

THE BUNDLING PROBLEM IN TAKINGS LAW: WHERE  
THE EXACTION PROCESS GOES OFF THE RAILS

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Thank you very much for having me speak at this conference, and congratulations to you, Michael, for having done so much work in this area for the past forty years. My job on this occasion is to explain why it is necessary to examine the exaction question from the ground up in order to reach a principled solution to what has become a confused body of legal doctrine about an ever-more common legal practice.

I take this view because what is striking about virtually all of the Supreme Court decisions in this area is that they assume a legal universe in which the status quo ante is unquestioned. Thus the cases proceed as though it were perfectly legitimate to make claims that the state possesses some kind of omnibus environmental easement that in turn requires all private owners to engage in actions of environmental mitigation before being allowed to develop their private land. The rule in question surely applies to wetlands in light of the record in the recent Supreme Court decision in *Koontz v. St. John's River Water Management District*.<sup>1</sup> But it is not limited to wetlands, for in *Koontz* it applied to uplands as well. Indeed, I will go further to note that the same logic applies to all sorts of urban and rural land. The government thinks that it is within its right to insist that it need issue permits for development only to private parties who toe the line on the conditions that it imposes. The common view of most lawyers, moreover, is that this process escapes any serious challenge under the Takings Clause, which provides, as we all know, “nor shall private property be taken for public use, without just compensation.” On this issue, *Koontz* gave a modest victory to the landowner, which resulted

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1. 133 S. Ct. 2586 (2013). For my earlier views, see Richard A. Epstein, *The Supreme Court's Mischievous Environmental Easement*, POINTOFLAW.COM (Feb. 5, 2013, 5:46 PM), <http://www.pointoflaw.com/archives/2013/02/richard-epstein-the-supreme-courts-mischievous-environmental-easement.php>.

in a remand. But even that action has led at least one commentator to ask whether *Koontz* is “The Very Worst Takings Decision Ever.”<sup>2</sup>

It is equally clear that one reason for the reticence is that neither the Supreme Court nor most commentators want to attack head on the basic question, which is, whether it is possible to optimize social welfare by the consistent application of the Takings Clause, and if so, how. Instead there is a tendency to follow the unfortunate trend set out by Justice William J. Brennan in *Penn Central Transportation Co. v. City of New York*,<sup>3</sup> who insisted that general principles cannot be developed under the Takings Clause, which in the end is best explicated by a series of ad hoc decisions that cannot be reduced to first principles.<sup>4</sup> It is all too apparent that no such approach will succeed if the Supreme Court is not prepared to undertake the effort. So let us go back first to the theory of the Eminent Domain Clause, then see how it applies to the *Nollan* case, which I think is paradigmatic, and then see how it applies to the situations in *Koontz*.

### I. THE ECONOMIC LOGIC OF THE TAKINGS CLAUSE

The basic problem in organizing a system of rights over real property is that land, and the improvements made to it, are not movable, so conflicts necessarily arise in which neither party has within it the power to move out of harm’s way. In addition, developers need at times to assemble land, which cannot be done through voluntary transactions, in order to make spaces suitable for productive development, whether for a new city hall or for a railroad track.

Now, at this point there is a choice. The assembly in question could be done by fiat: the government just announces that it will take land to devote to these public uses without having to pay compensation for what it has taken. But it is just that option that is foreclosed by the Takings Clause, which at the very least is meant to be a bulwark

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2. See John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1 (2014).

3. 438 U.S. 104 (1978).

4. *Id.* at 124 (noting the use of “essentially ad hoc, factual inquiries,” because his Court, “quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons”) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

against the all too foreseeable instances of arbitrary exercises of government power. There is an enormous danger in allowing the government to take property for public use, without just compensation, even after the most solemn deliberation. Those deliberations can stress public benefits without offering the disinterested observer any indication as to whether the transaction that the government proposes will *on net* advance the public welfare. Yet that desired social outcome will not be the case if the value of the property in public hands, when used for public use, is lower than its value in private hands, when used for the private use that the government action displaces. The Takings Clause is meant not only to compensate people whose property has been taken; it is also needed to stop that stream of unwise government actions from taking place.

