EXACTIONS AND IMPACT FEES

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INTRODUCTION

I first met Professor David Callies at a land use conference at Chapman Law School, organized by Professor Craig "Tony" Arnold. As a relatively new law professor, I had switched to using David's land use casebook for my class.[1] I was delighted to meet one of the authors of the casebook I was using. Professor Callies was one of my legal "rock stars," along with Professors Jesse Dukeminier, Carol Rose, Grant Nelson, Dale Whitman, Gideon Kanner, Holly Doremus, Joe Sax, Bob Ellickson, Richard Epstein, and others. I have since added more "rock stars" to my list, many of whom spoke at the Fourteenth Annual Brigham-Kanner Property Rights Conference. Because of all of those in attendance, and most of all because of David Callies, I was honored to be a part of the conference and journal publication.

From the beginning, David supported my work as a junior scholar and encouraged me by introducing me to other greats, like Steve Eagle and Michael Berger. Professor Callies and I co-authored an article and talked about exchanging teaching assignments and houses so that I could go to Hawai'i and he could visit family in Los Angeles. Although the exchange has not worked out yet, David arranged for me to visit for a semester at University of Hawai'i while he was on sabbatical in 2013. During that visit, I discovered that he and I disagree about one topic in land use, and I will address that issue in this Essay. I was using Professor Callies's property book (as agreed in advance),[2] and when covering impact fees, I discovered that he thinks they should be subject to the *Nollan/Dolan* test and I do not. This was in 2013, right before *Koontz* was decided. Of course, I let

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1. DAVID L. CALLIES, ROBERT H. FREILICH & SHELLEY ROSS SAXER, CASE AND MATERIALS ON LAND USE (7th ed. 2017).

2. DAVID L. CALLIES ET AL., CONCISE INTRODUCTION TO PROPERTY LAW (1st ed. 2011).

the students know about this difference of opinion, but because I would be grading their exams, I suggested they adopt my view for purposes of the class. This Essay suggests that any future review by the U.S. Supreme Court of this issue should determine that while monetary exactions are subject to *Nollan/Dolan*, legislatively enacted impact fees are not.

I. BACKGROUND: THE *NOLLAN/DOLAN/KOONTZ* TRILOGY

Before discussing how courts, practitioners, and academics have interpreted the judicial scrutiny requirements for exactions and, by extension, for impact fees, this section will focus on the major U.S. Supreme Court cases addressing the issue. In addition to *Nollan*, *Dolan*, and *Koontz*, I will also discuss *Horne* and *Lingle* as they relate to the Court's takings jurisprudence for exactions.

In *Nollan v. California Coastal Commission*, the Nollans submitted a permit application for coastal development to the California Coastal Commission, where they proposed to demolish their current property to rebuild a new property.[3] The commission recommended that the permit be granted, subject to the condition that the Nollans allow the public an easement to pass laterally across their property.[4] The Nollans objected to the condition, but the commission overruled the objections and granted the permit subject to the Nollans' recordation of a deed restriction granting the easement.[5] The Supreme Court noted that the commission could not require the Nollans to convey this easement without paying just compensation but that it could deny the permit "outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede" legitimate state interests.[6] Therefore, if the commission required the Nollans to convey the easement as a condition for obtaining a land use permit, then such "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[7] However,

3. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).
4. *Id.*
5. *Id.*
6. *Id.* at 835–36.
7. *Id.* at 836.

a permit denial that "would interfere so drastically with the Nollans' use of their property as to constitute a taking" would be compensable under *Penn Central Transportation Co. v. City of New York*.[8] The *Nollan* Court explained:

> [T]he Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede [legitimate state] purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.
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> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. . . . Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.
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> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."[9]

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

9. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835–37 (1987) (footnotes omitted) (citations omitted) (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 584 (1981)).

In *Nollan*, the Court held that because the demand for an easement was a condition for granting a development permit that the government could otherwise deny the easement condition would not be a taking so long as it satisfied the same purpose achieved by a permit denial.[10] This "essential nexus" requires that in order to substitute the exaction for the permit denial, the exaction must "further the end advanced as the justification for the prohibition."[11]

The *Dolan v. City of Tigard*[12] decision used the same premise as *Nollan* "that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking."[13] The *Dolan* Court refined the *Nollan* "essential nexus" test to require "that an adjudicative exaction requiring dedication of private property must also be "'rough[ly] proportiona[l]' . . . both in nature and extent to the impact of the proposed development."[14]

In *Dolan*, Florence Dolan submitted an application to expand her store and parking lot.[15] The city planning commission conditioned the approval upon her agreement to set aside land for a public greenway that would minimize flooding in the nearby lake and to place a pedestrian/bicycle pathway that would relieve traffic congestion.[16] The Supreme Court held that the City's requirements constituted an unconstitutional taking.[17] The Court distinguished the City's actions against Florence Dolan from other situations involving "legislative determinations classifying entire areas of the city, [because] here the city made an adjudicative decision to condition [the] petitioner's application for a building permit on an individual parcel."[18] In addition, the City imposed conditions that went beyond limitations on the use of Ms. Dolan's parcel, instead requiring "that she deed portions of the property to the city."[19] The Court relied on

10. *Id.*
11. *Id.* at 837.
12. Dolan v. City of Tigard, 512 U.S. 374 (1994).
13. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546 (2005).
14. *Id.* at 547 (citing *Dolan*, 512 U.S. at 391, and City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (emphasizing that we have not extended this standard "beyond the special context of [such] exactions").
15. *Dolan,* 512 U.S. at 374.
16. *Id.*
17. *Id.*
18. *Id.* at 385.
19. *Id.*

> the well-settled doctrine of "unconstitutional conditions," [under which] 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 sought has little or no relationship to the property.[20]

In determining "whether the degree of exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development," the *Dolan* Court turned to state court decisions since they "have been dealing with this question a good deal longer than we have."[21] The Court employed the "Goldilocks" test. They found that the state court standard using "very generalized statements as to the necessary connection between the required dedication and the proposed development" was too lax, while the standard requiring "a very exacting correspondence, described as the 'specifi[c] and uniquely attributable' test" was too strict."[22] Instead, the state court standard "requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development" was an intermediate standard that was "just right."[23] However, the Court described this test as "rough proportionality" instead of "reasonable relationship" to avoid confusion with the similar "term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause."[24]

The Court in *Dolan* expanded the justification for treating land-use permit conditions as an exception to the per se physical taking rule by relying on the unconstitutional conditions doctrine.[25] *Dolan* also stressed two differences between the land use regulations that were sustained against constitutional challenges in *Village of Euclid* and *Pennsylvania Coal* from the exactions that were asserted against Florence Dolan.[26] The Court explained:

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20. *Id.* at 385 (noting that "the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements"). *Id.* at 385–86 (citations omitted).

