning its rough proportionality test and found nothing suggesting this inquiry.[98] Even accepting the majority's new test, the dissenters questioned the majority's rationale behind invalidating the permit conditions.[99] First, the dissenters noted that the majority failed to consider the benefits Dolan may enjoy from improved drainage and alternative transportation.[100] Second, the dissenters criticized the majority's rejection of the City's factual findings as resting on weak ground.[101] In sum, the dissenters in *Dolan*, as in *Nollan*, worried that the Court is systematically creating additional barriers through which governmental entities must pass in order to impose exactions. In a sense, the Court seems to be chipping away at the government's flexibility to address land-use issues that are local in nature and that historically enjoy judicial deference.

Aside from the Court's new test and its application to the facts at hand in *Dolan*, it addressed two other points that would come to bear heavily on

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92. *Id.* at 386–87 (citing *Nollan*, 483 U.S. at 835).

93. *Id.* at 388 (citing *Nollan*, 483 U.S. at 834).

94. *Id.* at 391.

95. *Id.* at 395–96 (citing Dolan v. City of Tigard, 854 P.2d 437, 447 (1993) (Peterson, J., dissenting), *rev'd*, 512 U.S. 374 (1994)).

96. *Id.* at 396 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).

97. *Id.* at 398 (Stevens, J., dissenting) (citing J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14–15 (N.H. 1981), *overruled by* Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); Simpson v. City of N. Platte, 292 N.W.2d 297, 301–302 (Neb. 1980)).

98. *Id.* at 398–99 (citing J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14–15 (N.H. 1981), *overruled by* Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); Simpson v. City of N. Platte, 292 N.W.2d 297, 301–302 (Neb. 1980); Billings Properties, Inc. v. Yellowstone Cnty., 394 P.2d 182, 187–88 (Mont. 1964)).

99. *Id.* at 399.

100. *Id.*

101. *Id.* at 403.

future exactions determinations: (1) the doctrine of unconstitutional conditions and (2) the legislative-adjudicative distinction. Although mentioned only in brief, these two points have been the subject of much scholarly debate.[102] First, the Court characterized the exactions in *Dolan* as adjudicative and seemingly stated that legislative exactions would not be subject to the same scrutiny but would be assessed merely as an exercise of the government's police power—i.e., given a presumption of validity.[103] Second, the Court noted that exactions analyses are constrained by the doctrine of unconstitutional conditions, which prohibits the government from conditioning a benefit upon an individual in exchange for that individual's constitutional right.[104] The Court did, however, qualify its statement with the phrase, "where the benefit sought has little or no relationship to the property."[105] That phrase suggests the Court recognizes that in some circumstances—when the essential nexus and rough proportionality tests are satisfied—the doctrine of unconstitutional conditions will not bar an exaction.

C. The Scope of Nollan *and* Dolan

1. *Parking Ass'n of Georgia, Inc. v. City of Atlanta*

Although the Supreme Court created a two-part test for assessing the constitutionality of exactions, it left gaps for the lower courts to fill. In the wake of *Dolan*, lower courts struggled with how and when to apply the heightened scrutiny. One of the more pressing questions left unanswered was whether *Nollan* and *Dolan* exclusively applied to adjudicative decisions or should also be extended to legislative enactments. The Supreme Court passed up an opportunity to comment on this issue and clear up the confusion in the lower courts when it denied a petition for writ of

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102. *See generally* Matthew Baker, *Much Ado About* Nollan/Dolan*: The Comparative Nature of the Legislative-Adjudicative Distinction in Exactions*, 42 URB. LAW. 171, 172 (2010) (arguing that the distinction adds to the "'mess' and 'muddle' of Takings Clause jurisprudence") (quoting Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT 279, 279 (1992); Carol Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984)); Daniel L. Siegel, *Exactions After* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 582 (2009) (discussing whether the unconstitutional conditions doctrine limits the scope of *Nollan* and *Dolan* to adjudicatively imposed real property exactions).

103. *Dolan*, 512 U.S. at 385.

104. *Id.*

105. *Id.*

certiorari in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*.[106] There, the Supreme Court of Georgia upheld an ordinance that required existing surface parking lots to include landscaping equal to at least 10% of the paved area and have at least one tree for every eight parking spaces.[107] The Georgia court distinguished *Dolan* on the grounds that *Dolan*'s exaction was adjudicative in nature and the exaction of the Atlanta City Council was legislative and, thus, subject to *Agins v. City of Tiburon*'s less rigid "substantially advances" analysis.[108] As such, the court upheld the ordinance.[109] Justice Clarence Thomas dissented on the Supreme Court's decision to deny certiorari, urging that the conflict in the lower courts be cleared up. To this point, he famously stated:

> It is hardly surprising that some courts have applied *Dolan*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a taking analysis . . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[110]

2. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*

The first United States Supreme Court case to apply *Dolan*'s rough proportionality test was *City of Monterey v. Del Monte Dunes at Monterey, Ltd*.[111] In *Del Monte Dunes*, the landowners sought to develop a 37.6-acre oceanfront parcel in the City of Monterey.[112] The parcel in question was zoned to accommodate more than 1,000 multifamily residential units.[113] The landowners submitted a proposal for only 344 residential units, but the

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106. Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995).

107. *Id.* at 203.

108. *Id.* at 203 n.3 (citing Agins v. Tiburon, 447 U.S. 255 (1980)); *See* Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528, 532 (2005).

109. *Id.* at 203.