Yet what is the alternative? One possibility is to use a model of voluntary transaction so that all the parcels intended for a particular development can only be taken with the unanimous consent of every individual whose property is going to be taken. That insistence on consent follows from a strong libertarian model that holds that the only proper uses of government power are to prevent the use of force and fraud. The recalcitrant landowner has done neither, so his power to hold out for the price that he desires must be protected. The result is not simply that it will cost more money to build the public project. It is that in many cases the project will not get built at all, as the multiple, strategic demands of individual landowners will block the public project even when its completion does serve the common good by the metric mentioned above: the property is more valuable in public hands than in private ones.

The constitutional solution that gets us between the horns of this dilemma is that the government may take for public use so long as it pays just compensation. In the case of the town hall or the railroad, it becomes a political judgment as to whether that public use is wise or not. That judgment in turn is exercised more sensibly when the taxing power of the state is so constrained that government can neither force the cost of the taking onto one select group when the benefit is widely dispersed, nor conversely require payments to come from general revenues when the benefit is limited to a select group of the public at large.

Bracketing that public use problem in this case, it is clear that the takings power gets rid of the holdout power that could otherwise be

exercised by determined individuals, while the just compensation requirement constrains greedy government officials from taking something for nothing. As Jim Burling said in his earlier remarks, there is no question that if the government can take property at a zero price, it will take a lot of property. But if government has to pay market value for the property taken, it will take a lot less. In most cases we do not allow private parties to take individual pieces of property from others without just compensation, because a competitive market helps determine correct prices. But even if they had the power to take, it would never be for zero price. Government may have the power to force transactions that are denied to private parties, but if they are endowed with the special power to take without consent, then just compensation limitation is critical to making sure that this power is exercised only for proper purposes—namely, at fair value when the holdout problem cannot be avoided through voluntary transactions.

The just compensation formula is thus the key to good government. It helps shape the way in which the government takes land and the way in which the government collects its taxes. In each case the proper application of government power is restricted, to the extent that human institutions can make it so, to cases in which the value of particular pieces of private property are greater in public hands than in private hands. If it is not, then it is unlikely that the government would make the purchase in the first place.

Social welfare is at the core of the takings power. Knocking out the takings power undermines social welfare by inducing the government—or more accurately, some dominant political coalition—to over-consume. The upshot is the same type of resource distortions that arise whenever private parties are allowed to take each other's property for zero price. Our laws are intended to block private theft. They should do the same thing with government theft.

## II. EXACTIONS

It is ironic that it took so long for the exactions question to receive explicit treatment under the Takings Clause in the famous decision in *Nollan v. California Coastal Commission*.<sup>5</sup> That delayed response

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5. 483 U.S. 825 (1987).

is particularly surprising since the law of exactions has long been a part of the general law of unconstitutional conditions. “Stated in its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of that person’s constitutional rights.”<sup>6</sup> Sometimes it is said that the “greater” power to exclude necessarily entails the “lesser” power to allow exercise of right, subject to conditions. Originally that position was accepted as a constitutional tautology,<sup>7</sup> but with time it became clear that the power to *select* the target of regulation was a far more dangerous power. Thus the doctrine of unconstitutional conditions was applied as early as the 1920s in *Frost v. Railroad Commission*<sup>8</sup> to strike down a California law that required all private haulers to act as common carriers—i.e., take all comers at reasonable rates—if they wanted to gain access to the public highways. Justice Sutherland made it clear, at least for the moment,<sup>9</sup> that the state could not use its monopoly power over the public roads to destroy competition among various types of carriers using those roads. The point is worthy of generalization. The correct use of exclusive government powers is the advancement of competition in all relevant dimensions.

This problem is an enormous one, for the government exerts monopoly power not only when it operates the only public highway system in town, but also when it issues or withholds building permits. It was just that power that set up the Supreme Court’s decision in *Nollan*. In that case the Coastal Commission wished to condition the

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6. For an extensive discussion, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 5 (Princeton Univ. Press 1993).

7. See *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses.

So it may take the less step of limiting the public use to certain purposes.

*Id.* The decision was rightly overruled in *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). For my discussion of this evolution, see RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 425–32 (2014).

8. 271 U.S. 583 (1926).

