THE CONSTITUTIONALITY OF LEGISLATIVELY IMPOSED EXACTIONS

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Where once government was closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs.[1]

INTRODUCTION

The ownership of property encompasses a variety of rights, including the right to possess, occupy, devise, sell, rent, and, most importantly, the right to use. As John Locke explained, we live in an organized society in order to better protect our property.[2] In order to effect an ordered and prosperous state of affairs, citizens have entrusted their government with certain powers. The most relevant power for the purposes of this Article is the ability of government to regulate the use of private property in order to protect the larger community from nuisance-like impacts that would otherwise be caused by particular uses of property.[3] Thus, government can prevent land uses that would otherwise cause flooding to neighbors, create noxious odors, or directly injure others. No takings-related just compensation is due in such cases because the rights inherent in the

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1. San Remo Hotel L.P. v. City and Cty. of San Francisco, 27 Cal. 4th 643, 692 (2002) (Brown, J., dissenting).

2. And 'tis not without reason, that [man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 150 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

3. This is the principal justification for zoning. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.").

ownership of property do not include the right to injure neighbors.[4] However, the right to restrict nuisances does not give government carte blanche to define nuisances out of whole cloth: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[5] Despite these limitations, government's power to freely regulate land use to prevent nuisances is broad. And, indeed, governments have generously interpreted the power to regulate land use well beyond the traditional understandings of nuisances.

The demands on modern government are many. They include the demand of the people that government do far more with the regulation of property than simply prevent nuisances and similar palpable external harms. Thus, we not only have areal-use restrictions, height restrictions, and density restrictions, we also have aesthetic-review boards. We have overlays for various endangered and not so endangered species. We have riparian and other ecological setbacks. And we have wetlands and sensitive-habitat zones, airport corridor restrictions, and a myriad of other land use restrictions maintaining the status quo. Suffice it to say, many of these land use restrictions go far beyond the prevention of traditionally understood nuisance-like impacts that affect neighbors and the community.[6]

Some of these regulations—when they go "too far,"[7] deny all use or value,[8] or fail to meet the *Penn Central* balancing test[9]—may give rise to a compensable taking, especially when they are not grounded in a meaningful nuisance-preventing rationale.[10] But to the extent

4. Lucas v. S. C. Coastal Council, 505 U.S. 1003 (1992). There are, however, differing opinions on whether such land use restrictions are effective and worth the cost. *See, e.g.*, BERNARD H. SIEGAN, LAND USE WITHOUT ZONING (1972).

5. *Lucas*, 505 U.S. at 1029.

6. *Euclid*, 272 U.S. 365, involved only areal use and size restrictions on buildings.

7. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

8. *Lucas*, 505 U.S. at 1019 ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

9. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action." (citation omitted)).

10. The legitimacy of the nuisance-preventing rationale must be emphasized. Simply saying that a land use is a nuisance does not make it so. Otherwise, this would come down to

that a governmental body can make a plausible case that a land use–permit denial serves a legitimate nuisance-prevention rationale, the denial is likely to be upheld by a deferential court against a takings challenge under the background-principles rationale of *Lucas*.

Government regulators usually have more options than simply denying the offending land use. They can, under the right circumstances, suggest and approve an alternative land use that can meet the landowner's objectives while avoiding negative externalities. Or, as will be examined in much more detail below, regulators can impose conditions on the land use, including the condition that the permit-seeking landowner ameliorate the project's adverse impacts with an exaction, such as restoring wetlands, improving traffic infrastructure, or engaging in habitat restoration.

At the same time that they are regulating to prevent noxious land uses, democratically elected officials are under pressure to provide more goods and services to their voters. It is all the better if the officials can provide these amenities with as few new taxes as feasible. The public wants better roads, affordable housing for all,[11] bigger parks, and prettier communities. The public wants to live in Eden, and it wants someone else to pay the rent.

Thus, there is a match made in heaven for an elected official here: the public's desire for free amenities married to the government's ability to control land use with its concomitant power to demand exactions. Permit-seeking property owners can be forced to pay for many of the amenities desired by the public. But an elected official's heaven can be a landowner's hell.

Unchecked, excessive regulations can destroy all use and value in a property. It can result in a regulatory taking. Similarly, unchecked demands for exactions in place of permit-denying regulations can lead to violations of the doctrine of unconstitutional conditions. Thus in the context of land use, the doctrines of regulatory takings

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a mere test of whether the legislative body had a "stupid staff" that could not concoct a harm-preventing rationale for a land use restriction. *Lucas*, 505 U.S. at 1025 n.12. For a contrary view, see John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1298 (1996) (contending that in the colonial era "legislation was a principal source of nuisance law").

11. This is ironic considering that the regulatory constraints imposed on homebuilding are a chief cause of the escalation of home prices. For more on inclusionary zoning, see James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397 (2009).

and unconstitutional conditions are inextricably intertwined. And when avoiding a regulatory taking caused by a permit denial, government cannot simply substitute the permit denial with whatever set of exactions it desires. A town's land use–permitting department is not its ATM. There are constraints on the ability of government to demand exactions in exchange for land use permits.

I. THE DEVELOPMENT OF THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN THE CONTEXT OF LAND USE PERMITTING—FROM *NOLLAN* TO *KOONTZ*

A. The Doctrine of Unconstitutional Conditions

A governmental body may be tempted to demand some action or something of value in exchange for the receipt of a government benefit. Often, the demand can be legitimate, as when the benefit carries with it certain inherent duties and responsibilities. For example, the grant of an unpatented mining claim carries with it the duties to expend resources on the development of the claim's minerals and to properly register the claim on an annual basis.[12] And, of course, any development of the minerals on the claim must be done in a manner consistent with applicable environmental laws and regulations.[13]

But sometimes government demands too much—as when government requires the sacrifice of a constitutional right in exchange for some government benefit or discretionary permit. In one of the earliest cases invoking the doctrine, the Supreme Court held that the purpose of the doctrine is to enforce a constitutional limit on government authority:

> [T]he power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[14]

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12. *See* Mining Law of 1872, 30 U.S.C. § 28 (2019) (specifying a one-hundred-dollar annual work requirement); United States v. Locke, 471 U.S. 84 (1985) (noting an annual registration requirement).

13. *See, e.g.*, 36 C.F.R. § 228.8 (2019).

14. Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 593–94 (1926) (The state legislation

In *Perry v. Sindermann*, the Court considered whether due process protections would attach to the decision not to rehire a junior college professor who had criticized the school's administration. The Court noted,

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Such interference with constitutional rights is impermissible.[15]

Similarly, in *F.C.C. v. League of Woman Voters*, the government conditioned the receipt of federal money on an agreement that public radio station operators forego their First Amendment right to editorialize.[16] The government argued that there was "some risk that these traditionally independent stations might be pressured into becoming forums devoted solely to programing and views that were acceptable to the Federal Government."[17] But the Court found that the danger posed by "the bewitching power of governmental largesse"[18] could not justify the ban because the statutory scheme had structural protections against such co-option.[19] Because the danger inherent in the funding statute was insufficient to justify the ban on first amendment expression, the Court held that the "no-editorializing" condition was unconstitutional.[20]

These and other cases fall under the rubric of the doctrine of unconstitutional conditions.[21] While the first cases employing the

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conditioned the right to use public highways on the dedication of personal property to the State for public uses.).

15. Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted).

16. F.C.C. v. League of Women Voters of Cal., 468 U.S. 364, 370, 398 (1984).

17. *Id.* at 386.

18. *Id.* at 388.

19. *Id.* at 388–89.

20. The Court rejected the justifications for the prohibition, saying, "The risk that local editorializing will place all of public broadcasting in jeopardy is not sufficiently pressing to warrant § 399's broad suppression of speech." *Id.* at 391 (citing 47 U.S.C.A. § 399 (West, Westlaw through Pub. L. 116-5)).

21. Burling & Owen, *supra* note 11, at 416 n.86 (collecting cases decided on the doctrine of unconstitutional conditions). But note that whether a case falls within that doctrine can be debated. *See, e.g.*, *League of Women Voters*, 468 U.S. at 408 (Rehnquist, J., dissenting) ("[T]his case [is] entirely different from the so-called 'unconstitutional condition' cases, wherein the

doctrine as an analytical tool did not involve land use, that changed in 1987 with *Nollan v. California Coastal Commission*.[22]

The regulation of land use is not new.[23] As governments developed land use–permitting regimes, they also understood the advantages in asking for something in exchange for those permits. Sometimes such demands were appropriate, other times not. In time, a fairly robust set of standards developed in the state courts for the imposition of an exaction that is a condition for the granting of a permit.[24] But some agencies were outliers, demanding more than could be justified even under the generous standards of their jurisdictions.

B. Nollan *Applies the Doctrine of Unconstitutional Conditions to Land Use Permitting*

The California Coastal Commission was one such outlier. Patrick and Marilyn Nollan sought to replace a run-down, one-story bungalow with a two-story home along Faria Beach in Ventura County. The Nollans owned their property to the mean high tide line. For the Coastal Commission, this was a problem. The agency was on a mission to provide maximum access to and use of the beaches, and to do so it wanted a piece of every parcel above the mean high tide line for a lateral public easement.[25] In time, theoretically, there would be public access easements parallel to every private beachfront home along the California coast.

To achieve its goal, the Coastal Commission demanded a lateral easement (land parallel to the coast seaward of their home) constituting about one-third of the Nollans' lot in exchange for a permit to rebuild their home. As the Supreme Court noted, if the Commission had simply taken the property, it would have had to pay just compensation.[26] If the Commission could have legitimately denied the permit because of adverse nuisance-like impacts, it would have

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Court has stated that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.'" (quoting *Perry*, 408 U.S. at 597)).

22. 483 U.S. 825 (1987).

23. *See* Hart, *supra* note 10, at 1257.

24. *Nollan*, 483 U.S. at 839–40 (collecting cases).

25. The Commission's guidelines required an access easement in exchange for development permits. *Id.* at 857–58 (Brennan, J., dissenting).

26. *Id.* at 831.

been the end of the inquiry.[27] But the Commission did something else. It used its power to deny the permit as a means to acquire some of the Nollans' property—for free. In effect, the Commission required the Nollans to buy their permit. The Commission went too far. The case eventually reached the Supreme Court where a majority described the scheme as "an out-and-out plan of extortion."[28] The Court held that unless the Commission could demonstrate that giving up the portion of the property had a nexus to and would ameliorate an impact caused by the permitted activity, the Constitution could not countenance the exaction.

The Commission tried to justify the exaction with the suggestion that travelers along Highway 1 looking in the direction of the sea would see a two-story house where a one-story house once stood. When neighboring owners similarly built two-story homes, members of the travelling public would encounter a "psychological barrier" to realizing the existence of the coast.[29] Taking that claim at face value, the Court could not see the connection between that impact and the dedication of the land on the seaward side of the Nollans' home—land that could not be seen by the travelling public. The exaction lacked a "nexus" to any impact caused by the development and was thus unconstitutional.[30]

C. Dolan *Adds a Rough Proportionality Test*

The Court in *Dolan v. City of Tigard*[31] amplified the nexus test. In *Dolan*, the owner of a hardware store near Fanno Creek in Tigard, Oregon, sought permission from the City to expand the store and pave thirty-nine parking spaces. Here, too, the City agreed to give the permit—but only upon the condition that the owner dedicate a public easement over her riparian property in the flood-plain and build a bicycle path. Presumably there was a nexus between these demands and the adverse impacts caused by the project. Because the paving of thirty-nine parking spaces would create an impermeable surface, it could increase the risk of flooding, thus justifying the

27. This is true "unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking." *Id.* at 836.

28. *Id.* at 837.

29. *Id.* at 838.

30. *Id.*

31. 512 U.S. 374 (1994).

public easement on the riparian area. Similarly, a larger store could create traffic impacts, which could be alleviated with the bike path. The owner, however, did not agree, not understanding how allowing the public onto her private property could ameliorate any threat of flooding. Nor did she think many people would visit the store on bicycles to buy hardware and plumbing supplies.[32] But the City did have a plan for bicycle paths and a public greenway park along the creek, so it could not resist the opportunity presented by the permit request to demand these public goods at no cost to the City.

While an argument could be made that there was at least some plausible nexus between the project impacts and the demands, the owner considered the connection too attenuated. And the Supreme Court agreed, holding that the City has the burden to demonstrate some level of "rough proportionality" between the project's impact and the exaction.[33] For example, asking for a bike trail to ameliorate traffic impacts from a new apartment building might be roughly proportional if the new apartment dwellers were likely to use the bike path for transportation, but asking for the same bike trail in exchange for a plumbing store expansion might not be.

In *Dolan*, Justice Rehnquist made a passing remark in dicta that has given rise to attempts to circumvent the holding. In assuring governments that the decision would not affect the general, run-of-the-mill land use regulation, the Court distinguished the *Dolan* facts:

> First, they [acceptable land use regulations] 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.[34]

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32. Justice Scalia did not think so either as he remarked at oral argument, "People are going to go to the hardware store on their bike? . . . There are a lot of bike paths around Washington, and I've never seen people carrying shopping bags on their bikes." Transcript of Oral Argument at *27, *Dolan*, 512 U.S. 374 (No. 93-518), 1994 WL 664939.

33. *Dolan*, 512 U.S. at 391 ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

34. *Id.* at 385.

As will be shown below, this passage has given rise to the argument that legislatively imposed exactions are not subject to analysis under the doctrine of unconstitutional conditions.