110. Parking Ass'n of Ga., Inc., v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting in denial of certiorari).

111. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (citing Dolan v. City of Tigard, 512 U.S. 374 (1994)).

112. *Id.* at 694.

113. *Id.* at 695.

planning commission denied their application.[114] After several attempts to reduce the scale of the development, the planning commission eventually approved the landowners' site plan subject to several conditions, including dedicated areas of public open space, landscaping, buffer zones, view corridors, and public and private streets.[115] The architectural review committee recommended approval to the planning commission, but the commission ultimately rejected the recommendation and denied the permit.[116]

For the first time, the Court considered whether *Dolan* should apply to outright denials of development permits or should be constrained to permit conditions that demand dedications of real property. In concluding that *Dolan* is inapplicable to the facts of *Del Monte Dunes*, the Court noted that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."[117] *Dolan*, the Court continued, "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development."[118]

The Court's statement reveals two very important points about the scope of *Dolan*. First, and most apparent, is the Court's holding that *Dolan* is inappropriate for cases where there has not actually been a *conditioned permit* but rather a *denial of development*. But impliedly, the Court is also stating that *Dolan* does not apply to decisions outside physical dedications of land. Taken together, these statements dramatically curtail *Dolan*'s scope and courts' ability to apply heightened scrutiny to land-use decisions.

D. De-Cluttering Nollan *and* Dolan: Agins, Lingle, *and the Substantially Advances Test*

Not until the Supreme Court's 2005 decision in *Lingle v. Chevron USA, Inc.*[119] did the clutter of *Nollan* and *Dolan* start to clear up. *Lingle* itself did not deal with exactions but inadvertently addressed the scope of *Nollan*/*Dolan*'s heightened scrutiny. Notable to the *Lingle* decision is that it

114. *Id.*
115. *Id.* at 696–97.
116. *Id.* at 697.
117. *Id.* at 702.
118. *Id.* at 703.
119. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

overturned *Agins v. City of Tiburon*[120] and its flawed "substantially advances" test, which stated that a taking exists if the regulation at issue does not substantially advance a legitimate governmental interest.[121] Although *Nollan* and *Dolan* drew upon the language of *Agins*, neither case specifically applied the substantially advances test. In fact, the *Lingle* Court made clear that its decision in overturning *Agins* would not disturb the holdings of previous takings cases that had relied on the *Agins* test.[122] However, the Court did take the opportunity to review its previous decisions and clarify some of the ambiguous language. Key to the language in *Lingle* is that the Court appears to be moving toward more broadly endorsing government regulation and flexible land-use decisions.[123]

To better gauge the *Lingle* Court's position on land-use regulation, it is important to discuss the Court's reasoning in overturning *Agins.* In *Lingle*, the Court considered whether a statutory rent cap on lessee-dealer service stations is an unconstitutional taking.[124] The district court and the Ninth Circuit Court of Appeals both invalidated the statute, based on *Agins*, finding that the rent cap did not substantially advance Hawaii's asserted interest in controlling retail gasoline prices.[125] In reversing the Ninth Circuit, Justice Sandra Day O'Connor, writing for the Court, held that the "[substantially advances] formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in [the Court's] takings jurisprudence."[126] More specifically, the Court criticized the *Agins* test for failing to assess the "magnitude or character of the burden" or how the burden is distributed among property owners.[127]

The *Lingle* Court also went on to say that it is unclear how Hawaii's statute will actually burden Chevron's property rights.[128] This uncertainty, articulated the Court, is precisely why courts should grant deference to the decisions of local governments and not put themselves in the role of analyzing the effectiveness of state and local regulation.[129] Strict scrutiny,

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120. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *abrogated by* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

121. *Lingle*, 544 U.S. at 532.

122. *Id.* at 545.

123. *See id.* at 547 (noting that *Dolan* applies to adjudicative exactions "involv[ing] dedications of [private] property").

124. *Id.* at 532.

125. *Id.*

126. *Id.* at 540.

127. *Id.* at 542 (emphasis omitted).

128. *Id.* at 543–44.

129. *Id.* at 544.

reasoned the Court, has no place in "substantive due process challenges to government regulation."[130] The Court reiterated this point just a month later in *Kelo v. City of New London* when it approved what critics deride as a "private taking"—although the Court merely argues an expanded reading of the "public use" requirement of the Takings Clause—based on the comprehensive redevelopment plan proposed by the local government.[131] Interestingly, Justice O'Connor penned the dissent in *Kelo* solely for the purpose of condemning the Court's broad reading of the "public use" and not on its due deference to the local government.[132] In fact, O'Connor cited her own opinion from *Hawaii Housing Authority v. Midkiff*, stating:

> [In the Court's previous holdings, it] emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts deciding on what is and is not a governmental function and . . . invalidating legislation on the basis of their view on the question at the moment of decision, a practice which has proved impracticable in other fields.[133]

Against this backdrop, the *Lingle* Court briefly discussed *Nollan* and *Dolan* and revealed some key distinctions to be drawn in analyzing exactions. First, the Court discussed the unconstitutional conditions doctrine and clarified its application to *Nollan*/*Dolan* scrutiny. The Court specified that "the 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 has little or no relationship

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> The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Id.

130. *Id.* at 545 (citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963)).

131. *See* Kelo v. City of New London, 545 U.S. 469, 488–89 (2005) (refusing to second-guess the City's development plan and the means by which it carries out that plan).

132. *Id.* at 494 (O'Connor, J., dissenting).