9. *Frost* was largely gutted by Sutherland himself in *Stephenson v. Binford*, 287 U.S. 251 (1932).

issuance of a building permit to the Nollans on their willingness to convey to the public a lateral easement that cut across the front of their land above the high-water mark. There was in fact no substantive difficulty with the application, for the Nollans only wished to replace their small beachfront bungalow with a larger house that was similar in all respects to those along its stretch of the beach, so there were no traditional police power issues of either health or safety. For these purposes, it is also safe to assume that an easement open to all counts is one that is dedicated to public use. But the real challenge is to decide whether the public gain from the creation of this lateral easement exceeds the private loss. Accordingly, the correct intellectual inquiry runs as follows: let the government figure out exactly what that lateral easement is worth to its citizenry. Once it has collectively made that determination, it then can raise funds through taxes or fees to compensate the landowner for the loss of value to his property after it condemns the easement. If the public body does its calculations correctly, and it concludes that the value of the easement is indeed greater than the reduction in value of the servient land to its owner, it takes the easement and pays the compensation.

That simple process yields a social improvement because the public is better off, and the individual landowner is not worse off. Equally important, if it turns out that the price is *not* worth paying, then the government does not condemn the easement, which again leads to the correct social outcome. The purpose of prices in markets is to prevent some ill-advised transfers. The same happens in the government context. Clearly, the effectiveness of this argument depends on the accurate valuation, but that point is true in all takings cases whenever there is no ready market to measure the value of any divided interest in property, which is commonly the case.

Now, most government agencies are convinced of the worth of their public mission, so they would like to find a way to move forward with their regulatory programs without having to pay anything at all. It is there where the permit power intervenes by allowing the state regulator to *bundle* the permission to build with the willingness of the owner to sacrifice that lateral easement or other interest. Allowing this tactic to work should be regarded as an abject form of judicial capitulation to the destructive forces of special interest politics.

To see why, consider two cases. First, assume that the building permit is worth \$100,000 to the property owner who wants to build or

expand a beachfront house. Assume further that the lateral easement across the front of the property imposes on the landowner a cost of only \$25,000. Faced with this inevitable choice, the rational landowner will compare the gains from receiving the building permit against the losses from surrendering the easement. He will then choose the more valuable item and accept the condition, ending up \$75,000 to the good. At one level, this looks like a bargain for mutual gain, which it is against the status quo ante in which no permit is granted and no easement created.

Unfortunately, the analysis above asks the wrong question, because the choice made by the landowner does not address the social choice of whether or not the lateral easement is worth more to the public at large than the cost the encumbrance imposes on the original owner. What is needed here is the head-to-head comparison of the rival uses. So in each and every case in which the government bundles the permit with the easement, it is avoiding the fundamental question behind the Takings Clause: is the easement worth more in public or private hands? If it is worth more in public hands, there is an increase in social welfare. But if not, then the taking should not take place, given the decline in social welfare. Bundling always obscures that choice, and so it should never ever be allowed. Once it is prohibited, then the government body has to make the normal social calculation by asking whether the easement costs the government in taxes and fees more than it is worth. Thus if the value of the easement to the public is only \$15,000 in the above case, the government should not receive it, because overall social value dips from \$100,000 to \$90,000 ( $\$100,000 - \$25,000 + \$15,000$ ). In the other case it increases from \$100,000 to \$110,000 ( $\$100,000 - \$25,000 + \$35,000$ ). But under the bundling technique, it is impossible to tell whether that easement is worth \$35,000 or \$15,000, so there is a built-in certainty that error will manifest itself in some cases. That won't happen if the permit is separated from the easement, in which case the payment of compensation supplies a strong sorting mechanism. The condemnation goes forward only when the easement produces gains, but not otherwise.

Now, this bundling problem is compounded in *Koontz* by the incorrect way in which the law now defines the relevant set of property rights. Generally speaking, the orthodox theory of the Takings Clause holds that private property is defined under state law, after which

the government then decides whether or not to exercise its powers of condemnation. In order to figure out what the phrase “private property” means, however, it is not possible to work with two inconsistent definitions simultaneously. It is not correct to say that that private property means one thing in disputes between private parties and quite another when the dispute is between the government.