21. *Id.* at 388–89.

22. *Id.* at 389.

23. *Id.* at 390.

24. *Id.* at 391.

25. Dolan v. City of Tigard, 512 U.S. 374, 388 (1994).

26. *Id.* at 384–85 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

> First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an *adjudicative* decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.[27]

Courts across the country applied the *Nollan/Dolan* standard to physical exactions for more than twenty years. Some courts also applied this standard to in-lieu monetary exactions.[28] In *Koontz v. St. Johns River Water Management District*,[29] the U.S. Supreme Court directly addressed the issue of whether monetary exactions should be subject to review under the *Nollan/Dolan* test. It recognized that lower courts divided over this question of federal constitutional law and resolved the conflict by holding that monetary exactions should be subject to the *Nollan/Dolan* test.[30]

Coy Koontz had applied for a permit to develop 3.7 acres of his 14.7 acre property.[31] To offset the environmental impact of this development on existing wetlands, one of the alternatives suggested by the water district required Koontz to fund offsite mitigation work that would enhance fifty acres of wetlands owned by the water district.[32] The Court noted that "in lieu of" fees "are functionally equivalent to other types of land use exactions" and held that "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[33] Therefore, when the government demands property from a permit applicant, this demand "must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money."[34]

The *Koontz* Court explained the reasoning for protecting owners applying for land use permits:

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27. *Id.* at 385 (emphasis added).

28. *See, e.g.*, Ehrlich v. Culver City, 12 Cal. 4th 854, 876, 50 Cal. Rptr. 2d 242, 911 P.2d 429, 444 (1996); Flower Mound v. Stafford Estates Ltd. Partnership,135 S.W. 3d 620, 640–41 (Tex. 2004).

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

30. *Id. at* 2594.

31. *Id.* at 2592.

32. *Id.* at 2593.

33. *Id.* at 2599.

34. *Id.* at 2603.

> *Nollan* and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. Our decisions in those cases reflect two realities of the permitting process. The first is that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. 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. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.
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> A second reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset. Where a building proposal would substantially increase traffic congestion, for example, officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road. Respondent argues that a similar rationale justifies the exaction at issue here: petitioner's proposed construction project, it submits, would destroy wetlands on his property, and in order to compensate for this loss, respondent demands that he enhance wetlands elsewhere. Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.[35]

Prior to *Koontz*, the Court's discussions about the need for increased scrutiny of exactions under *Nollan* and *Dolan* emphasized the special context of "adjudicative exaction" as an exception to what would otherwise be considered a per se physical taking.[36] However,

35. *Id.* at 2594–95 (citations omitted).

36. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546–47 (2005); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702–03 (1999).

in *Koontz* the majority did not specifically address the distinction between legislative action and adjudicative action and instead focused on the unconstitutional conditions doctrine first applied to land use permits by the Court in *Dolan*. Justice Kagan's dissent in *Koontz* noted the lack of clarity in regards to this distinction:

> Perhaps the Court means in the future to curb the intrusion into local affairs that its holding will accomplish; the Court claims, after all, that its opinion is intended to have only limited impact on localities' land-use authority. The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there "the city made an *adjudicative* decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination[ ] classifying entire areas of the city." Maybe today's majority accepts that distinction; or then again, maybe not. At the least, the majority's refusal "to say more" about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.[37]

Following *Koontz*, the Supreme Court again addressed a takings challenge involving personal property as opposed to real property. In *Horne v. Department of Agriculture*, raisin growers brought a takings claim under the Fifth Amendment because the Agricultural Marketing Agreement Act of 1937 required them to turn over a portion of their raisins to ensure an orderly raisin market.[38] Under this Act, the California Raisin Marketing Order demanded that the growers physically set aside a percentage of their crops for transfer to the government, which "then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market."[39] The Ninth Circuit Court of Appeal's challenged decision "viewed the reserve requirement as a use restriction, similar to a government condition on the grant of a land use permit" and subjected it to the *Nollan/Dolan* test because the government

37. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (emphasis added) (citations omitted).
38. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2424 (2015).
39. *Id.*

"imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market)."[40]

After applying the test, the Ninth Circuit "found that the reserve requirement was a proportional response to the Government's interest in ensuring an orderly raisin market, and not a taking under the Fifth Amendment."[41] The Supreme Court instead addressed "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' applies only to real property and not to personal property."[42] The Court responded "no" and held that the reserve requirement was a physical taking because it required that the growers transfer actual raisins to the government.[43] Such a requirement is the "classic taking in which the government directly appropriates private property for its own use."[44]

Thus, the *Horne* Court viewed the federal legislative requirement to set aside raisins and transfer them directly to the government as a physical taking under the *Loretto* per se doctrine. Because the set-aside was not in exchange for a permit that the government could otherwise deny, it was not analogous to the land-use permit condition. Therefore, the Court did not treat it as an exception to the per se physical taking rule that might be constitutionally allowable so long as it survived *Nollan/Dolan* scrutiny. Just as the *Loretto* Court required just compensation for the per se physical taking of space on Jean Loretto's apartment building for a cable line, the *Horne* Court required just compensation for the per se physical taking of the Hornes' raisins.[45]

Before *Koontz*, but subsequent to *Nollan* and *Dolan*, the Court in *Lingle v. Chevron U.S.A. Inc.*[46] addressed the "long recognized" principle from *Agins v. Tiburon* that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and

40. *Id.* at 2425.

41. *Id.*

42. *Id.* (quoting Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012)).

43. *Id.* at 2425–26.

44. *Id.* at 2425 (quoting Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002)).

45. *Id.* at 2426 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–35 (1982)).

46. Lingle v. Chevron U.S.A. Inc. 544 U.S. 528 (2005).

does not 'den[y] an owner economically viable use of his land.'"[47] The *Nollan* Court relied on the *Agins* principle in addressing the scrutiny required for exactions.[48] The *Lingle* Court held that the "substantially advances" prong of the two-prong *Agins* test was, in actuality, a substantive due process argument not a takings test.[49]

In *Lingle*, Chevron brought suit challenging Hawai'i's statute that limited the rent that oil companies could charge dealers who were leasing company-owned service stations.[50] Chevron sought a declaration that the rent cap constituted a taking under the Fifth and Fourteenth Amendments of the U.S. Constitution.[51] The Court held that Chevron was not entitled to summary judgment since it "argued only a 'substantially advances' theory in support of its takings claim."[52] The Court noted that the "substantially advances" test was derived from substantive due process decisions, not takings.[53]

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use*." It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.[54]

To set the stage before addressing the *Agins*'s "substantially advances" prong, the Court described its regulatory taking precedents.[55]

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47. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

48. *Id.*

49. *Lingle*, 544 U.S. at 545.