133. *Id.* at 499 (quoting Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240–41 (1984) (internal quotation marks omitted)).

to the property."[134] This explicit statement not only confirms that the *Nollan* and *Dolan* tests are based upon this doctrine but also implicitly reins in the scope of *Nollan*/*Dolan* to purely adjudicative—i.e., discretionary—determinations. Whether intentionally or inadvertently, the *Lingle* Court endorsed judicial deference to state and local regulation and further curtailed the application of heightened *Nollan*/*Dolan* scrutiny.

E. Confusion and Consensus in the Lower Courts

1. United States Circuit Courts of Appeal

A handful of federal circuit courts have addressed the scope of heightened scrutiny under *Nollan* and *Dolan*. In a line of cases between 1991 and 2011, the Ninth Circuit repeatedly held that mere monetary exactions are not subject to *Nollan*/*Dolan* and that heightened scrutiny does not apply to legislative enactments.[135] As early as 1991, before *Dolan*, the Ninth Circuit discussed development fees in *Commercial Builders of Northern California v. City of Sacramento*.[136] There, the court upheld an ordinance that conditioned nonresidential building permits on payment of a fee to help create affordable housing.[137] The court derived its reasoning from *United States v. Sperry Corp.*,[138] which stated, "It is artificial to view deductions of a percentage of a monetary award as physical appropriations

134. *Lingle*, 544 U.S. at 547 (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

135. *See* Conklin Dev. v. City of Spokane Valley, 448 F. App'x 687, 689 (9th Cir. 2011) ("The applicability of the *Nollan*/*Dolan* framework is limited, however, to *adjudicative* land-use exactions 'requiring dedication of private property' where a *per se* physical taking has occurred." (quoting *Lingle*, 544 U.S. at 547)); Mead v. City of Cotati, 389 Fed. App'x. 637, 638 (9th Cir. 2010) (citing Nollan v. Calif. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994)) ("A generally applicable development fee is not an adjudicative land-use exaction subject to the 'essential nexus' and 'rough proportionality' tests of [*Nollan* and *Dolan*]."); McClung v. City of Sumner, 548 F.3d 1219, 1227 (9th Cir. 2008) ("In comparison to legislative land determinations, the *Nollan/Dolan* framework applies to adjudicative land-use exactions where the 'government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.'" (quoting *Lingle*, 544 U.S. at 546)), *abrogated by* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013); Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (citing *Nollan*, 483 U.S. at 837) ("The rationale for [*Dolan*'s] burden shifting appears to rest on the Court's concern that where the government demands individual parcels of land through adjudicative, rather than legislative, decision making, there is heightened risk of extortionate behavior by the government."); Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 875 (9th Cir. 1991) (rejecting appellants' argument that a fee provision is akin to a physical taking of property).

136. *Commercial Builders of N. Cal.*, 941 F.2d at 875.

137. *Id.* at 873, 876.

138. United States v. Sperry Corp., 493 U.S. 52 (1989).

of property. Unlike real or personal property, money is fungible."[139] The Supreme Court, in *Sperry*, had reversed the Federal Circuit Court of Appeal's holding that an exaction of a percentage of an award from the Iran Claims Commission is a physical taking.[140] Notably, the Federal Circuit was the only circuit court to treat a fee provision as an unconstitutional taking under *Nollan*.[141]

The Ninth Circuit discussed *Nollan*/*Dolan* in greater depth in 2008 in *McClung v. City of Sumner*.[142] There, the court addressed whether a legislative, generally applicable development condition that does not require the owner to dedicate property for public use should be reviewed under the less rigid balancing test set out in *Penn Central Transportation Co. v. City of New York* or the stricter *Nollan*/*Dolan* standard.[143] After reviewing the weight of authority supporting the distinction between broad legislative enactments and discretionary adjudicative decisions, the court concluded that *Penn Central* applied to a city ordinance requiring all new developments to install minimum twelve-inch storm pipes.[144] The capstone in the circuit court's reasoning is its statement, "To extend the *Nollan*/*Dolan* analysis here would subject *any* regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers."[145] Here, the court noted that the democratic political process could resolve concerns about improper legislative development fees.[146]

2. State Courts

While critics of the legislative-adjudicative distinction contend that state courts are divided on whether *Nollan*/*Dolan* applies to legislative exactions,[147] in reality many state courts in the wake of *Dolan* have rejected heightened scrutiny of legislative exactions and held that ordinances and statutes that condition permits should be granted deference and assessed

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139. *Commercial Builders of N. Cal.*, 941 F.2d at 875 (quoting *Sperry Corp.*, 493 U.S. at 62 n.9) (internal quotation marks omitted).

140. *Sperry Corp.*, 493 U.S. at 58–59.

141. *Commercial Builders of N. Cal.*, 941 F.2d at 875.

142. McClung v. City of Sumner, 548 F.3d 1219, 1225–28 (9th Cir. 2008), *abrogated by* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

143. *McClung*, 548 F.3d at 1222.

144. *Id.*

145. *Id.* at 1228.