Another misconception following both *Nollan* and *Dolan* was the idea that only conditions demanding land are subject to the cases' logic. Under this theory, government demands for land invoke the doctrine because land cannot be taken without paying just compensation. But the taking of money doesn't comfortably fit the doctrine because compensating the taking of money with money seems circular. However, if a demand for money were not subject to the doctrine, then it would be relatively easy to circumvent the doctrine's logic. For example, what if the California Coastal Commission had not asked for the easements from the Nollans but instead asked for enough money to condemn the beach (and paid the Nollans the fair market value of the easements with using the money it had exacted from the building permit exchange)? What if the City of Tigard had demanded that Mrs. Dolan give the City enough money to condemn the flood-plain easement and build the bicycle path? Would asking for money instead of interests in land be any different in the constitutional sense?

For some years after *Dolan* was decided, the lower courts were mixed on this question. Some courts found that demands for money were exempt from the doctrine of unconstitutional conditions while other courts found that any demand for any sort of property, including money, was subject to the doctrine.[35]

D. Koontz *Applies the Doctrine to Monetary Exactions*

The Court resolved this conflict in 2013 with its decision in *Koontz v. St. Johns River Water Management District*.[36] This saga began in 1972 when Coy Koontz Sr. applied for a permit to develop a small shopping center on a portion of a 14.9-acre parcel near the intersection of two major roadways near Orlando, Florida.[37] After obtaining the requisite local town permits, all Koontz needed was a wetlands permit from the St. Johns River Water Management District, which he applied for in 1994. After some negotiations he reached a deal: in order to develop 3.7 acres, he would dedicate the remaining 11 to open

35. See cases cited in Burling & Owen, *supra* note 11, at 399 n.7.
36. 570 U.S. 595 (2013).
37. *Id.* at 599.

space in order to mitigate for some of the wetlands he would touch with the project. But when it came time to sign the permit documents, he learned the District wanted more. Apparently, the 11 acres didn't satisfy the District's aspiration of a 1:10 ratio of developed land to wetlands. To make up for the difference, the District demanded that Koontz finance the drainage improvement of some district-owned property over five miles away, at a cost of up to $150,000.[38] Koontz refused, and the permit was denied.

Coy Koontz then sued, arguing that the demand constituted a taking in violation of *Nollan* and *Dolan*. The litigation outlasted Coy Koontz Sr. His son, Coy Koontz Jr., carried on with the litigation. After an initial trial court victory, the case eventually wound up at the Florida Supreme Court where Koontz lost on two theories. First, the court found that because the permit had been denied, no condition had actually been imposed. It would be premature and counterproductive to subject the denial to an analysis under *Nollan* and *Dolan*. Second, because Koontz was objecting to a monetary demand and not one demanding land, *Nollan* and *Dolan* were not apposite.[39]

The Supreme Court reversed. All members of the Court agreed that a governmental body cannot avoid scrutiny under *Nollan* or *Dolan* simply through the expedient of denying a permit when the owner refuses to accede to the demanded exaction. The majority opinion put it this way: "The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so."[40]

The dissent agreed with this formulation:

> I think the Court gets the first question it addresses right. The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's

38. *Id.* at 601–02; Petition for Writ of Certiorari at *4, *Koontz*, 570 U.S. 595 (No. 11-1447), 2012 WL 1961402.

39. St. Johns River Water Mgt. Dist. v. Koontz, 77 So. 3d 1220, 1230 (Fla. 2011) ("Accordingly, we hold that under the takings clauses of the United States and Florida Constitutions, the *Nollan/Dolan* rule with regard to 'essential nexus' and 'rough proportionality' is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.").

40. *Koontz*, 570 U.S. at 606.

> conveyance of a property interest (*i.e.,* imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.,* imposes a condition precedent). That means an owner may challenge the denial of a permit on the ground that the government's condition lacks the "nexus" and "rough proportionality" to the development's social costs that *Nollan* and *Dolan* require.[41]

Where the majority and dissent parted ways on this point was whether there had actually been a permit denial based on the failure to accede to the conditions, as opposed to a breakdown in negotiations.[42] Put another way, the dissent thought that the permit was denied because of the adverse impacts that could follow the development and that any exactions were merely suggestions in negotiations that broke down—and were not the official reason for the permit denial. Be that as it may, the critical takeaway here is that everyone on the Court agreed that in the right factual circumstances a demand for an exaction can lead to a violation of the doctrine of unconstitutional conditions even if the permit applicant is denied a permit.

There was less agreement on the second question—whether a monetary exaction qualified for the *Nollan* and *Dolan* treatment. The majority held that "'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[43] The Court distinguished cases like *Eastern Enterprises v. Apfel*,[44] finding that in the case of Coy Koontz, the monetary exaction was tied to the use of a specific parcel of land—his 3.7-acre development proposal.[45]

Again, the dissent disagreed, arguing that "a requirement that a person pay money to repair public wetlands is not a taking,"[46] in part because the demand "does not affect a 'specific and identified propert[y] or property right[]'; it simply 'imposes an obligation to

41. *Id.* at 619–20 (Kagan, J., dissenting). The dissent continues to suggest that the proper remedy for such a permit denial is the invalidation of the condition but not compensation.

42. *Id.* at 621 (Kagan, J., dissenting).

43. *Id.* at 612.

44. Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). The Court found that the retroactive application of a levy on coal companies to pay for black lung disease was unconstitutional. Four Justices would have found this levy constituted a taking. Justice Kennedy, concurring, found that it violated due process. Justice Kennedy and the four dissenters agreed that this levy was not a taking because there was no identifiable property interest tied to the monetary demand. *Id.* at 540 (Kennedy, J., concurring).

45. *Koontz*, 570 U.S. at 613.

46. *Id.* at 624 (Kagan, J., dissenting).

perform an act' . . . that costs money."[47] Whatever the import may be of this semantic disagreement, it is clear from the holding of *Koontz* that a monetary exaction, including an exaction that demands payment to perform some task, is now subject to the constraints of *Nollan* and *Dolan*.

The dissent also suggested that the holding would destroy land use permitting as we know it or, at least, that the decision would "threaten[] significant practical harm,"[48] even threatening the "flexibility of state and local governments to take the most routine actions to enhance their communities."[49]

Lastly, the Court dismissed the dissenters' argument that this holding would open up the floodgates to tax challenges, based on the theory that taxes are really invalid monetary exactions, finding that "teasing out the difference between taxes and takings is more difficult in theory than in practice."[50] Nor, the majority found, would the "decision . . . work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees."[51]

The *Koontz* decision, along with its siblings *Nollan* and *Dolan*, have evoked marked differences in reactions. Some suggest that it stands for a simple proposition that should be uncontroversial: developers can be required to pay the full external costs of their projects—but no more.[52] To property rights advocates, this proposition seems eminently fair. But others have been nearly apoplectic in their criticism of *Koontz*, calling it the "worst" ever Supreme Court takings decision.[53]

E. Are the Criticisms of Koontz *Justified?*

Despite the dissent's prognostications, *Koontz* has not augured the end of land use planning as we know it. This is not surprising.