50. *Id.* at 533.

51. *Id.*

52. *Id.* at 545.

53. *Id.* at 544.

54. *Id.* at 543 (emphasis added) (citation omitted).

55. *Id.* at 538–42.

These precedents established "two relatively narrow categories (and the special context of land-use exactions . . .)" of per se takings for Fifth Amendment purposes, and noted that outside of these categories the factors set forth in *Penn Central* would govern regulatory takings challenges.[56] The two categories of per se takings arise from *Loretto v. Teleprompter Manhattan CATV Corp.,* finding a taking "where government requires an owner to suffer a permanent physical invasion of her property,"[57] and from *Lucas v. South Carolina Coastal Council*, where "regulations that completely deprive an owner of 'all economically beneficial us[e]' of her property" constitute a taking.[58] The Court explained that these three tests focus on the severity of the burden that the government places on property rights.[59] First, a permanent physical invasion "eviscerates the owner's right to exclude others" and justifies finding a per se taking.[60] Second, the total deprivation of economically viable use is the same as a permanent physical occupation and results in a per se taking.[61] Finally, the *Penn Central* test examines the "magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."[62]

After finding that the "substantially advances" prong of *Agins* was a substantive due process challenge and *not* a takings challenge, the *Lingle* Court addressed the impact that its decision might have on previous cases.[63] The Court recognized that its decisions in *Nollan* and *Dolan* "drew upon the language of *Agins*," but explained that both of these decisions were takings challenges to "adjudicative land-use exactions" and did not apply the "substantially advances" test.[64]

> In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan,*

56. *Id.* at 538.
57. *Id.*; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
58. *Lingle,* 544 U.S. at 538; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).
59. *Lingle*, 544 U.S. at 539.
60. *Id.*
61. *Id.* at 539–40.
62. *Id.* at 540.
63. *Id.* at 541–46.
64. *Id.* at 546.

> these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides 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 to the property." 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.[65]

In *Lingle*, the Court explained that its decision to reclassify the *Agins*'s "substantially advances" test from a takings challenge to a substantive due process challenge did not affect the principles developed in *Nollan* and *Dolan*.[66] Although the Court used language from *Agins* in these two cases, it did not rely on the "substantially advances" test but instead applied a Fifth Amendment takings analysis.[67] "Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to *adjudicative land-use exactions*—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."[68]

The Supreme Court precedent briefly discussed above establishes that the per se physical taking category from *Loretto* requires just compensation whenever the government effects a permanent physical occupation (no matter how minor) of either real property or personal property.[69] However, when the government demands either real or personal property from a landowner in exchange for a permit to develop her land, such demands are exactions subject to the *Nollan/Dolan* test for constitutional validity. The exaction sought must have an "essential nexus" to the anticipated impact of the development on the community, and the magnitude of the exaction sought must have "rough proportionality" to the magnitude of the potential impact.[70]

65. *Id.* at 547–48 (citations omitted).
66. *Lingle,* 544 U.S. at 546.
67. *Id.*
68. *Id.* (emphasis added).
69. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2425–26 (2015).
70. Dolan v. City of Tigard, 114 S. Ct. 2309, 2317–19 (1994).

The government may deny the permit because of its anticipated externalities, unless such denial would constitute a taking under the *Penn Central* factors test because of its severe impact on the landowner's property interest. However, so long as the government is entitled to deny the permit without effecting a taking, the *Nollan/Dolan* scrutiny serves as a check against the government imposing unconstitutional conditions ("the government may not deny a benefit to a person because he exercises a constitutional right") on the landowner's right to assert a Fifth Amendment takings claim.[71]

The issue of whether impact fees, even though legislatively enacted, will require *Nollan/Dolan* scrutiny—just as adjudicative actions involving physical or monetary exactions do—is a continuing debate after the *Koontz* decision. Justice Thomas concurred in denying certiorari to a subsequent case involving this issue, *California Building Industry Ass'n v. City of San Jose*.[72]

> This case implicates an important and unsettled issue under the Takings Clause. The city of San Jose, California, enacted a housing ordinance that compels all developers of new residential development projects with 20 or more units to reserve a minimum of 15 percent of for-sale units for low-income buyers. . . . Petitioner, the California Building Industry Association, sued to enjoin the ordinance. A California state trial court enjoined the ordinance, but the Court of Appeal reversed, and the Supreme Court of California affirmed that decision.
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> Our precedents in *Nollan v. California Coastal Comm'n* and *Dolan v. City of Tigard* would have governed San Jose's actions had it imposed those conditions through administrative action. In those cases, which both involved challenges to administrative conditions on land use, we recognized that governments "may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use."
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> For at least two decades, however, lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged

71. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013) (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983)).

72. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928 (2016).

> taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating. The decision below, for example, reiterated the California Supreme Court's position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears "a reasonable relationship to the public welfare."
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> I continue to doubt that "the existence of a taking should turn on the type of governmental entity responsible for the taking." Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.
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> Yet this case does not present an opportunity to resolve the conflict. The City raises threshold questions about the timeliness of the petition for certiorari that might preclude us from reaching the Takings Clause question. Moreover, petitioner disclaimed any reliance on *Nollan* and *Dolan* in the proceedings below. Nor did the California Supreme Court's decision rest on the distinction (if any) between takings effectuated through administrative versus legislative action. Given these considerations, I concur in the Court's denial of certiorari.[73]

As mentioned above in his concurrence to the denial of certiorari in *California Building Industry Ass'n v. City of San Jose*, Justice Thomas dissented to the denial of certiorari in *Parking Ass'n of Georgia, Inc. v. City of Atlanta* based on the same issue. He noted that "[t]he lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature."[74]

Practitioners and scholars anticipate that this issue will come before the Court once litigation presents the appropriate case to allow

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73. *Id.* at 928–29 (citations omitted) (respectively quoting Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586 (2013) (describing *Nollan/Dolan* framework); Cal. Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435, 456–59; Parking Ass'n of Ga v. City of Atlanta, 515 U.S. 1116, 1117–18).

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

the Court to give guidance to state and federal courts.[75] I am hopeful that some of the ideas presented in this publication as well as in my article, *When Local Government Misbehaves*, might help convince the Court to treat judicial scrutiny of legislative impact fees as a land use regulation. Instead of subjecting such fees to the *Nollan/Dolan* test, applicable state standards should govern judicial scrutiny. These state standards range from a deferential rational basis test in California to a searching inquiry in North Carolina.[76] The Court should distinguish legislative action from adjudicative action and give states the opportunity to apply their own standard of judicial review to legislative land use regulations.