Unfortunately, this intellectual confusion now dominates the Supreme Court’s tortured view on the enormous breadth of the federal government’s navigation servitude, which is said to dominate all private interests in any navigable body of water. Textually, it is a huge stretch to say that the power of Congress to regulate commerce among the several states gives it the power to sweep aside all private property interests in water. Yet just that thoroughly mischievous and confused proposition was roundly endorsed by Justice Robert Jackson in *United States v. Willow River Co.*<sup>10</sup> That position was later endorsed by Justice William O. Douglas in a narrow five-to-four vote in *United States v. Twin City Power Co.*<sup>11</sup>:

It is no answer to say that these private owners had interests in the water that were recognized by state law. We deal here with the federal domain, an area which Congress can completely preempt, leaving no vested private claims that constitute “private property” within the meaning of the Fifth Amendment.<sup>12</sup>

This creation of government property by fiat wipes out all traditional private rights, and it does so when there is nothing about the navigation system that precludes the standard application of the eminent domain power to protect the complex array of “usufructuary” water interests: riparian access, the ability to maintain a wharf of a mill, and so on. The mindset behind the navigation easement also leads to a similar assertion of powers outside the navigation easement, for it is no accident that Justice Brennan in *Penn Central* placed explicit reliance on *Willow River* in a decision that, when all was said and done, refused to recognize that air rights were fully vested property interests under New York law.<sup>13</sup>

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10. 324 U.S. 499 (1945). For my extensive criticism of the navigation servitude, see Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, in PROPERTY IN LAND AND OTHER RESOURCES 317, 342–51 (Daniel H. Cole & Elinor Ostrom eds. 2012).

11. 350 U.S. 222 (1956).

12. *Id.* at 227.

13. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978).



Note the political dynamic that follows. If there is a set of neighbors who wish to restrict certain use by a private party, they will typically have to purchase a restrictive covenant to achieve their ends. But if the government has rights that transcend those of the citizens it represents, acquisitive neighbors may not seek to obtain that same restriction at no cost to them by the enactment of some kind of a zoning law or other restrictive program. The Takings Clause was intended to rein in these grand factional ambitions. The ability to redefine property rights undercuts that function and opens up endless opportunities to public abuse and confusion, which thus undercuts the central mission of that clause.

It is now easy to predict what will happen in a wide variety of political circumstances. Let us suppose a majority gets together and thinks that it is appropriate to restrict what the neighbor can do with his property. So the local majority, in the form of the local water management district, informs someone like Mr. Koontz, who wishes to build on his property, that he must comply with an environmental easement over his property. That decision in effect requires him to buy back the right to use his property from government in order to go forward with his building plans.

Not surprisingly, this supposed environmental easement has been recognized nowhere in the history of Western civilization until the rise of the modern environmental movement. Generally speaking, easements have to be created by agreement or by prescription. In a few limited cases they are created by implication<sup>14</sup> or necessity.<sup>15</sup> But the environmental easement has no known contours but is so definite that the government can pump up its contours by assertion in order to increase the size of its exaction. The grand assertion of this easement should be treated as a massive taking. Since no compensation is ever forthcoming for its creation, the condition should be struck down forthwith under a per se rule. That decision does not block any water district decision to take private lands for environmental purposes. It only ensures that the desirable set of incentives with it are created through the standard eminent domain process in which the government, acting as the agent for the public, pays full value for what it takes.

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14. See, e.g., *Sanborn v. McLean*, 296 N.W. 496 (Mich. 1925) (sewage easement by implication on the subdivision of a single parcel of land).

15. *Othen v. Rosier*, 226 S.W.2d 622 (Tex. 1950) (denying the doctrine when the lock in is not created by a single conveyance).

What is so appalling about the *Koontz* case is that both sides agree on the one point that should be emphatically rejected—namely, that the government has the environmental easement that allows it to insist as of right on a program of environmental mitigation as a precondition for issuing a building permit. At this point, *Koontz* starts to resemble the current situation under rent control laws, where at the end of a lease the landlord has to *repurchase* the right to reoccupy the premises from his newly empowered tenant, even though he is entitled to regain possession as of right under the terms of the lease. The definition of what the landlord owns is the exclusive right to buy back from the government, at a price satisfactory to the government, that which he already owned under the common law of property. I commend Justice Samuel Alito for writing an opinion that imposed some modest limits on government power. But the incurable defect of his opinion is to address, and to reject, the claim that the government easement allows it to impose, as of right, a duty of environmental mitigation on a private landowner.