146. *Id.*

147. *See, e.g.*, Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 496–500 (2006) (illustrating the divide in the state courts and highlighting those that subscribe to a limited application of *Nollan*/*Dolan*).

under either the substantive due process "arbitrary and unreasonable" standard advanced in *Euclid* or under the more traditional regulatory takings tests laid out in *Penn Central* and *Lucas v. South Carolina Coastal Council* (or *Agins*).[148] In reaching their decisions, the courts examined state and federal precedent and exercised their own judgment to reason that "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present."[149]

Some state courts have refused to apply heightened scrutiny to any development fees and other monetary exactions.[150] The courts that have hesitated granting judicial deference to all monetary exactions have applied *Dolan*'s legislative-adjudicative distinction to hold that only monetary exactions assessed in ad hoc adjudicative permitting decisions—i.e., on a discretionary basis—fall under *Nollan/Dolan*.[151] The California Supreme Court in *Ehrlich v. City of Culver City*, a case which a number of other state courts have looked to for guidance, elucidated on this point at length and ultimately decided that discretionary decisions present "an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation."[152]

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148. *See* Rogers Mach., Inc. v. Wash. Cnty., 45 P.3d 966, 977 (Or. Ct. App. 2002).

> With near uniformity, lower courts applying *Dolan* to monetary exactions have done so *only* when the exaction has been imposed through an adjudicatory process; they have expressly declined to use *Dolan*'s heightened scrutiny in testing development or impact fees imposed on broad classes of property pursuant to legislatively adopted fee schemes.

Id.

149. Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1002 (Cal. 1999) (quoting Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996)) (internal quotation marks omitted).

150. *See, e.g.*, McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (citing City of Lyons v. Suttle, 498 P.2d 9 (Kan. 1972) (applying a reasonableness standard to a development impact fee).

151. *See, e.g.*, St. Clair Cnty. Home Builders Ass'n v. City of Pell City, 61 So. 3d 992, 1007 (Ala. 2010) ("Accordingly, *Dolan* does not apply to generally applicable legislative enactments . . . . [T]he burden rests on the party challenging the ordinance to prove that it is arbitrary and unreasonable.").

152. *Ehrlich*, 911 P.2d at 439.

III. WHAT *KOONTZ* GOT WRONG

A. Doctrine of Unconstitutional Conditions

The Court in *Koontz* began its discussion by emphasizing the importance of the unconstitutional conditions doctrine.[153] The Court's exuberance for this doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up," is admirable, and the doctrine undoubtedly is applicable when local governments are trying to wrest land away from developers and other permittees.[154] However, the Court misapplied the doctrine to permit conditions that do not deprive the landowner of any protected constitutional right. This misapplication is inconsistent with the Court's previous holdings and defies the rationale behind the doctrine.

The Court cited several pivotal decisions in which the government has conditioned the receipt of benefits on an individual relinquishing his or her constitutional rights, specifically such fundamental guarantees as freedom of speech and the right to travel, and then went on to discuss the Fifth Amendment rights implicated in *Nollan*, *Dolan*, and other exactions cases.[155] Here, the Court is correct in asserting that Fifth Amendment rights are entitled to the same protections as the fundamental rights at play in its previous unconstitutional conditions cases. Although already established in *Dolan* and *Lingle*, the Court belabored this point by citing examples of how the government may coerce permit applicants into relinquishing rights to land.[156] "Extortionate demands of this sort," warned the Court, "frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."[157]

Yet, the fact that this doctrine applies to land-use exactions that involve physical dedications—or takings—of land is well settled and inherent in the purpose of the doctrine.[158] What the Court failed to address at this point in

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

154. *Id.*

155. *Id.* (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983)) (citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 51 (2006); Rutan v. Republican Party of Ill., 497 U.S. 62, 78 (1990); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 269 (1974); Perry v. Sindermann, 408 U.S. 593, 597–98 (1972)).

156. *Id.* at 2595 ("So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable.").

157. *Id.*

158. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (explaining that the unconstitutional conditions doctrine is violated when the government requires a person to give up the right to receive just compensation for property taken for public use in exchange for a benefit).

its opinion is how this doctrine applies to monetary exactions and other conditions that do not result in Fifth Amendment takings. Eventually the Court reached this point, somewhat circuitously, when it rejected the District's claim that monetary exactions are not subject to *Nollan/Dolan* scrutiny because they do not rise to the level of a taking.[159] The disjointed nature of this discussion leaves the reader unclear as to whether the Court would apply the unconstitutional conditions doctrine to *any* exaction case or whether it is applying it *here* because the monetary demand by the District is, in the Court's view, a protected property interest under the Fifth Amendment. The lower courts were confused after *Dolan*; the *Lingle* Court seemingly settled the issue on the application of this doctrine; and now *Koontz* appears to further muddy the waters.

Putting aside this confusion, the Court's holding that the monetary exaction in this case is a protected property interest is even more problematic. After the *Lingle* Court confirmed that the unconstitutional conditions doctrine applies to land-use exactions, commentators began discussing whether or not this statement would further limit the reach of *Nollan* and *Dolan*.[160] What is clear is that *Nollan/Dolan* apply only when an actual property right is relinquished—i.e., taken. What is unclear is how property rights proponents and more conservative courts will interpret "property rights" under this examination. The unconstitutional conditions doctrine *should be* limiting the scope of heightened scrutiny to physical dedications of land or conditions so onerous that they deprive the owner of all beneficial use of the land—i.e., the type of action that would amount to a taking outside the permitting process.

In the context of development fees, payments in lieu, and other monetary conditions placed on land-use permits, no constitutionally protected right has been relinquished. As the *Nollan* Court suggested, no taking would occur if these fees were assessed outside the permitting process.[161] The *Koontz* Court got around this point by reasoning that the money the District requested for improving wetlands amounted to a compensable property interest.[162] As the dissenters noted, this holding is entirely inconsistent with Supreme Court precedent.[163] The dissenters cited *Eastern Enterprise v. Apfel*, which held that "an obligation to spend money

159. *Koontz*, 133 S. Ct. at 2599.