Unlike most legislative actions, exactions pose a special concern because

> land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. . . . [and] [e]xtortionate demands of this sort frustrate the Fifth Amendment right to just compensation.[77]

Therefore, it is appropriate to apply a federal test (*Nollan/Dolan*) to physical and in lieu exactions—situations where it is necessary to "provide important protection against the misuse of the power of land-use regulation."[78] However, state and local legislative actions should receive deference, and any claim of a taking based on legislative action should be subject to *Penn Central* if it constitutes a partial

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75. *See, e.g.*, Dabbs v. Anne Arundel Cty., No. 18-54 (July 6, 2018) (petition of certiorari filed presenting the question of "whether legislatively proscribed monetary exactions on land use development are subject to scrutiny under the unconstitutional conditions doctrine"). *Compare* STATE AND LOCAL GOVERNMENT LAND USE LIABILITY § 12:10 (2017) ("Following *Koontz*, the U.S. Supreme Court is likely to apply *Nollan/Dolan* in the same manner as the California Supreme Court interpreted in *Ehrlich* and *San Remo*. . . . The *Nollan* and *Dolan* heightened scrutiny tests apply only to development fees imposed on an individual, ad hoc basis in a discretionary permit granting process, and not to general legislatively formulated fees."), *with* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 3:45 (2017–2018 ed. 2017) (stating that "the majority's decision [in *Koontz*] to extend *Nollan/Dolan* to monetary exactions can be construed to include both *ad hoc* monetary exactions as well as legislated exactions such as impact fees and even mandatory affordable housing requirements").

76. Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105 (2016); *see* Etheridge v. Cty. of Currituck, 762 S.E.2d 289 (N.C. Ct. App. 2014).

77. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594–95 (2013).

78. *Id.* at 2591.

taking, *Loretto* if it is a permanent physical occupation not associated with a permit request, or *Lucas* if it deprives a landowner of all economically viable use.

II. JUDICIAL, PRACTITIONER, AND ACADEMIC VIEWS AS TO IMPACT-FEE SCRUTINY

In his article, *Mandatory Set-Asides as Land Development Conditions*,[79] Professor Callies notes that even courts that do not apply heightened scrutiny to legislatively imposed fees do apply some form of *Nollan*'s essential nexus test. I agree that courts should apply a rational nexus test to legislative impact fees to make sure there is a rational connection between the fee collected and the project's impact that the fee will mitigate. As Professor Callies discusses in his article, such was the case in both the California Supreme Court's decision in *San Remo Hotel v. City & County of San Francisco*[80] and the New Jersey Supreme Court's decision in *Holmdel Builders Ass'n v. Township of Holmdel*.[81] He points out that the only part of the *Nollan* decision that these two cases did not apply was the act of shifting the burden to the government to prove the nexus.[82] The reason is that the burden of proof was unclear until the U.S. Supreme Court "clarified in *Dolan* that the burden of proof shifts to the government. There, the Court cited to *Nollan* when it said that 'the burden properly rests on the city.'"[83] What is important, however, is that all jurisdictions require some form of nexus between the harm caused by the development and the interest that the exaction purportedly serves. Thus, even under the California or New Jersey approach, *Nollan*'s requirement that the "'same' interest be served by the exaction still applies, albeit in different terms."[84] It seems we do agree on the need to apply a rational nexus test to impact fees. However, it is at this point that we part company. Professor Callies would apply the *Dolan* requirement of rough proportionality, while I would apply

79. David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42/43 URB. L. 307 (2010).

80. San Remo Hotel L.P. v. City & Cty. of S.F., 27 Cal. 4th 643, 41 P.3d 87 (2002).

81. Holmdel Builders Ass'n v. Twp. of Holmdel, 121 N.J. 550, 583 A.2d 277 (1990).

82. Callies, *supra* note 79, at 318–20.

83. *Id.* at 320.

84. *Id.*

a second rational nexus test that examines whether the government uses funds obtained from the impact fees for the purpose collected.

Professor Callies concludes his article by noting that most local government-inclusionary housing programs provide substantial density bonuses and other advantages to developers who are required to provide affordable housing. He advises that if local government wishes to mandate affordable housing set-asides or fees on development, it should make sure that they only apply to development that creates the need for affordable housing and are "set low enough to survive a proportionality challenge."[85] I agree that any legislatively adopted set-asides or impact fees, whether for affordable housing or other infrastructure needs, should only apply to development projects that adversely impact the public needs for which the fees were intended. However, requiring proportionality of the fee collected does not make sense in the case of legislatively imposed impact fees. The municipality has already calculated these fees based upon the needs of the community and upon an assessment of how different types of development activity affect those needs.

When a city council adopts an ordinance to establish impact fees, it calculates the legislative impact fee after an in-depth analysis of the impact that certain development activities will have on city services. For example, an ordinance setting wastewater impact fees will likely define the relevant factors in calculating these fees—such as the equivalent residential unit ("ERU"), plumbing fixture unit, service unit ("SU"), connection charge, strength factor, flow factor, etc.—based on the type of unit and the expected wastewater discharge from that particular use.[86] Various formulas will employ these factors to calculate an impact fee based on general information about the expected impact of particular uses. The municipality builds proportionality into the formula based on these factors. For example, in 2012 the City of Thousand Oaks, California, set a connection charge rate per service unit for wastewater at $10,168 and set the formula to determine service unit as SU = [(ERU) x (strength factor) x (flow factor)] or [(ERU) x (combined factor)].[87]

Applying the *Dolan* proportionality test to legislatively determined impact fees would require a court to review the city council's formulas

85. *Id.* at 329.

86. *See, e.g.*, CITY OF THOUSAND OAKS, 2011 USER FEE MANUAL, FISCAL YEARS 2011–2012 AND 2012–2013, 321–42 (2012), http://www.toaks.org/home/showdocument?id=2468.

87. *See id.* at 317.

and calculations to determine whether it had calculated these fees in proportion to the anticipated impact of the development activity. Such judicial scrutiny would be excessive, particularly when reviewing a legislative action. Instead, the dual rational nexus test requires the court to ask whether the city has used these collected funds to maintain and improve the wastewater collection system to ensure that these fees are not taxes collected and deposited into the city's general revenues.