Once the environmental easement is rejected, the case takes on a radically different posture, for it is now necessary to first establish the relationships between private parties in order to understand the scope and limits on government power. In *Koontz*, this inquiry raises some serious issues. To recap, Koontz owned about fourteen acres of land on which he wanted to build on a little less than four acres. As an aside, it is not clear whether or not he reduced his demands solely because he knew that he would have to respond to the demand for environmental mitigation. Anyhow, for him to accomplish his program he agreed in his permit application to build up the land in one place and regrade it in another. He also agreed to build a dry-bed pond that would allow him to control the flow of storm water that could run off from his building and its nearby parking lot. This last request is surely appropriate, for there is no doubt in my mind that if in fact he had so constructed the land to increase the run off into public waters or into his neighbors' land, his conduct would amount to a tort under the standard rule of *Rylands v. Fletcher* that renders it wrongful to bring, keep, or collect water on his land responsible for its escape.<sup>16</sup> Indeed that last position was rightly affirmed by the

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16. See *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), *aff'g*, L. R. 1 Ex. 265 (1866). The case involves further complications in that the water was not fully collected but was only run off.

Supreme Court in *Dolan v. City of Tigard*,<sup>17</sup> in which Chief Justice William Rehnquist made it clear that the City had a legitimate interest to make sure that paving over open ground did not increase the flow of water into public waters.<sup>18</sup> That position is consistent with the view that landowners can be held liable in tort for redirecting rainwater over the land of their neighbors.<sup>19</sup>

As a general principle, whenever a private landowner or the government, as trustee of public waters, can hold private landowners responsible for harms after the fact, it is permissible to enjoin that wrongful conduct to prevent the harm from occurring in the first place. It was for just this reason that Koontz included the grading requirement and the water-pond system. Once those devices are sufficient to meet the peril, the rest of the development is Koontz's concern, not anyone else's. If his precautions fail, he of course is still liable for the harm that his new development has caused. The carryover of the common law rules against the government yields some cases in which it can enjoin as of right and yields others in which it must pay in order to acquire a benefit that it needs.

Putting the point in this fashion gives rise to the common objection that it is often difficult to tell the difference between two situations: withholding a benefit on the one hand and inflicting a harm on the other. That distinction is critical to the above analysis because the pollution case is inflicting harm, and the refusal to dedicate one's property as a wetland is withholding a benefit. If the distinction collapses, there is nothing left doctrinally to limit legislative discretion. Anything that the state does not like can be reclassified as either a public or a private nuisance so that its power to restrict without compensation is secured.

This all too fashionable line of argument received a qualified endorsement in some Supreme Court decisions, including by Justice Scalia in *Lucas v. South Carolina Coastal Council*.<sup>20</sup> There, Justice Scalia wrote:

The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which

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17. 512 U.S. 374 (1994).

18. *Id.* at 387.

19. *Keys v. Romley*, 412 P.2d 529 (Cal. 1966).

20. 505 U.S. 1003 (1992).

government may regulate without compensation was an easy one, since the distinction between “harm-preventing” and “benefit-conferring” regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas’s land is necessary in order to prevent his use of it from “harming” South Carolina’s ecological resources; or, instead, in order to achieve the “benefits” of an ecological preserve.<sup>21</sup>

Unfortunately, this passage is wrong in all its particulars. This contested distinction is *not* just in the eye of the beholder just because someone chooses to object to it. The easiest way to see why is to start outside the law of nuisance with ordinary interactions between people. Outside some supercharged legal dispute, is it proper to say that everyone in the world has benefited me because no one in the world has hit me? Similarly, is it possible to say that everyone in the world has simultaneously hurt me because they have not given me some money to improve my lot? Note that in either of these two worlds, the number of wrongs that cry out for redress is infinite and undefined, for everyone both benefits and harms everyone else simultaneously. But no one ever thinks or says that everyone is entitled to restitution for not hitting or is subject to tort liability for not giving, which is what the Scalia position entails.

In order to avoid that bizarre result in the takings contexts, we understand both phrases so that actions between strangers, whether for restitution or for tort, now become the rare exception and not the universal rule. I am responsible for hitting other people, which is *prima facie* tortious. That is not a universal condition but an event that happens only infrequently. Similarly I am responsible in restitution when I confer some tangible property or labor on another person, and then only in cases of necessity or mistake in which the other person is incapable of caring for himself. That too is a rare occasion. The number of claims shrinks from infinite to close to zero.