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47. *Id.* (Kagan, J., dissenting).

48. *Id.* at 626 (Kagan, J., dissenting).

49. *Id.* at 627 (Kagan, J., dissenting).

50. *Id.* at 616 (majority opinion).

51. *Id.* at 618.

52. *See, e.g.*, Christina M. Martin, Nollan *and* Dolan *and* Koontz—*Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More*, 51 WILLAMETTE L. REV. 39 (2014).

53. Not one to mince words, John Echeverria claims, "*Koontz v. St. Johns River Water Management District* is one of the worst—if not the worst—decision in the pantheon of Supreme Court takings decisions." John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 1 (2014) (footnote omitted).

Citing *United States v. Causby*,[54] in an earlier takings case, Justice Ginsburg wrote that "[t]ime and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. . . . The sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability."[55] The same can be said of *Koontz* for several reasons.

First, Justice Kagan's criticism of *Koontz* in the dissenting opinion belies the Justice's limited experience with land use permitting. Permitting agencies and developers are well versed in the give and take of negotiations over land use planning. It is an intensely dynamic process with proposals, citizen input, counter-proposals, agreements, disagreements, and—when all goes well—resolution. That's not to say that the process works smoothly or well. Sometimes it doesn't, especially in regulation-happy states like California.[56] With the possible exception of communities dominated by a "Not In My Backyard" attitude, it remains in the interest of both developers and regulators to work together. Most communities recognize there is a need for new homes and businesses, and most developers are willing to work with the community and trade a few extra amenities for permits. It is only when one side or the other is unreasonable that the process can break down. But *Koontz* does little to alter these dynamics. More significantly, in the postrecession, post–*Koontz* years, there has not been an explosion of unfettered and unregulated development. It just hasn't happened.

Second, how could *Koontz*, as a practical matter, make life that much tougher for permitting agencies? Before *Nollan* was decided, many jurisdictions already required some justification when demanding exactions from landowners.[57] *Nollan* didn't change the calculus of land use permitting; neither did *Dolan*. Indeed, before *Dolan* was decided, a number of states required some show of reasonableness

54. United States v. Causby, 328 U.S. 256, 275 (1946).

55. Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 36–37 (2012).

56. RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED 293 n.4 (1985) ("California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat.").

57. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839–40 (1987) (listing several string citations to state court decisions that do not treat permit conditions as mere exercises of land use power).

in assessing permit conditions. Nor will *Koontz* change the calculus. Prior to the decision in *Koontz*, several states required the same sort of nexus justification for cash exactions.[58] Surprisingly, California has required a showing of a nexus and rough proportionality for monetary exactions since 1994,[59] but no one has ever seriously complained that developers have free reign to trample on the public interest in California. Now the long-standing rules of these states apply in all jurisdictions.

Third, it's hard to imagine how any of these decisions could conceivably tie the hands of regulators trying to act in the public interest. These decisions simply require the regulators to demonstrate that the required exaction, whether it be land or money, is roughly proportional to a harm caused by the proposed development—a harm that could otherwise justify denying the project. But shouldn't regulators do that as a matter of course? Regulators do not, in theory, write down a list of community wants on slips of paper, put them into a hat, and pull one or more out whenever a developer walks in the door seeking a permit. Rather the regulator must have some conception that the exaction will relate in some way to the development. So why not prove the relationship is real? Consultants abound who can and do perform such studies. Coy Koontz agreed to give up eleven acres because his development had some plausible connection to the wetlands affected by the actual development. However, he surely considered the $150,000 in additional costs to fix a distant district property to be from the "pulled out of the hat" variety of exactions. So why not require the St. Johns River Water Management District to show nexus and rough proportionality? It was Koontz's money, after all, that the District was demanding.

Perhaps some of the criticism is based on the idea that the demand of money in *Koontz* was inchoate—that it was only a *suggestion*.[60] There was, so the argument goes, no final take-it-or-leave-it offer. Instead of saying no to a $150,000 demand (or "suggestion"), maybe Koontz should have countered with one for only one hundred thousand dollars. Or maybe he should have agreed to paint the

58. *See also* Burling & Owen, *supra* note 11, at 429 (including a survey of state decisions on this matter).

59. Ehrlich v. City of Culver City, 12 Cal. 4th 854, 881–85 (1996) (applying *Nollan* and *Dolan* to monetary exactions).

60. Koontz v. St. Johns River Water Management District, 570 U.S. 595, 621 (2013) (Kagan, J., dissenting).

District's headquarters. But that's beside the point. As far as the majority was concerned, the permit was denied because Koontz refused to pony up the amount demanded by the District. To the Court, Koontz had a take-it-or-leave-it offer before him, and he left it. Future cases will have to resolve the question of whether a particular exaction is too indefinite to be considered a reason for a permit denial or if it is the clear reason for the denial. In the case of *Koontz*, the Court thought it was the latter.

This won't have any real world, practical impact on the ability of government agencies to negotiate over permits—so long as agencies make plain the distinction between negotiating positions and final demands. But what is different is that the agencies inclined to demand money in lieu of land, or the regulators that give the permittee the choice of paying with land or money, must now justify what is being demanded after all the give and take of negotiations are completed.

This doesn't prevent developers and permitting agencies from entering into voluntary development agreements—even when the developer agrees to give up more than could be constitutionally justified. Indeed, ever since *Nollan*, developers have often acceded to requests for greater exactions than could be justified under the doctrine of unconstitutional conditions, from a sense of civic duty, a desire to grease the permitting process, or a combination of both.[61] This will not change.

Some have argued that Koontz could have avoided the permit demand if he agreed to a much smaller project (but that was still large enough to avoid a clear taking). This misses the point. The project he sought a permit for was the project that led to the demand for cash. The doctrine of unconstitutional conditions doesn't require permit applicants to seek lesser permits. When that doctrine is applied in other constitutional contexts, there is no demand that the permittee attempt to get other permits until the unconstitutional condition is reduced. For example, if a person seeking a parade permit is told she can only get the permit if the marchers agree not to carry signs criticizing a war, there is a clear violation of the doctrine

61. *See* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663 (2001); Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761 (1993); John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"*, 25 URB. LAW. 49 (1993).

of unconstitutional conditions. The permit seeker need not go back and negotiate for another permit for a shorter parade, fewer marches, or perhaps one with smaller signs. Coy Koontz had every right to challenge the demand that was required for the development permit he wanted.

One scholar proposes that until an exaction is imposed, it should not be subject to review under the doctrine of unconstitutional conditions.[62] This is unmoored from the actual doctrine of unconstitutional exactions. If, for example, an unlawful condition is demanded for a parade permit, no one could seriously suggest that the condition must be complied with before a challenge could be brought. Nor is the suggestion practical: if landowners were forced to first convey property (land, money, or whatever) to receive their permit, the ability to sue to recover that property later would entail unnecessary complications and potentially lead to greater injustice. Some states, like California, hold that a permittee who pays the exaction and proceeds with the permit is barred from challenging the condition.[63] Better is the formula that is employed by statutory procedures such as California's Mitigation Fee Act wherein landowners can receive a permit and pay the freight under protest while pursuing judicial remedies.[64] But even where that procedure is available, it is quite possible that the developer cannot afford an exorbitant permit condition—to pay it and hope that a challenge may succeed before facing bankruptcy.