The outcome from the *Nollan/Dolan* scrutiny over legislative impact fees may be the same as applying the *dual rational nexus* test, used in many states before the advent of the *Nollan/Dolan* test for exactions. Here, Professor Callies and I agree that distinguishing between legislative and administrative actions over impact fees may be a distinction without a big difference—*but there are differences.* The dual rational nexus test, applied to impact fees in many states, requires scrutiny—to make sure not only that the fees are related to the development's potential impact, but also that they are not a tax in disguise by requiring that the fees collected go to the specified purpose and are not deposited as general revenue. This test has a very different rationale for the scrutiny of impact fees than does the *Dolan* review for rough proportionality. The legislative process determines whether the impact fee is rationally related and proportional to the anticipated impact based on studies, formulas, calculations, etc., that are unconnected to the actual project proposed. Finally, treating exactions differently than impact fees preserves the distinction between legislative and adjudicative decisions. This distinction is an important part of land use jurisprudence and provides a check on the greater potential for governmental abuse of power when decisions are individualized.[88]

In his subsequent article, *Through a Glass Clearly: Predicting the Future in Land Use Takings Cases*, Professor Callies suggested that:

> (1) Land development conditions will continue to come under even more strict scrutiny for nexus and proportionality to the problems and needs generated by the development/developer so charged. This is particularly true with respect to affordable, workforce housing exactions—so-called "inclusionary zoning"—where the connection to market-priced housing projects has always been

88. Saxer, *supra* note 76, at 167.

> virtually non-existent. Only commercial developments generating a demonstrated need for low-income workers will successfully generate such mandatory housing set-asides.
>
> (2) Courts will continue to be confused by the difference, if any, between legislative and administrative/quasi-judicial exactions in the application of *Nollan-Dolan-Koontz*. If this last unresolved land development conditions issue reaches the United States Supreme Court, the Court is likely to find the distinction irrelevant.[89]

Professor Callies examined the ramifications of the Court's decision in *Koontz* and concluded "[w]hat the Supreme Court clearly decided" was as follows:

> (4) *Impact Fees*. The [*Koontz*] decision by its terms also applies to impact fees imposed by government to pay for public facilities such as schools, public parks, and wastewater treatment plants. There is no reasonable distinction among in-lieu fees, mitigation fees, and impact fees, since all are fees charged by government as a condition for land development approval (as distinguished from charges such as user fees and taxes, discussed below). All are embraced by the Court's term "monetary exaction," and thus all are now subject to the nexus and proportionality requirements of *Nollan* and *Dolan*.
>
> (5) *Other "Exactions" vs. Taxes and User Fees*. The dissent in *Koontz* makes much of the confusion between impact fees, on the one hand, and property taxes and user fees, on the other, that will become more significant as a result of the decision. . . .
>
> (6) *Legislative vs. Non-Legislative Conditions*. A key remaining issue with respect to land development conditions is whether different standards apply if the land development condition is legislatively, rather than administratively or quasi-judicially, imposed. While at least one sitting Justice on the Court has opined in a certiorari petition denial dissent that there is no defensible difference, other judges have suggested that deference to legislative determinations should lower the level of scrutiny applied to such legislative exactions as compared with administrative or quasi-judicial, one-off exactions.[90]

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89. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 44–45 (2014).

90. *Id.* at 46–48.

Professor Callies discusses whether to apply the *Nollan/Dolan* test to legislative actions.[91] He asserts that until the Supreme Court addresses the question of whether *Nollan*, *Dolan*, and *Koontz* apply to more generalized exactions, "it is likely that government entities will endeavor to adopt more generalized exactions that look like legislation" and argue that exactions challenged by landowners are not subject to heightened scrutiny because they are more legislative than adjudicative.[92] Professor Callies also addresses the potential for a "lose-lose" outcome if local government finds it easier to deny requests for permits outright rather than negotiate with applicants and face the heightened standard of *Nollan* and *Dolan*. Instead of encouraging negotiations that would allow landowners to trade property or money to obtain a permit, the bargains "w[ould] fail to occur because of the government's fear that [their] offer, even if rejected, w[ould] attract the heightened scrutiny that *Koontz* now requires."[93]

In his article *Legislative Exactions and Progressive Property*, Professor Timothy Mulvaney addresses this debate about the level of judicial scrutiny applied to administrative exactions and legislative impact fees in takings cases (although he calls both exactions).

He notes that there are three choices as to how to approach this debate:

(1) Subject both categories to a level that is deferential to the government—rational basis.
(2) Subject both categories to heightened scrutiny—*Nollan/Dolan*.
(3) Subject only administrative actions to heightened scrutiny—*Nollan/Dolan*.[94]

I would add a fourth category, which is the one that I advocate.

(4) Subject administrative actions (exactions) to *Nollan/Dolan* scrutiny and legislative impact fees to a dual rational nexus test.

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91. Callies, *supra* note 89.

92. *Id.* at 48.

93. *Id.*; *see also* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2611 (2013) (Kagan, J., dissenting) ("If every suggestion could become the subject of a lawsuit under *Nollan* and *Dolan*, the lawyer can give but one recommendation: Deny the permits, without giving [the developer] any advice—even if he asks for guidance.").

94. Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 138 (2016).

This fourth category contains the same first prong from *Nollan* but has a second prong that requires courts to scrutinize whether the municipality uses the impact fee for the purpose stated in support of the first prong, and not as a general revenue-raising device. If the municipality uses the fees it collects for general revenues, we should treat the impact fee as a tax, which may not be within the municipality's authority to enact. Applying this dual rational nexus test to impact fees retains the distinction between legislative and administrative actions—a distinction that runs throughout the land-use law framework.

Professor Mulvaney asserts that scholars who adopt the category three view (legislative exactions should be immune from heightened takings scrutiny) should be aware that "such a position could produce some second-order consequences that actually undercut the goals of progressive conceptions of property."[95] He goes on to state,

> In this Part, I identify and assess two potential anti-progressive secondary consequences of recognizing the legislative-administrative distinction in exaction takings law. I contend in the first section that pressing the idea that legislative exactions are significantly less likely to abuse property owners than administrative exactions (and thus deserve greater judicial deference) necessarily risks marginalizing case-by-case administration more generally, which could have important ripple effects on takings law outside the exactions context. I assert in the second section that formal acceptance of the legislative-administrative distinction in the exactions context could prompt governmental entities to retreat from employing administrative exactions and other administrative measures, a move that could come with substantial costs given that in many contexts only administrative processes can respond comprehensively to the heterogeneous impacts of a given development project and afford crucially important attention to the affected parties' personal, social, political, and economic identities.[96]

While I appreciate Professor Mulvaney's perceptive observations about the potential for second-order consequences when distinguishing between legislative and administrative actions, I assert that using the distinction between administrative action and legislative action in regards to impact fees and exactions is intellectually honest and

95. *Id.* at 140.
96. *Id.* at 152.

is not intended to achieve any particular political outcome. Courts have applied this distinction throughout the framework of land use law as a way to protect against local government overreach.[97]