The choice of baselines would not matter in a zero transaction-costs world in which an infinite number of disputes could be resolved at zero cost in an infinitesimal period of time.<sup>22</sup> But once these

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21. *Id.* at 1024.

22. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

transaction costs become positive, the choice of baseline can no longer be random, for it is now responsive to the concern that the legal system not drown the world in high transactions costs needed to remedy an endless stream of nonexistent wrongs. Even if by some miracle Scalia's alternative baseline were initially adopted—which has never been the case in the private law—the shift to the common law rules on tort and restitution would constitute a massive across-the-board Pareto improvement, with huge gains shared by all. The traditional harm/benefit distinction thus makes perfectly good sense. And that distinction connects without a hitch to the law of nuisance once it is understood to involve nontrespassory physical invasions, at least if that term is construed broadly enough to cover, as it should, the cases of the diversion of water. In essence, the proposals that Koontz offered did more than meet the requirements of the common law rules.

But once the distinction between conferring benefits and imposing harms disappears, it now becomes permissible for the Water District to say to Koontz that if he wants to exercise his development rights, he has to buy them back because of the public benefits from an ample supply of increasingly scarce wetlands. As an eminent domain proposition, the Water District compares the value of this plot as a wetland with its value for private use, and condemns only when the former is greater than the latter. That conclusion is most unlikely for this particular parcel. If the District wants to acquire other parcels, it can levy general taxes to raise the revenues, without distorting the acquisition process.

When the use of the eminent process is rejected, Koontz has to buy back his development rights, at which point a destructive bargaining cycle starts through the political process. There is no upper bound on what the water district can demand, so it will demand a great deal. But it is all cheap talk, because the District would never pay the landowner the sums needed to complete the deal. Just that happened in *Lucas*, for once the Coastal Council was ordered to pay \$500,000 to prevent *Lucas* from building on either of its two plots, they abandoned the entire enterprise and sold both plots off for that sum with the development rights intact.<sup>23</sup> It turns out that there are

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23. "After paying Lucas \$850,000 in compensation for the two lots, South Carolina proceeded to sell the lots to private parties for development. Large homes now sit on both lots." WIKIPEDIA, *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*, [http://en.wikipedia.org/wiki/Lucas\\_v.\\_South\\_Carolina\\_Coastal\\_Council#Result](http://en.wikipedia.org/wiki/Lucas_v._South_Carolina_Coastal_Council#Result) (last visited Apr. 14, 2015).

a lot better ways for the Coastal Council to spend that money on beach maintenance.

The aftermath of the *Lucas* decision should be one of relief, not distress, for that is exactly the way in which the system of eminent domain should work—force some degree of monetization of the environmental interest in order to guide public policy on whether or not to take. At this point we now can state the secret of the doctrine of unconstitutional conditions: to the extent that the individual engages in something that would be a traditional tort against his neighbor, or against the public at large, the public can condition the permit on need to stop that behavior. With the legitimate end, the only question is whether the means chosen are overbroad or underinclusive. But, alternatively, to the extent that the government wishes to go beyond tort prevention—and remember this is now an intelligible concept—it must pay under the formula that the more it takes, the more it pays. By this test Mr. Koontz had got it right, and Justice Alito got it wrong by trying to figure out which conditions were permissible and which were not.

Now the important intellectual point is this: once the first step in the analysis is wrong, everything that follows is wrong as well. Hence much of the discussion of the unconstitutional conditions doctrine in *Koontz* is a distraction from the main event. It makes no difference for the analysis whether the conditions involved have to do with the restrictive covenant that is imposed on the same parcel of land that is to be developed or whether it requires a cash or kind contribution to fix up some culvert or ditch located elsewhere in the district. Neither are nuisance prevention.

Similarly, Justice Elena Kagan is way off base when she argues that this exaction should be treated as just another real estate tax even though it is levied on a particular transaction. The basic point about real estate taxes is they are based upon the market value of the property taxed. The revenues collected are to be spent on general public purposes so that the distribution of the tax is roughly proportionate to the distribution of the public goods that the tax supplies. The hope is that following this regime produces a Pareto improvement in that all persons benefit by an amount greater than the tax imposed, which means that public deliberations will seek common solutions rather than partisan gains, because nobody will vote for a tax that leaves them worse off than before, even after the benefits supplied are taken into account.