II. CAN THE DOCTRINE BE AVOIDED THROUGH LEGISLATIVELY IMPOSED CONDITIONS?

One issue looms large over the doctrine of unconstitutional conditions in the context of land use exactions: what if a condition is imposed by a legislative body rather than through the ad hoc permitting process? The dissent in *Koontz* raised this as a possible way out of the *Koontz* requirement,[65] and some jurisdictions have adopted this distinction.[66]

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62. Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277 (2011).

63. Pfeiffer v. City of La Mesa, 69 Cal. App. 3d 74 (1977).

64. CAL. GOVERNMENT CODE § 66020, *et seq.* (West 2019). This applies, however, only to conditions imposed by local governments in California not the State or state agencies.

65. *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting).

66. *See* Burling & Owen, *supra* note 11, at 429–38 (listing states that have adopted this formulation).

This is a curious notion. In other contexts of the doctrine's application, it matters not whether a condition is imposed by a bureaucrat or a legislature. Indeed, even in land use cases, the Supreme Court has struck down exactions that were merely the applications of legislative schemes—in *Nollan*, *Dolan,* and *Koontz.* Yet the myth of a legislative exception persists. The basis of this misunderstanding is often traced to dicta in *Dolan*, where Chief Justice Rehnquist noted that area-wide zoning regulations would not be subject to the rough proportionality requirement.[67]

Traditionally, when courts, including the Supreme Court, have considered the doctrine of unconstitutional conditions, it matters little how the condition was imposed—whether by a bureaucrat, an elected official, or a legislative body, courts have routinely stricken conditions that force people to give up a constitutional right in order to obtain a government permit or benefit.

Nor is there a good reason to treat legislatively imposed exactions with more leniency than ones imposed administratively. As Justice Thomas put it, "A city council can take property just as well as a planning commission can."[68] What matters is the exercise of government power, not the source of that power. To a landowner being forced to exchange a right for a permit, it doesn't matter who wields

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67. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (Zoning cases "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.").

68. Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting from denial of certiorari, joined by O'Connor, J.) *See also* Amoco Oil Co. v. Vill. of Schaumburg, 277 Ill. App. 3d 926, 942, 661 N.E.2d 380, 390 (1995) ("Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 401–07 (2002) (arguing against the legislative-adjudicative distinction); Brian T. Hodges, *Are Critical Area Buffers Unconstitutional? Demystifying the Doctrine of Unconstitutional Conditions*, 8 SEATTLE J. ENVTL. L. 1, 26 (2018) (arguing that "there is simply no basis in the U.S. Supreme Court's unconstitutional conditions case law to conclude that conditions imposed pursuant to an act of generally applicable legislation are exempt from the nexus and proportionality requirements"). *But see* 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, 242 (2017) (arguing that "the *Nollan/Dolan* test should *not* apply to legislatively imposed exactions, *provided* that such exactions satisfy two key criteria: (1) the exaction is generally-applied; and (2) the exaction is applied based on a set legislative formula without any meaningful administrative discretion in that application").

the enforcement power. What matters is that power is being wielded to take a constitutionally protected right.[69]

Given this doctrinal background, many legal scholars find "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators."[70]

In fact, in the context of land use exactions, a number of lower courts have held that the intermediate scrutiny of *Nollan*, *Dolan*, and *Koontz* applies, although some have not.[71] Because of a split among the lower courts, and indeed the split within the courts in California and Maryland, there is a significant chance that the Court will review the issue of legislatively imposed exactions.

There have been several recent petitions for writ of certiorari to the Supreme Court asking it to resolve this question. So far, these have been unsuccessful.

*A. Post–*Koontz *Exaction Challenges*

1. Development Impact Fees in Dabbs v. Anne Arundel County

A recently denied petition came out of the case *Dabbs v. Anne Arundel County*.[72] In *Dabbs*, the Anne Arundel County Commission

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69. Not all agree. Professor Hansen argues, for example, that the "*Nollan/Dolan* test should *not* apply to legislatively imposed exactions, *provided* that such exactions satisfy two key criteria: (1) the exaction is generally applied; and (2) the exaction is applied based on a set legislative formula without any meaningful administrative discretion in that application." 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, 242 (2017).

70. David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 567–68 (1999). *See also* Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decision-making in the land use context).

71. As noted in the Dabbs v. Anne Arundel Cty. petition for certiorari,

> The Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions.
>
> On the other hand, the Supreme Courts of Alabama, Alaska, Arizona, California, and Colorado, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively imposed conditions.

Petition for Writ of Certiorari at *31, Dabbs v. Anne Arundel Cty., 139 S. Ct. 230 (2018) (No. 18-54), 2018 WL 3377056 (citations omitted).

72. Dabbs v. Anne Arundel County, 182 A.3d 798 (Md. 2018).

imposed a development-permitting scheme wherein all development permits were subject to a predetermined impact fee, untethered to analysis of any actual impacts. As stated in the petition:

> Dr. Dabbs was required to pay a large "development impact fee" to the County as a condition of receiving a permit to build a new single-family home. Despite the County's claim that the fees are necessary to mitigate for the impacts that a new home may have on school, transportation, and public safety infrastructure, the County never explained how it calculated his or any of his neighbors' impact fees. Thus, after years of community frustration that the money was exacted without a sufficient nexus or proportionality to its alleged purpose, Dr. Dabbs agreed to act as a class representative in a lawsuit seeking an explanation for the fees and/or a refund of fees.
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> . . . .
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> . . . The amount of the fee is determined at the time a property owner applies for a development permit based on a legislatively determined fee schedule. The ordinance requires that landowners pay all impact fees in full as a condition on the issuance of an approved building permit. Alternatively, the property owner may satisfy the condition by dedicating land or buildings to the County in lieu of the fee.
>
> The stated purpose of the impact fee ordinance is to ensure that project proponents "pay [their] proportionate fair share of the costs for land, capital facilities, and other expenses necessary to accommodate development impacts on public schools, transportation, and public safety facilities." Despite this nod toward the nexus and proportionality requirements of *Nollan* and *Dolan*, the ordinance does not require the County to make any project-specific determination regarding actual impacts. Instead, "[t]he legislatively imposed development impact fee is predetermined, based on a specific monetary schedule, and applies to any person wishing to develop property in the district."[73]

Dr. Dabbs challenged the impact fees, alleging that their blanket imposition, without an individualized analysis of the actual impacts

73. Petition for Writ of Certiorari at *4–5, Dabbs v. Anne Arundel Cty., 139 S. Ct. 230 (2018) (No. 18-54), 2018 WL 3377056 (citations and footnotes omitted).

caused by a particular development, violated the unconstitutional conditions doctrine. The Maryland Court of Appeals disagreed, creating a per se rule that legislatively imposed fees are exempt from the intermediate scrutiny established in *Nollan*, *Dolan*, and *Koontz*. The question presented thus was: "Whether legislatively proscribed monetary conditions exactions on land use development are subject to scrutiny under the unconstitutional doctrine as set out in *Koontz v. St. Johns River Water Management District*; *Dolan v. City of Tigard*; and *Nollan v. California Coastal Commission*."[74]

The Supreme Court denied the petition of certiorari, as it did the petitions in the affordable housing–mandate cases, discussed next. That's not an affirmation of these decisions by the Court.[75] It only means that property advocates will have to wait another day to bring the issue of legislatively imposed conditions to the Court's attention.