160. *See* Lauren Reznick, Note, *The Death of* Nollan *and* Dolan*? Challenging the Constitutionality of Monetary Exactions in the Wake of* Lingle v. Chevron, 87 B.U. L. REV. 725, 748–49 (2007) (noting that many commentators predicted the end of *Nollan/Dolan* scrutiny after *Lingle*).

161. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987) (emphasizing that if a city could exercise its police power to limit or prohibit development it can impose a permit condition).

162. *Koontz*, 133 S. Ct. at 2599.

163. *Id.* at 2603–04 (Kagan, J., dissenting).

can never provide the basis for a takings claim."[164] The majority distinguished *Apfel* by reasoning that the money at issue in *Koontz* "'operate[d] upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment."[165] The majority analogized *Apfel* with previous cases that have found takings when the government seizes a lien—a right to receive an income stream that is secured by a particular piece of property.[166]

The majority's rationale in equating Koontz's development fees to a secured lien is entirely erroneous. A lien is an identifiable, non-fungible source of income that is specifically derived from a particular piece of property.[167] For example, when a property owner fails to make payments to a creditor, the creditor can place a lien on the property to secure the payment of the debt.[168] If the government extinguishes that lien, the creditor loses that income stream and the ability to have the debt repaid.[169] In *Koontz*, despite the fact that the District requested the development fees in order for Koontz to construct on his particular piece of property, the money that the government would have received was not an income stream from that property. The money was not derived from, secured by, or attached to the property—it was fungible. If a taking occurred anytime the government directed the owner of a particular piece of property to make a monetary payment, all property taxes would be invalidated.

Indeed, the majority rebuffed the dissenter's claim that this decision reaches taxes and user fees.[170] Rather, the majority acknowledged that the power to levy taxes does not implicate Fifth Amendment protections but merely asserted that the fees in this case were clearly distinguishable from taxes.[171] Yet, the Court said little more to guide lower courts and local governments on the line between taxes and takings. Rather, it merely stated:

> We need not decide at precisely what point a land-use permitting charge denominated by the government as a 'tax' becomes 'so arbitrary . . . that it was not the exertion of taxation but a

164. *Id.* at 2599, 2605 (citing E. Enters. v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)).

165. *Id.* at 2599 (quoting *Apfel*, 524 U.S. at 540) (Kennedy, J., concurring in the judgment and dissenting in part)).

166. *Id.*

167. *Apfel*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part).

168. *See generally* Jessica A. Bacher, *Zoning and Land Use Planning*, 39 REAL EST. L.J. 206, 206 (2010) (discussing the use of liens to collect taxes on delinquent properties).

169. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that liens are a compensable property interest).

170. *Koontz*, 133 S. Ct. at 2600–01.

171. *Id.* at 2602.

> confiscation of property.' . . . [W]e have had little trouble distinguishing between the two.[172]

The fact that the Court has little trouble distinguishing the two is not the concern. The Court will not be guiding the land-use decisions of local governments and will not necessarily be directing the lower courts on how to draw this distinction. But more importantly, if the fees in *Koontz*—or similar development fees in other scenarios—are *not* taxes, that does not necessarily mean they are specific non-fungible income streams subject to compensation. The language in *Apfel* does not support this and neither does pure logic. But the Court focused its discussion around distinguishing the development fees from taxes—concluding that under Florida state law, the District does not even have the ability to tax[173]—without considering that there may be other monetary conditions that are neither takings *nor* taxes.

The dissent highlighted another wrinkle in the Court's holding on monetary exactions. The Court never clarified whether the heightened scrutiny will apply to purely adjudicative decisions or to legislative decisions as well. This is the particular issue dividing the lower courts, and the *Koontz* Court seemingly passed on the opportunity to settle the issue. Alternately, the Court's silence on this issue may imply that it recognizes no distinction between these two processes. While this is consistent with Justice Thomas's dissent in the Court's denial of certiorari in *Parking Ass'n of Georgia*, it is *inconsistent* with prior Supreme Court precedent.[174] One clue to this puzzle, however, is the Court's explicit abrogation of *McClung*, the Ninth Circuit case that held that generally applicable legislative exactions are subject only to *Penn Central* balancing and not heightened *Nollan/Dolan* scrutiny. Yet, the Court elected not to disturb any of its previous holdings and did not reconcile the language in those cases with conflicting language in *Koontz*.

So, where does this leave the unconstitutional conditions doctrine and land-use exactions? The lower courts face confusion about when to apply the doctrine—thereby subjecting the permit condition to heightened scrutiny—and at what point a monetary exaction becomes a compensable taking. Although *McClung* has been abrogated, precedent that seemingly conflicts with *Koontz* remains good law. If there was any clarity in

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172. *Id.* (quoting Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24 (1916)).

173. *Id.* at 2601.

174. *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (distinguishing *Dolan* from cases involving legislative determinations); Lingle v. Chevron, U.S.A. Inc., 544 U.S. 528, 547 (2005) (reaffirming *Dolan*'s application to adjudicative decisions).

exactions jurisprudence after *Lingle*, it has surely been clouded over by the *Koontz* Court.

B. Legislative-Adjudicative Distinction

While the *Koontz* Court never expressly addressed the legislative-adjudicative distinction, and whether such distinction had any bearing on its decision in this case, the opinion raises several relevant points for analysis. As stated above, the Court impliedly extended *Nollan/Dolan* analysis to legislative exactions by abrogating *McClung* and by not qualifying its holding that monetary exactions are subject to heightened scrutiny. This alone merits concern about the effect *Koontz* will have on land-use planning.