What the Water District program did was impose a set of special assessments to fund the creation of general public benefits. If this is allowed, then the entire structure of the tax system becomes indefinite; factions will seek programs that preserve benefits for their members while imposing costs on outsiders. Two or more factions can play that game, so the downward cycle continues as people squabble over liabilities that each group will happily impose on all the others.

So the basic normative rule is that selective impositions can never be used to fund general benefits. At this point, there is no reason *ever* to use any system of exaction in *Koontz*-like situations, because general real property taxes will always dominate exactions in funding the creation of public goods. It is for just this reason that the costs of making general repairs to beach installations should appear on the public budget to which Koontz has to contribute his pro rata share based on the increased value of his property. But it is a mistake to use exactions as a form of off-budget financing to pay for general benefits from a single landowner or group of landowners

So if this analysis is correct, it is not necessary for Justice Alito to send this case back to the Florida courts with complex instructions to decide whether, and if so why, this exaction does, or does not, pass muster. The rule remains as before: nuisance prevention by appropriate means is fine, but cost shifting for generalized public benefits is not. There is no holdout problem to overcome so long as public funds raised by general taxes are used to secure public benefits.

On this model all the second-tier issues raised in *Koontz* turn out to be irrelevant. It is no longer relevant to ask whether the exaction attaches to the same parcel of land over which development rights are claimed. The Supreme Court constantly refers to an “essential nexus” between the exaction imposed and the benefit supplied, but the term is a major intellectual distraction because it is not meant to echo the principle of proportionality just mentioned.<sup>24</sup> Nor does it matter whether the exaction is in cash or in kind. It is, of course, possible that any onsite restriction may be a nuisance control device. But it is surely impossible for the remote improvements to squeeze in under that rubric, so the same nuisance prevention formula is easier

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24. “In [*Nollan* and *Dolan*] we held that a unit of government 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.” *Koontz*, 133 S. Ct. at 2586.

to apply in the case of onsite requirements than in the case of offsite requirements. Indeed if the nuisance problems are insuperable, it is a good thing for this development *not* to take place.

Oddly enough, under the current law it takes some analysis to figure out how bargaining takes place under the two rules. Start with the artificial rule that states that the exaction must be tied to the land on which the development takes place. That rule limits the demands the water district can make. But it need not kill the deal because the district might rather have the development even if it cannot get all the financial assistance it desires for other projects. After all, the in-kind exaction releases funds for other purposes. But of course, it can always bluff and insist that unless more is coming, the permit will not be granted, at which point the landowner has to decide whether to hold firm or to pay additional consideration to get the job done.

Overall, my guess is that the broader rule would give the water district more scope to insist on offsite improvements at the initial stage and would probably result in a distribution of benefits that is more favorable to the water district than the landowner. But again the distribution of surplus is not the key question here. Rather, that question is whether or not the restrictions should be imposed in the first place, at which point the simple eminent domain approach dominates both these alternatives.

The first point is that there is no longer a bargaining game, only the usual disputes over just compensation for a partial restrictions. The second point is that the price requirement on the government will weed out ill-advised acquisitions. Why move for complexity when simplicity will work better? The fundamental point is that no sound system of governance gives any political party the unbounded level of discretion that is created under the current law, which combines an imperfect understanding of the exaction game with a flawed definition of private rights.

The state should not be able to avoid its own budget constraints by declaring a new set of rights for itself that it then conveniently sells back to private parties in unprincipled and costly negotiations. Just that happens when permits are bundled with improper conditions, which is why, as a matter of first principle, the process has to stop.

In closing, it is worth noting yet again that virtually all of the intellectual confusion derives from the usual progressive mindset that assumes that social welfare is improved by weakening property rights



and entrusting an ever larger set of issues to government agencies whose disinterested experts are said to reason their way to the correct social end. That model has failed everywhere else it is tried, most conspicuously in general administrative law. Yet usually those failures lead to efforts to double down on the administrative state with more restrictions and penalties. This is the path of destruction, and the only path that will succeed is one towards market liberalization in which the Takings Clause is returned to its original function. Seen from a broad perspective, the exaction problem is yet another iteration of a failed intellectual model that has always outperformed the traditional classical liberal model of governance that is encapsulated in the standard account of Takings Clause—take and pay.