The decision whether to recognize the distinction between legislative and administrative actions should not depend upon whether or not it promotes progressive property objectives. As a proponent of robust property rights, I support this distinction and argue that the outcome in this debate should not depend upon how it fits into any particular political or theoretical mindset. Professor Mulvaney contends that "cabining the application of *Nollan* and *Dolan* scrutiny to administrative exactions amounts to a pragmatic effort to halt expansion of what is perceived as an ill-conceived and dangerous roadblock to government regulation in the land use arena."[98]

As an advocate of not applying *Nollan* and *Dolan* scrutiny to legislative impact fees, I do not consider this heightened scrutiny applied to administrative exactions to be "an ill-conceived and dangerous roadblock." In fact, I support this heightened scrutiny, as it provides a much-needed check on the potential for government abuse in the individualized permitting process. I also support applying heightened scrutiny to other individualized actions such as eminent domain, both under the Fifth Amendment and under the RLUIPA (Religious Land Use and Institutionalized Persons Act) protections for religious institutions.[99]

The *Koontz* majority subjected in-lieu monetary exactions to the heightened scrutiny test of *Nollan/Dolan*. This approach fits within the existing state and federal judicial framework used to prevent land use regulatory abuse.[100] However, legislatively determined impact fees are not monetary exactions and should not be subject to *Nollan/Dolan* heightened scrutiny. Instead, courts should evaluate impact fees under existing state standards, which range from rational basis scrutiny to more exacting reviews.

> Much debate and scholarship has followed the *Koontz* decision. Some have predicted that the consequences will be dire for local governments if the Court's holding is applied to any monetary

97. Saxer, *supra* note 76, at 115.

98. Mulvaney, *supra* note 94, at 141.

99. Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653 (2004).

100. Saxer, *supra* note 76.

> fee demanded of developers and possibly to environmental regulation as well. Justice Kagan's dissent, which disagreed with the majority's extension of *Nollan* and *Dolan* to the payment or expenditure of money in government permitting, expressed this concern by avowing that the uncertainty of this rule "threatens to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny." Others assert varying views including that 1) the *Koontz* decision is a "big yawn" that will have little effect, particularly on environmental regulation, which is already governed by environmental impact review; 2) the *Koontz* majority was wrong to extend the *Nollan/Dolan* inquiry to monetary exactions and instead should have recognized that the claim ultimately rests on substantive due process that should be governed by the deferential rational basis standard; 3) similar to the impact of *Nollan/Dolan,* after *Koontz,* planners and local officials will do a better job of "justifying and documenting the rationale for exacting money or land from developers"; 4) *Koontz* created a per se taking when a government attaches a monetary obligation to property that cannot be classified as a tax; 5) the Court's *Nollan/Dolan* limitations on land-use negotiations "run counter to the economic idea that takings jurisprudence makes governments face a higher cost for regulation"; and 6) the courts should differentiate between fees and expenditures such that heightened scrutiny should apply to fees only where the permit applicant is required to directly transfer money to the government, but not to expenditures that "require a permit applicant to spend money to carry out mitigation activities." This Article, with the support of others, proposes that in-lieu exactions that are individually assessed as part of the permitting process should be treated differently than the impact fees that are developed through the legislative process and applied equally to all developers without regard to the specific project.[101]

In *Takings and Extortion*, Professor Daniel P. Selmi rejects what he calls the "extortion narrative," which underlies the Court's recent exaction cases and "sees local governments not as acting in good faith in the public interest, but as fixed on extorting concessions out of developers."[102] Professor Selmi first reviews the Court's takings

101. *Id.* at 108–09 (citations omitted).

102. Daniel P. Selmi, *Takings and Extortion*, 68 FLA. L. REV. 323, 325 (2016).

cases on exactions to show how the Court developed and endorsed the extortion narrative beginning in 1987 with the *Nollan* decision. Selmi notes that *Koontz* in its holding and reasoning "fully reflect[s] the extortion narrative in the context of exactions takings."[103] He then examines the "basis for [t]his fundamental premise that governments are prone to misuse their land use power"[104] and finds that the following theories may explain the basis:

1. The economic theory, particularly the public choice theory "proposes that, like individuals acting in the private sector, regulators will act largely in their self-interest" and that politicians will seek to extract benefits for voters from proposed projects to gain re-election from the voters who outnumber developers;[105]
2. The impacts addressed by exactions are believed to have expanded to include environmental degradation, housing, and additional conditions negotiated by development agreements;[106]
3. Development interest groups are believed to use the narrative as "an important vehicle both for attracting the Court's attention to appeals and for articulating a theme in briefing them;"[107]
4. The narrative is believed to be aligned "with the personal political ideologies of the individual Justices who make up the majority in the exactions cases" based mainly on the "distrust of local government efforts at environmental protection."[108]

Professor Selmi asserts that "the extortion narrative does not rest on literal proof of extortion" but rather on whether the imposed or proposed exactions fail the *Nollan/Dolan* test.[109] Even if the local

103. *Id.* at 327–33.

104. *Id.* at 338 (noting that the Court did not explain the basis for this narrative in *Nollan*, *Dolan*, or *Koontz*).

105. *Id.* at 338–39 (noting that this theory fails to take into account the studies that have examined conditions placed on projects by the government and found that government has not overreached, as well as the fact that developers have the ability to exit those jurisdictions that overreach and instead use the economic power of development interests at the local level).

106. *Id.* at 340–41.

107. *Id.* at 341.

108. *Id.* at 341–42.

109. *Id.* at 362.

government acted in good faith when imposing conditions, courts will automatically assume extortion if the exactions fail the test.[110] In addition, Selmi notes "the Court now has fully linked its exactions jurisprudence to the unconstitutional conditions doctrine," which is "nowhere reflected in the text of the Constitution," and thus distances the Court's jurisprudence from the actual language of the Fifth Amendment.[111] Professor Selmi concludes by suggesting that, while "[a] majority of the Court has endorsed the extortion narrative," there are critical flaws in this narrative such that it will not provide a convincing and sustainable foundation for exactions takings law.[112]

The unconstitutional conditions doctrine creates an analytical "fly in the ointment" for takings jurisprudence and is an unnecessary distraction from the language of the Fifth Amendment. Without using this doctrine, the *Nollan* decision created an exception to the per se taking rule for physical occupations under *Loretto* when the government imposed an exaction in exchange for granting a permit, even though the government would be justified in denying the permit entirely unless such denial resulted in a taking under the *Penn Central* test. In my view, it was unnecessary to add the unconstitutional conditions doctrine to the takings analysis in the *Dolan* case, which established the degree of nexus needed under *Nollan* to avoid the per se physical taking claim from *Loretto*. Extending this test to in-lieu monetary exactions in *Koontz* did not require the unconstitutional conditions doctrine. The *Nollan* case had already established the exception to *Loretto* for exactions demanded in exchange for permit approval when the government could constitutionally deny the permit without paying just compensation.