While Justice Thomas recognizes no constitutional difference between legislative and adjudicative exactions, there are indeed many constitutional and prudential distinctions that can be drawn between these types of decisions. Surely, as Justice Thomas points out in *Parking Ass'n of Georgia*, "If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property."[175] Thomas is correct—there is no doubt that a taking would have occurred. This is precisely why the Supreme Court has established a series of balancing and categorical tests to determine when a government action amounts to a taking—either physical or regulatory. As such, property owners already benefit from protections against improper legislative takings. But that is not the question these cases seek to address. Rather, the question is whether legislative *exactions* are subject to heightened scrutiny. As the Court repeatedly has emphasized, exactions pose a significant threat of extortion on the part of the government. Is that threat of extortion present in legislative exactions? Here, the courts have frequently said "no."[176]

First, because legislative conditions are not discretionary and the legislature does not bargain with the permit applicant before passing the relevant ordinance or statute, the threat of extortion is relatively absent in the legislative sphere. The legislature exercises its police power in passing new laws and does not bargain away its police power in one-on-one adjudications of existing laws. Second, if the Court subjects legislative

175. Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1118 (Thomas, J., dissenting in denial of certiorari).

176. *See, e.g.*, San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 103 (Cal. 2002) ("But a different standard of scrutiny would apply to development fees that are generally applicable through legislative action 'because the heightened risk of "extortionate" use of the police power to exact unconstitutional conditions is not present.'") (quoting Ehrlich v. City of Culver City, 911 P.2d 429, 444 (1996)).

enactments to heightened scrutiny, it will be putting itself in the shoes of the legislature. The only way for courts to analyze the essential nexus between the condition imposed and the stated purpose of the enactment is to determine the effectiveness of the legislation. This is not the role of the courts.[177] To move in this direction, the Court would be validating *Agins*' flawed and now-defunct "substantially advances" test. And finally, the political process is available for property owners burdened by the requirements of the legislation.[178] This strong check on the legislative power helps insulate the public from extortion and other coercive power.

This legislative-adjudicative distinction, however, may be a double-edged sword for land-use decisions. If courts fail to recognize a distinction, they will be inclined to hold legislative exactions to the same standards as adjudicative exactions. As previously noted, this will allow courts to tread too far into the legislative sphere. However, if courts draw too hard of a distinction and fail to recognize the hybrid nature of the land-use permitting process, many decisions that involve even some small discretionary component will automatically receive *Nollan/Dolan* scrutiny. To this end, heightened scrutiny should be reserved to those situations where a taking would occur outside the permitting process, ruling out most exactions decisions that do not involve physical dedications of property.

Both the majority and dissent in *Koontz* accept that the District's permit conditions were discretionary and, thus, adjudicative. Yet, a look at the underlying legislation and the process by which Koontz sought his permit, reveal that the conditions were more hybrid in nature. As stated above, the wetlands on Koontz's property were subject to regulation under two state statutes.[179] To comply with the conservation goals of the state statutes, the District requires that applicants seeking to develop wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere.[180] Thus, the process began with a purely legislative enactment.

However, when Koontz applied for his permit and negotiated for conditions with the District, the parties were adjudicating, and Koontz was specifically challenging the condition as applied to his permit—rather than

177. *See Lingle*, 544 U.S. at 544 (emphasizing that the "courts are not well suited" to "scrutinize the efficacy" of legislative enactments).

178. McClung v. City of Sumner, 548 F.3d 1219, 1228 (2008), *abrogated by* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

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

180. *Id.*

facially attacking the statute itself.[181] Whether this case falls within the legislative or adjudicative context is somewhat debatable. In fact, this is one reason critics have derided the distinction in the first place—land-use decisions often result in hybrid processes.[182] At one end of the spectrum are broad legislative enactments that require an entire class of property owners to undertake some specific act or pay a specific impact fee before undertaking to develop or change the use of a parcel. As the courts have aptly noted, these determinations are free from the coercive power that can come along with more ad hoc decision-making, and improper exactions can be rectified through the political process. At the other end of the spectrum are adjudicative decisions that are barely rooted in a legislative enactment. Without any meaningful guiding principles in a statute or ordinance, a government's conditions are more likely to become arbitrary and capricious, and the applicant is more likely to feel coerced into meeting the demands of the government.

But the reality is that most land-use decisions take on a hybrid form. Local ordinances typically target areas that attempt to sensitively guide development—for environmental, aesthetic, economic, or other practical reasons—and may prescribe conditions that must be satisfied in order to meet the needs of the particular area or class of properties.[183] Even with the criteria specified in the ordinance, permittees are typically required to obtain site plan approval from a planning commission or other quasi-adjudicative body.[184] In an effort to tailor development appropriately and to work with property owners on getting their site plans approved, these commissions will likely impose conditions that must be met in order to obtain approval.[185] Conditional use permits are almost ubiquitous in local governments and give the government flexibility in tailoring development to the specific needs of each site.[186]

To illustrate this point, we can look at an historic preservation ordinance. A typical preservation ordinance designates entire districts or

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181. *Id.* at 2593. The Henderson Act did not require this type of conditional permitting. *See* Fla. Stat. Ann. § 373.414(1) (West 2012) (stating that the "proposed activity [must] be . . . in the public interest").

182. *See* Haskins, *supra* note 147, at 501 (discussing the hybrid nature of many land use regulations and noting that this is the "battleground on which litigation is based").