2. Traffic Impact Fees and American Furniture Warehouse Co. v. Town of Gilbert[76]

In *American Furniture Warehouse*, a developer challenged a traffic impact fee as an unconstitutional taking. As the Arizona Court of Appeals saw it, "The issue, then, is whether a challenge to the application of a generally applicable, legislatively imposed fee is a challenge to an adjudicative act for purposes of [American Furniture Warehouse's] claim that the fee imposed was an unconstitutional taking."[77] The court found the fee was legislative and as such not subject to the *Nollan/Dolan* analyses. Moreover, it expressly found that "[w]hat *Koontz* did not do was replace, negate or (given the facts) even address *Dolan*'s legislative/adjudicative dichotomy . . . . As a result, *Koontz* did not hold that *Dolan* applied to generally applicable legislative development fees like those imposed in the traffic signal [System Development Fee]."[78]

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74. *Id.* at *I (citations omitted).

75. The denial of certiorari in a particular case does not imply anything about the merits of the case. Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari) ("[D]enial carries with it no implication whatever regarding the Court's views on the merits of a case . . . ."). *See also* Darr v. Burford, 339 U.S. 200, 226 (1950) (Frankfurter, J., dissenting) ("[D]enial means that this Court has refused to take the case. It means nothing else.").

76. 425 P.3d 1099 (Ariz. Ct. App. 2018).

77. *Id.* at 1103.

78. *Id.* at 1106.

Of course, *Koontz* was silent on whether such a distinction remains the law because that issue was not before it; but it was not an affirmation of the distinction. Indeed, in other contexts where the doctrine of unconstitutional conditions has been applied, the Court has routinely struck down legislatively imposed conditions.[79]

Nevertheless, the Arizona court aligns itself with those holding that legislatively imposed exactions are immune from scrutiny under *Nollan*, *Dolan*, and *Koontz*.[80]

B. Affordable Housing Mandate Cases

Other recent examples of petition for writ of certiorari denials have arisen in California out of affordable housing mandates. In those cases, developers of market-rate housing have been forced to build and sell housing units at subsidized prices for qualifying lower-income buyers.[81] When challenged under a doctrine-of-unconstitutional-conditions claim, the California courts have held that because the exactions were imposed via a legislative act or formula, they are merely land use or zoning regulations, not subject to *Nollan*, *Dolan*, or *Koontz*. So far, the Court has declined to accept such cases for review.[82]

Affordable housing mandates, also called "inclusionary zoning,"[83] is the practice where local communities conscript developers to build or pay for "affordable" housing units in exchange for permits to build market-rate housing.[84] While the ordinances vary from community to community, they all have some common elements:

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79. *See* Burling & Owen, *supra* note 11.

80. For more context on the arguments before the Arizona court, see Brief for Pacific Legal Foundation as Amici Curiae Supporting Appellant, American Furniture Warehouse v. Town of Gilbert, 425 P.3d 1009 (Ariz. Ct. App. 2018) (No. 1 CA-CV 16-0773), 2017 WL 4867274, *available at* https://pacificlegal.org/AmericanFurniture.

81. For an extended discussion of legislative exactions and affordable housing mandates, see Burling & Owen, *supra* note 11.

82. *See, e.g.*, 616 Croft Ave., LLC v. City of West Hollywood, 3 Cal. App. 5th 621 (2016), *cert. denied*, 138 S. Ct. 377 (2017); California Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435 (2015), *cert. denied*, 136 S. Ct. 928 (2016).

83. Calling these programs "inclusionary zoning" presupposes that they are zoning measures in the first place—a key assumption that goes to the heart of their legitimacy. For that reason, I will call them by the less conclusory term "affordable housing mandates" in this Paper.

84. "Affordable housing mandate" is a preferable term to the more common "inclusionary zoning" term because California cities use the tactic of calling this practice "inclusionary zoning" in order to escape the holdings of *Nollan*, *Dolan*, and *Koontz*.

a. The affordable housing requirements go into effect once a certain threshold is met—usually when a developer seeks to build at least ten to fifteen units of market-rate housing.[85]
b. Sometimes, however, an affordable housing fee is imposed on every land use permit—from large subdivisions to single-parcel-lot splits.[86]
c. The builder may be required to build an "affordable" unit that roughly matches the size of the neighboring market-rate units
d. The affordable units must usually be placed within the same development as market-rate units, although ordinances can have options for placement elsewhere.
e. Alternatively, a builder may have the option of paying an in-lieu fee, with the fee set by a formula.
f. The units must be sold to buyers who meet certain income criteria, often hovering around of fifty to seventy percent of the area's average income.
g. The units must be sold at a price that the lower-income resident can afford—based on a formula where mortgage payments will amount to roughly one-third of the typical lower-income resident's take-home pay.
h. The units must have deed restrictions attached—so the lower-income buyer can sell only to other lower-income buyers at a controlled price. Excess profits (fair market value over a controlled sales price) cannot be recognized by lower-income owners.

1. California Building Industry Association v. City of San Jose[87]

In this case from California, the City of San Jose required and still requires developers of fifteen or more residential units to set aside ten percent of their units for sale to lower-income buyers, with a price based on the buyer's ability to afford mortgage payments, calculated on a percentage of their income. Alternatively, developers

85. *See, e.g.*, Home Builders Ass'n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188 (2001) (describing the ten unit threshold).

86. *See, e.g.*, Cherk v. Cty. of Marin, No. A153579, 2018 WL 6583442, at *1 (Cal. Ct. App. Dec. 14, 2018) (review denied Mar. 13, 2019) (describing the $39,960 that was demanded in exchange for dividing a single parcel into two lots). A petition for writ of certiorari was docketed on June 13, 2019 (Case No. 18-1538).