The concern about overreach or government abuse of power in local land use regulation has driven the development of varying degrees of judicial scrutiny in our land-use law jurisprudence long before the Court raised the "extortion narrative" in the *Nollan* decision. My article, *When Local Government Misbehaves*, addresses the "various levels of scrutiny applied to land-use decisions and shows how these levels are designed to prevent the abuse of power, particularly when actions are exercised at the individualized level."[113] I compare

110. *Id.*
111. *Id.* at 373–75.
112. *Id.* at 376.
113. Saxer, *supra* note 76, at 110.

> the scrutiny levels applied to land use actions[—]such as: legislative versus administrative actions; spot zoning challenges; consistency with the general plan; impermissible delegation of legislative authority; initiative and referendum authority; eminent domain challenges; and constitutional challenges, both facial and as applied[—]to corroborate the theme that abuse of power is controlled through increased judicial scrutiny when appropriate.[114]

It is this consistent framework, not the "extortion narrative," that supports subjecting ad hoc in-lieu exactions to heightened scrutiny when a developer applies for a permit. However, this rationale should not apply to uniform monetary fees imposed legislatively.

State courts have been uncertain as to whether they should subject legislatively enacted impact fees to the *Nollan / Dolan* test. Courts in California, Arizona, Georgia, and Colorado have found that it does not apply,[115] while courts in Washington, Illinois, South Dakota, and Oregon have applied the *Nollan / Dolan* test to legislative actions.[116]

After the *Koontz* decision, the Washington Court of Appeals in an unpublished decision rejected the unconstitutional conditions challenge by the Common Sense Alliance against a county ordinance requiring the dedication of property by owners applying for permits to develop shoreline parcels.[117] Relying on an earlier "Washington appellate court decision that characterized *Nollan* and *Dolan* as establishing a due process test, subject only to minimal scrutiny," as well as the dissent in *Koontz*, "the lower court concluded that a landowner may not challenge a legislative exaction under the doctrine of unconstitutional conditions."[118] Instead, "the lower court applied a rule that excludes legislatively-imposed exactions from heightened *Nollan / Dolan* scrutiny."[119]

The Utah Supreme Court in *Alpine Homes, Inc. v. City of West Jordan* adjudicated property developers' allegations that the City violated regulations requiring a municipality to spend the impact fees

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114. *Id.*

115. *See* Daniel J. Curtin, Jr. & Andrew Gowder, Jr., *Recent Developments in Land Use Planning and Zoning Law Relating to Exactions*, 36 URB. LAW. 519 (Summer 2004).

116. Callies, *supra* note 89, at 49–50.

117. Petition for Writ of Certiorari, Common Sense Alli. v. San Juan Cty., 137 S. Ct. 58 (2016) (No. 15-1366), 2016 WL 2754833 *8–9 (writ of certiorari denied).

118. *Id.* at *8–9 (citing Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 160 Wash. App. 250, 273–74 (2011)).

119. *Id.* at *9.

collected on specific categories of expenditures within six years.[120] The court held that "[t]he developers' allegations here that West Jordan either failed to spend impact fees within six years or spent the fees on impermissible expenditures are inadequate to support a takings claim."[121] The court explained that "[t]he manner in which a city spends impact fees does not affect the constitutionality of the initial demand for fees, which is the focus of the *Koontz* monetary exactions analysis."[122] However, the Utah court's analysis seems to confirm that it would subject impact fees to the *Nollan/Dolan* test. It stated, "In the context of a city's demand for impact fees in exchange for a land-use permit, the applicant may challenge the fee by asserting that it lacks either an essential nexus or rough proportionality to the anticipated external impacts of the proposed development."[123]

The California Court of Appeal in *616 Croft Ave. v. City of West Hollywood* relied on the California Supreme Court's decision in *California Building Industry Ass'n v. City of San Jose* to resolve a challenge to an affordable housing ordinance.[124] The appellate court held that a city ordinance, requiring developers "to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an 'in-lieu' fee designed to fund construction of the equivalent number of units the developer would have otherwise been required to set aside," was not an exaction.[125] Therefore, the restriction was not subject to *Nollan* and *Dolan* scrutiny and was instead "a municipality's permissible regulation of the use of land under its broad police power."[126]

Federal courts have also struggled with the level of scrutiny required for legislatively enacted impact fees. A federal district court in Illinois reviewed state and federal constitutional challenges to an ordinance enacted by the City of Chicago to increase the availability of affordable housing in Chicago. In *Home Builders Ass'n of Greater Chicago v. City of Chicago*, a real estate developer was required to

120. Alpine Homes, Inc. v. City of West Jordan, 845 Utah Adv. Rep. 57 (2017).

121. *Id.* ¶ 29.

122. *Id.*

123. *Id.* ¶ 28 (citing Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595, 2603 (2013)).

124. 616 Croft Ave. v. City of West Hollywood, 3 Cal. App. 5th 621, 628 (2016) (citing Cal. Bldg. Indus. Ass'n. v. City of San Jose, 61 Cal. 4th 435, 443–44 (2015)).

125. *Id.*

126. *Id.* (quoting *City of San Jose*, 61 Cal. 4th at 457).

"set aside two housing units for rent or sale to low-income residents, or pay a $200,000 fee."[127] The developer paid the fee and then filed a takings claim in state court. The City of Chicago removed the case to federal court and the court dismissed the claim.[128] The court discussed the unconstitutional conditions doctrine applied in *Nollan*, *Dolan*, and *Koontz*, and noted that although the *Koontz* Court held that monetary fees imposed in lieu of a requirement to dedicate property are subject to the *Nollan/Dolan* test, it "did not hold . . . that all fees related to property regulation must meet the 'essential nexus' and 'rough proportionality' requirements."[129] Explaining that a restriction on the use of property is different from a seizure of property, the court noted that such a restriction is not a taking requiring compensation "unless it goes so far as to be a regulatory taking under *Penn Central Transportation Co. v. City of New York*."[130] These recent state and federal court decisions illustrate the debate and the need for guidance from the U.S. Supreme Court.