183. *See* MICHAEL A. ZIZKA ET AL., STATE AND LOCAL GOVERNMENT LAND USE LIABILITY § 5:2 (2013) (explaning that local governments have classified properties into complex zoning districts and that the land use in each district often depends on conditional permits).

184. *See id.* (implying that permittees usually need approval by stating that only some uses are still permitted as of right).

185. *See id.* (highlighting that conditional use regulations have become quite common).

186. *See id.* (noting that the decision to grant a permit is administrative but also contains some "quasi-legislative discretion").

individual landmark buildings and prescribes criteria that a property owner must adhere to when renovating or redeveloping a property.[187] The applicant must appear before a landmarks, historic preservation, or architectural review commission to obtain a "certificate of appropriateness."[188] In this venue, the commission may suggest alterations or conditions that an applicant must comply with before gaining approval.[189] The Supreme Court confronted just such a legislative scheme in *Penn Central*.[190] There, the Court formulated a three-part balancing test to determine whether a regulatory taking had occurred.[191] With the burden on the party challenging the regulation, the courts must balance the economic impact of the regulation, the investment-backed expectations of the property owner, and the character of the government action (physical or regulatory; benefits versus burdens).[192]

The reason that *Nollan/Dolan* established a new, heightened scrutiny for land-use exactions was the fear that local governments would coerce landowners into relinquishing their land to the government without receiving any just compensation. Absent in *Penn Central* was an outright physical dedication of land. The landmarks commission merely restricted the ability of the land to be redeveloped but did not confiscate the property owner's right to exclude—the most precious stick in the property rights bundle.[193] *Nollan/Dolan* sought to prevent local governments from improperly taking property under the guise of providing a benefit to the landowner. Without that coercive acquisition of physical property, the *Nollan/Dolan* standard is inapplicable and the lower standard of regulatory takings should apply, regardless of the extent to which the decision is completely legislative or involves some adjudicative process. This goes back to the key question that begins the *Nollan/Dolan* examination: Outside

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187. *Preservation Ordinance FAQ*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/saving-a-place/historic-districts/what-is-a-certificate-of.html#Uy8F_FxfZuy (last visited Apr. 2, 2013).

188. *What is a "Certificate of Appropriateness"?*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservationnation.org/information-center/saving-a-place/historic-districts/what-is-a-certificate-of.html#.UtXCc4Io7IU (last visited Apr. 2, 2014).

189. *See Local Preservation Laws*, NAT'L TRUST FOR HISTORIC PRES., http://www.preservation nation.org/information-center/law-and-policy/legal-resources/preservation-law-101/local-law/#7 (last visited Apr. 2, 2014) (explaining that historic preservation ordinances establish procedures for reviewing applications to alter historic property and that commissions have authority over granting such applications).

190. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 112 (1978).

191. *Id.* at 124.

192. *Id.*

193. *See id.* at 111–12 (stating that designation as a landmark required the owner to keep the building in good repair and made proposals to alter the landmark contingent on the Commission's approval).

the permitting process, would the government's demand constitute a taking? This is the first hurdle those challenging an exaction must meet to get into *Nollan/Dolan*.[194] Otherwise the party will fall into the traditional *Penn Central* analysis. Despite the fact that applicants for certificates of appropriateness under a landmarks ordinance receive their permits in an adjudicative setting, there is no doubt that *Penn Central* applies, merely because the conditions imposed on property owners—restrictions on redevelopment, specifications in materials, or prohibitions on change of use or expansion—are not outright physical takings of property outside the permitting process.

As the *Koontz* dissent points out, the demand on the landowner that resulted in the permit denial must be unequivocal, otherwise negotiations over how to best accomplish the goals of the local government and the developer would be susceptible to takings challenges.[195] As the dissenters warn, "the government might desist altogether from communicating with applicants."[196] The danger of chilling communication between applicants and local governments "would rise exponentially if something less than a clear condition—if each idea or proposal offered in the back-and-forth of reconciling diverse interests—triggered *Nollan-Dolan* scrutiny."[197] While the dissenters argued, in light of the majority's holding that an unconstitutional taking occurred even though the District possessed the right to deny the permit in the first place, their argument—possibly inadvertently and possibly intentionally—fully supports the need for adjudicative decisions that are not subject to heightened scrutiny when no physical dedications of land are at issue. Indeed, the lower courts are split over whether monetary exactions are due heightened scrutiny when imposed in adjudicative settings, and nearly all courts recognize the policy reasons behind different standards for legislative enactments.

However, the political process is still available in situations like that in *Koontz*. If the voters feel that conditions are improperly imposed under either the state statutes or local ordinances, they can ask for the laws to be repealed or amended. Similarly, while courts are rightfully concerned about extortion on the part of local governments, it is difficult to see why negotiations over site plans are coercive. First, the power balance may not be as one-sided as the courts suggest. Developers equally play on the fears of local governments losing out to neighboring communities—e.g., losing

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194. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

195. Koontz v. St. Johns River Water Mgmt. Dist. 133 S. Ct. 2586, 2610 (2013) (Kagan, J., dissenting).

196. *Id.*

197. *Id.*

taxes, jobs, and economic development. The ability of local governments to negotiate with developers to get their permits approved may give the government more leverage against coercion from the other side. Second, the local government is not merely demanding money in exchange for a permit. Rather, it is suggesting potential methods for meeting the needs of the community. In *Koontz*, the District specified that permits would be conditioned on the need for wetlands preservation. The ensuing negotiations were undertaken to meet those ends. Heightened *Nollan/Dolan* scrutiny is not necessary to determine whether the suggested permit conditions are furthering the legislative scheme.