87. 61 Cal. 4th 435, 351 P.3d 974 (2015), *cert. denied*, 136 S. Ct. 928 (2016).

may pay several hundred thousand dollars per unit into a low-income-housing fund. The City has not tried to justify these conditions with any showing that the development of market-rate housing causes any need for more affordable housing (although other cities have attempted to make such a showing with nexus studies).[88]

Instead, the City argues that the exactions are simply zoning mandates and, as legislative actions, not subject to *Nollan*, *Dolan*, or *Koontz*. Such affordable housing mandates have been criticized in the past[89] and upheld by a California court of appeal.[90] In *California Building Industry Association v. City of San Jose*, the California Building Industry Association ("CBIA") decided to take another run at the problem, alleging that the conditions violated the California Constitution's analogous law on regulatory exactions.[91] The California Supreme Court upheld the ordinance that required developers to build affordable housing units.

The court found that the *Nollan*, *Dolan* and *Koontz* standards for unconstitutional conditions did not apply

> because there is no exaction—the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process. This condition does not require the developer to dedicate any portion of its property to the public or to pay any money to the public. Instead, like many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale.[92]

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88. *See, e.g.*, Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. Rev. 971, 1020 (discussing the nexus study in Santa Monica). For a contrary view, see Benjamin Powell, *"The Economics of Inclusionary Zoning Reclaimed": How Effective are Price Controls?*, 33 FLA. ST. U. L. REV. 471, 474 (2005).

89. *See* Burling & Owen, *supra* note 11.

90. *See, e.g.*, Home Builders Ass'n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188 (2001) (upheld as unripe challenge).

91. *California Bldg. Indus. Ass'n*, 61 Cal. 4th at 442–43, 351 P.3d at 978. For strategic reasons, CBIA at first eschewed any federal constitutional arguments, only bringing them in on the appeal, and after *Koontz* was decided and new counsel joined the case. The absence of federal claims at the outset may have been a factor in the ultimate denial of the petition for writ of certiorari (Although the California Supreme Court interpreted federal law in reaching its decision, making the case a possible, albeit imperfect, vehicle for Supreme Court review. California Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435, P.3d 974, *cert. denied*, 136 S. Ct. 928 (2016)).

92. *California Bldg. Indus. Ass'n*, 61 Cal. 4th at 461, 351 P.3d at 991.

The court surmised that the program did not impose an exaction but was simply a type of zoning ordinance with price controls and that municipalities have "broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large."[93]

But demanding money or forcing the sale of some units at below-market prices is not the mere "regul[ation of] the use of real property."[94] Just saying this is not an exaction, doesn't make it "not an exaction." Owners are forced to give up money or the right to sell homes at full price in order to get a permit. To the extent that *Dolan* carved out a "legislative zoning" exception to the rule against unjustified exactions, that rule doesn't apply in this case. When the Supreme Court referred to "essentially legislative determinations classifying entire areas of the city" in *Dolan*,[95] it was referring to regulations such as zoning, height restrictions, and the like. The Court was certainly not contemplating the forced construction or creative financing of low-income housing, even if those exactions were imposed via ordinance rather than the planning department's permitting desk.

Moreover, this rationale misunderstands the logic of *Nollan*, *Dolan*, and *Koontz*. *Nollan* involved a California Coastal Commission policy wherein the right to build a home was conditioned on allowing the public to access a portion of the Nollans' property. *Dolan* addressed the City of Tigard's policy to condition development on public access and dedication conditions. *Koontz* challenged the water district's policy of not allowing development unless an owner agreed to give up a combination of land and cash equivalent (in this case, the cash to fix a district property). And in *California Building Industry Association*, the City of San Jose has a policy allowing development only if a developer allows some units to be occupied by the public at a reduced price or the owner pays a cash equivalent. The distinction between forcing Coy Koontz to spend money to fix district property and forcing San Jose developers to spend money to subsidize lower-income housing is elusive at best. What matters is that the property owner is being forced to sacrifice property in exchange for a permit to develop. It does not matter if the means to accomplish the forced

93. *Id.*
94. *Id.*
95. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

sacrifice is through a zoning bureaucrat following local law or a city council enacting local law. The rights are violated just the same.[96]

While concurring with the denial of certiorari in this case because of questions concerning the case's procedural history, Justice Thomas noted that the treatment of legislatively imposed exactions remains unresolved:

> For at least two decades, however, lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged 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."
>
> I continue to doubt that "the existence of a taking should turn on the type of governmental entity responsible for the taking."[97]

2. 616 Croft Ave., LLC v. City of West Hollywood[98]

In this case, husband-and-wife entrepreneurs, Shelah and Jonathan Lehrer-Graiwer, purchased two adjacent homes in West Hollywood in the early 2000s with a plan of building an eleven-unit condominium complex on the lots. The City of West Hollywood praised the "superior architectural design" of the project, and noted that it would provide "11 families with a high quality living environment" while "helping the City achieve its share of the regional housing need."[99]

Then the City demanded a $540,000 fee—to be used for "affordable housing."[100]

To avoid losing their permits, the Lehrer-Graiwers paid the fee under protest and sued the City, claiming that the fees were a

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96. This is essentially what Justices Thomas and O'Connor said in dissenting from the denial of certiorari in Parking Ass'n of Georgia v. City of Atlanta, 515 U.S. 1116 (1995). "The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.* at 1118 (Thomas, J., dissenting).

97. California Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of writ of certiorari) (citations omitted).

98. 3 Cal. App. 5th 621 (2016).

99. City of West Hollywood Resolution No. 05-3268, Petition for Writ of Certiorari, 616 Croft Ave., LLC v. City of West Hollywood, No. 16-1137, 2017 WL 1090008, at 4 (U.S.).

100. *Id.*

violation of their property rights. Ultimately the Lehrer-Graiwers lost their case in the California courts, which relied on *California Building Industry Association v. City of San Jose* and stated, among other reasons, that exactions imposed through legislation are not subject to the tests of *Nollan*, *Dolan*, and *Koontz*.

The California court of appeal ruled against the Lehrer-Graiwers, finding:

> [A]s in *San Jose*, the purpose of the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing. This type of fee is not "for the purpose of mitigating the adverse impact of new development but rather to enhance the public welfare by promoting the use of available land for the development of housing that would be available to low- and moderate-income households."[101]

In other words, because the court was able to transform the exactions into mere land use regulations, there was absolutely no reason to require the City to show any kind of relationship between the construction of new units and the need for more affordable housing.

Not surprisingly, the California Supreme Court denied review. Despite the U.S. Supreme Court asking the City to file a response to the petition and holding onto the case after the first conference, the Court ultimately denied certiorari.[102]

Property rights advocates continue to hope that the Court will someday take such a case. Exactions and other impact fees have a severe negative impact on housing affordability.[103] Adding more fees and costs won't make homes any cheaper. The law of supply and demand has not been repealed. Without the constraints of the doctrine of unconstitutional conditions, such exactions will only increase because there is simply no additional source of new money available to cash-strapped governments, other than politically unpalatable taxes.

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101. *Id.* at 629 (citations omitted).

102. 616 Croft Ave., LLC v. City of W. Hollywood, 138 S. Ct. 377 (2017), *cert. denied*.