In addition to litigating these issues and preparing amici briefs in support of one side or another, practitioners have weighed in on whether the U.S. Supreme Court will require legislatively imposed monetary exactions to be subject to heightened scrutiny under the *Nollan/Dolan* test. For example, a Sacramento lawyer, Glen Hansen, suggests, "the Court should find that neither the heightened scrutiny of *Nollan/Dolan*, nor the *Penn Central* factored analysis, should govern legislative exactions that (1) are generally applied, and (2) are based on a set legislative formula that provides no meaningful discretion to administrators in its application to specific properties."[131] Instead, he recommends that such legislative exactions should be subject to a reasonable-relationship test, adopted by state governments such as California, Colorado, and Ohio.[132] Mr. Hansen acknowledges that his recommendation is to follow Justice Kagan's suggestion in her *Koontz* dissent "that the Court 'approve the rule, adopted in several

127. Home Builders Ass'n of Greater Chicago v. City of Chicago 213 F. Supp. 3d 1019, 1021 (2016).

128. *Id.*

129. *Id.* at 1023–24.

130. *Id.* at 1024 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

131. Glen Hansen, *Let's Be Reasonable: Why Neither* Nollan/Dolan *Nor* Penn Central *Should Govern Generally-Applied Legislative Exactions After* Koontz, 34 PACE ENVTL. L. REV. 237, 291 (2017).

132. *Id.*

States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed ad hoc, and not to fees that are generally applicable.'"[133]

I agree that legislatively imposed monetary exactions, which I would call impact fees, should not be subject to the *Nollan/Dolan* test, but should instead be subject to the appropriate state standard. However, Hansen would substitute the reasonable-relationship state standard for existing state tests, such as the dual rational nexus test, and use this reasonable-relationship test as a new takings standard in place of *Penn Central*. Here we disagree as to the scrutiny that courts should apply to what Hansen calls legislative exactions. I submit that impact fees should be subject to the appropriate state standard, such as the dual rational nexus test, the reasonable-relationship test, or other existing state tests to distinguish these fees from unauthorized taxes. However, if the impact fee passes the applicable state test but "goes too far" in the impact the regulation has on the landowner's property, the landowner should still be entitled to bring a takings challenge and have it evaluated under the *Penn Central* analysis.[134]

A real estate partner at Sheppard Mullin offered helpful commentary about this issue in her article, Nollan*,* Dolan*, and the Legislative Exception*.[135] Deborah Rosenthal explained, "Most state courts addressing the issue have held that heightened scrutiny under *Nollan* and *Dolan* does not apply to legislatively adopted exactions.

Instead, they opine, fees and other exaction programs are subject to the same deferential 'rational basis' test applied to land use regulation under the police power."[136] Rosenthal predicts that "the legislative exception will be rejected by the Supreme Court, at least in its most extreme forms."[137] She argues that "both *Nollan* and *Dolan* resulted from generally applicable legislative programs" and that the easements required to obtain coastal development permits were neither ad hoc nor negotiated.[138]

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133. *Id.* at 254 (quoting Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting)).

134. *But see id.* at 281–85 (explaining why *Penn Central* should not be applied to legislative exactions).

135. Deborah M. Rosenthal, Nollan*,* Dolan*, and the Legislative Exception*, 66 PLAN. & ENVTL. L., Mar. 2014, at 4.

136. *Id.*

137. *Id.*

138. *Id.*

Rosenthal contends that *Nollan* and *Dolan* analysis asks three questions: 1) whether the exaction would be a Fifth Amendment taking if imposed as a stand-alone requirement; 2) whether there is an "essential nexus" between the exaction and the project impacts; and 3) whether the exaction is "roughly proportional" to the project impacts.[139] She suggests "heightened scrutiny is appropriate when courts are making fundamentally legal decisions about the character and nature of an exaction under the first two *Nollan* inquiries."[140] The time to challenge these decisions is during the adoption of the generally applicable, legislative-exaction programs, and "[h]eightened scrutiny is not appropriate when a legislatively adopted, generally applicable exaction is challenged under 'rough proportionality' at the individual permit level."[141]

Rosenthal's approach is similar to mine in that we agree that legislatively imposed impact fees should be subject to *Nollan* scrutiny because if the fees were requested unconnected to a permit application, they would be a per se taking. In order to be an exception to the per se physical taking of money under *Loretto*, the request must be in exchange for the granting of a permit. In addition, there needs to be an "essential nexus" between the fee required and the project's impacts. However, I contend that applying the "rough proportionality" test from *Dolan* is not appropriate at the individual permit level because the legislature has already determined the "rough proportionality" when it developed the generally applicable formula, as discussed above in the example from Thousand Oaks, California.[142]

CONCLUSION

Until the U.S. Supreme Court speaks directly to the distinction between adjudicative exactions for individual development permitting and legislative impact fees designed to offset the general externalities created by land development, local governments, courts, litigators, and scholars will continue to struggle with whether to apply the *Nollan/Dolan* test to these municipal requirements. I give due deference to Justice Thomas's recognition of this ongoing debate and

139. *Id.*
140. *Id.*
141. *Id.*
142. *See supra* text accompanying note 86.

his view that there should be no distinction between adjudicative and legislative actions. However, I assert that this distinction governs land use jurisprudence and guides the judicial scrutiny of local government action.[143] The Court should recognize this distinction to determine when the judicial branch should give deference to local legislative actions and when the courts should subject individualized government actions to heightened scrutiny to control the abuse of power.

Legislatively enacted impact fees should have a rational nexus (the "essential nexus" required by *Nollan*) between the impact that a particular type of development is expected to create and the fee that is generally imposed. However, courts should not subject these fees to the *Dolan* test for rough proportionality because the legislature has already monetarily assessed the impact caused by prototypical development projects. Studies, past experiences, formulas, and guidance from other municipalities will be the basis for these legislative determinations, which should be entitled to judicial deference. Instead, states should be free to apply the appropriate level of judicial scrutiny, ranging from a rational basis level to a more searching inquiry, which could include the dual rational nexus test that reviews whether the local jurisdiction is using the fees collected to offset the actual impact the development imposes.

We should not ignore the distinction between legislative and administrative actions in the context of exactions and impact fees, as this distinction is a bedrock principle of land use law. If the Court finds the distinction to be meaningless in this context, it will threaten the established land use framework that applies heightened scrutiny to local action only when there is concern that government abuse is more likely because of an individualized determination. Subjecting legislative impact fees to the heightened *Nollan/Dolan* scrutiny has the potential to erode the separation of judicial and legislative power by diminishing the degree of judicial deference given to state and local legislative action. Instead, states should retain the right to establish the level of judicial scrutiny applied to local land use regulation. If such regulation is so onerous as to constitute a taking under state or federal constitutional law, landowners should be entitled to bring a takings challenge under *Penn Central* as a partial deprivation of property based on legislative action, or under *Lucas* or *Loretto*, if applicable.

143. *See generally* Saxer, *supra* note 76.