So, where does this leave the legislative-adjudicative distinction for land-use exactions? The *Koontz* Court has more or less implied that the distinction is irrelevant. The fact that the Court never explicitly stated this may create confusion in the lower courts. Moreover, the Court's finding that the District's monetary conditions amounted to an improper taking may have far reaching ramifications and frustrate the efforts of local governments to make flexible land-use decisions.

IV. RAMIFICATIONS AFTER *KOONTZ*

A. Impact on Land-Use Regulation

Land-use exactions are an effective tool for mitigating the harmful impacts of development, and they give local governments the flexibility to tailor development to the communities' individualized needs—particularly social, environmental, and economic needs. While *Nollan* and *Dolan* created a heightened standard by which land-use exactions must be scrutinized in the courts, the limited scope of that standard has given state and local governments relatively wide discretion to impose development fees, set-asides, payments-in-lieu, conservation easements, and other permitting conditions that do not involve physical dedications of property. As the case law indicates, governments are creating affordable housing, conserving environmentally sensitive lands, protecting low-income renters, improving infrastructure, protecting view sheds, maintaining landscaping, preserving historic buildings, and mitigating the negative impacts of otherwise harmful development.[198] While a government may ask for a dedication of property to achieve one of these goals, most of these land-use planning initiatives can be achieved through development fees or other

198. *See supra* notes 1–7 and accompanying text.

monetary exactions or by working with developers to scale back or aesthetically improve upon their building proposals.

If courts remain uncertain about the scope of *Nollan/Dolan* after *Koontz*, state and local governments may remain similarly uncertain about their authority to impose exactions. Fearful of litigation, governments may refrain from negotiating with property owners or even creating legislation that achieves the same ends as an adjudicative permitting process. The harm to the public seems clear—municipalities may not benefit from the flexibility to achieve well-planned growth. But the property owners may also be harmed. As these cases demonstrate, often the developer's permit could have been denied under the ordinance or statute but the government was working with the developer to achieve a mutually compatible result. In this new landscape of uncertainty, governments may just outright deny permits altogether.

Another potential outcome is that courts may read *Koontz* as extending *Nollan/Dolan* to any exactions, legislative or adjudicative, monetary or physical. This may also have a chilling effect on governments. At the very least, courts may apply heightened scrutiny to any and all permit conditions, potentially invalidating many regulatory schemes that would otherwise have been upheld under a less rigid analysis.[199] *Penn Central* and *Lucas* have provided a solid basis for assessing regulatory takings for several decades. Both tests recognized the benefits that flow to the public from sound land-use planning. *Penn Central*, for example, is responsible for the myriad historic preservation ordinances at work today.[200] Where *Koontz* will leave these ordinances is unclear. An expanded *Nollan/Dolan* scope may pull into its net many of the land-use regulations that have helped improve our public spaces.

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199. *See* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 417–18 (2009) (discussing how inclusionary zoning violates the doctrine of unconstitutional conditions). Burling & Owen address inclusionary zoning post-*Lingle* and analyze legislation that requires developers to include a minimum number of affordable units. *Id.* The authors illustrate how this may violate the unconstitutional conditions doctrine by forcing developers to relinquish their right to sell property on the open market. *Id.* at 418. This is the type of ordinance potentially subject to higher scrutiny even more frequently after *Koontz*.

200. Daniel T. Cavarello, Comment, *From* Penn Central *to* United Artists' I & II*: The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593, 603 (1995) (stating that "the validity of historic preservation ordinances was no longer in doubt" after *Penn Central*).

B. A Step Backward

Furthermore, the *Koontz* decision signals a grand step backward from the Supreme Court's recent takings jurisprudence. After the heightened scrutiny established in *Nollan* and *Dolan*—scrutiny that signaled a departure from the presumption of validity and judicial deference enjoyed by land-use regulations after *Euclid*—the Supreme Court issued several decisions that tempered that scrutiny and reassured local governments that they still maintained authority to freely exercise their police powers without excessive judicial interference.[201] The *Koontz* Court may be hinting at increasingly more conservatism in the land-use and property rights realm, possibly foreshadowing ramifications beyond the exactions context. Justice Kagan predicts the majority will rue its decision—we can only hope she is wrong.

CONCLUSION

The *Koontz* Court erred in holding that monetary exactions are subject to heightened *Nollan/Dolan* scrutiny. With its decision, the Court may have also increased the scope of *Nollan* and *Dolan* to reach purely legislative exactions and simple development fees that previously had not been subject to these more rigorous takings tests. The lower courts and state and local governments may face uncertainty in how to apply the *Koontz* holdings, and the new ruling may severely restrict the ability of governments to engage in flexible land-use planning. The *Koontz* Court should have followed its own precedent and upheld the monetary conditions the District placed on Koontz's construction permit. Furthermore, the Court should have taken the opportunity to expressly clarify the legislative-adjudicative distinction and should have held that only physical dedications of land made in an adjudicative setting are subject to heightened scrutiny. Again, this would remain consistent with the Court's previous decisions and would validate the large majority of the lower courts' holdings. More importantly, limiting the reach of *Nollan* and *Dolan* would serve the pressing needs of state and local governments in making sound land-use decisions and achieving safer, more affordable, more attractive, and healthier environments.

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201. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 480 (2005) (explaining that their decision "reflect[s the Court's] longstanding policy of deference to legislative judgments").