103. Vicki Been, *Impact Fees and Housing Affordability,* 8 CITYSCAPE: J. POL'Y DEV. & RES. 139 (2005), https://www.huduser.gov/periodicals/cityscpe/vol8num1/ch4.pdf.

III. WHAT ABOUT TAXES?

One of the criticisms of *Koontz* in both the dissent and academia is that it could threaten the ability of governments to collect property taxes because taxpayers would claim that taxes were, in fact, monetary exactions.[104] As such, a taxpayer could subject his or her property tax to an intermediate scrutiny test, requiring the government to justify the impositions with a showing of adverse impacts caused by the ownership or use of the property. That presumably would unduly constrain the ability of government to collect taxes.

The *Koontz* Court pretty quickly dismissed the dissent's criticism, noting first that "property the government could constitutionally demand through its taxing power can also be taken by eminent domain."[105] Second, it just isn't that difficult to distinguish an exaction imposed on the use of property from a tax, stating that "teasing out the difference between taxes and takings is more difficult in theory than in practice."[106] Indeed, since *Koontz* was decided there has not been a significant number of cases arguing that taxes are unlawful exactions.

But Justice Kagan and Professor Echeverria suggest that the ability to make an easy distinction breaks down when it comes to legislatively imposed exactions that are assessed according to a formula.[107]

The critics, however, are not suggesting that ordinary property taxes might be mistaken for unlawful exactions, and a property owner's attempt to recast a property tax as an exaction would not be fruitful. There is a long and storied tradition of imposing property taxes. They are broadly applicable to all properties within a district and usually determined equally across the board, according to location and use. While they may not always be popular, they are ordinary and accepted. And they are far cry from the type of exactions imposed in cases like *Dabbs* or with the affordable housing mandates.

What makes these monetary exactions in cases like *Koontz*, *Dabbs*, or the affordable housing–mandate cases controversial and subject

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104. *See, e.g.*, Koontz v. St. John's River Water Mgt. Dist., 570 U.S. 595, 627 (Kagan, J., dissenting) ("[T]he majority's distinction between monetary 'exactions' and taxes is so hard to apply."); Echeverria, *supra* note 53, at 47 (suggesting a difficulty in distinguishing taxes from monetary exactions, especially legislatively imposed exactions).

105. 570 U.S. at 616 (majority opinion).

106. *Id.*

107. *See Koontz*, 570 U.S. at 621 (Kagan, J., dissenting); Echeverria, *supra* note 53.

to attempts to bring them under the constraints of the unconstitutional conditions doctrine is that they do not behave like ordinary property taxes. Property taxes generally are assessed on an annual basis; exactions only upon the occasion of a permit. Property taxes are assessed in an amount related to the value and use of the underlying property; exactions are usually unrelated to a property's value but are based on the nature of the activity (e.g., filling in a wetland or building homes). Property taxes usually support general funds; exactions are tied to a particular government program (e.g., restoring wetlands or building low-income housing). In short, property taxes can be conceptualized as a more passive imposition whereas an exaction is triggered by an action.

In the wake of California's property tax–limiting Proposition 13, cities in California have developed creative ways to finance new initiatives. The most "successful" have been the adoption of new fees and exactions. These are not property taxes. If they were, they would be limited by Proposition 13.[108] With California's Propositions 13 and 218, most new taxes and fees require a two-thirds-majority vote. Development exactions do not. And because the developers and future residents of the new homes are not likely to live in a community at the time an exaction is imposed, we have a regime uniquely susceptible to majoritarian abuse.

Exactions are often designed to ameliorate pre-existing problems—and not ones necessarily caused by the development subject to the exaction scheme.[109] The decisions in *San Jose* and *616 Croft* do not deny this reality; they embrace it. Whether it be an affordable housing shortage or lack of beach access, these problems are usually the result of past political failures.

For example, California's long-standing exclusionary zoning practices (large-lot subdivisions, rural greenbelt zoning, and the like)

108. In fact, the creative use of fees led to the subsequent Proposition 218, which requires a supermajority for new fees. *See, e.g.*, *1996 California Proposition 218*, WIKIPEDIA, https://en.wikipedia.org/wiki/1996_California_Proposition_218 (last visited Mar. 20, 2019). *See* CAL. CONST. art. XIII(A) (Proposition 13), XIII(C) (Proposition 218).

109. This, of course, is not compatible with the requirements of *Nollan*, *Dolan*, or *Koontz*. Exactions are supposed to be related to the property not other general or preexisting municipal needs unrelated to a development's impact. *See, e.g.*, Rohn v. Visalia, 214 Cal. App. 3d 1463, 1475 (1979) (determining that the City cannot demand that the developer fix a pre-existing traffic intersection alignment flaw); Amoco Oil Co. v. Vill. of Schaumburg, 277 Ill. App. 3d 926, 942, 661 N.E.2d 380, 390 (1995) (finding that the gas station remodel permit was improperly conditioned on land dedication to fix pre-existing traffic congestion).

combined with extraordinarily severe environmental-review procedures have made it impossible for the state to build anywhere near the number of new units necessary to keep pace with demand.[110] Indeed, the difficulty in building in California has led to some particularly macabre black humor.[111] While California politicians haven't loosened the choke hold on market-rate development, they have acknowledged that the spread of the tent cities of the homeless is a problem. And since politicians realize "something must be done"—but without raising taxes—they have turned to imposing the burden on those few hardy souls who try to develop at least some market-rate housing. These affordable housing exactions are not taxes; they are a substitute for taxes born of political cowardice. Putting them to the tests of *Nollan*, *Dolan*, and *Koontz* won't threaten the scheme of property taxation in any state, but it might hasten the day when politicians understand that in order to combat a housing shortage, we must either build more homes or raise the taxes on the citizens who so zealously fight new development.

It is an unfounded complaint that requiring some governments to justify their legislatively imposed monetary exactions and fees under *Nollan, Dolan, and Koontz* will adversely impact their ability to collect property taxes. These fees and exactions are with us because it's too difficult to raise taxes. Political expediency and tax-avoidance are not adequate reasons to avoid the doctrine of unconstitutional conditions.

CONCLUSION

The doctrine of unconstitutional conditions serves an important function in land use cases by preventing government from using its power over land use permitting to extort amenities from developers. While developers are often more than willing to contribute their fair

110. On average between 1980 and 2010, the state built about 120,000 new housing units per year, when up to 230,000 were needed to keep pace with growing population and changing demand, such as the desire to live in cities near jobs and transit. That demand has risen sharply over the past 10 years. The state now needs 180,000 new housing units per year, according to state housing officials, and it is building less than 80,000 annually on average.

Angela Hart, *How California's Housing Crisis Happened*, SACRAMENTO BEE, Aug. 22, 2017, https://www.sacbee.com/news/politics-government/capitol-alert/article168107042.html. *See also Why are Housing Costs So High?*, L.A./VENTURA CHAPTER BLDG. INDUS. ASS'N OF S. CAL., https://bialav.org/why-are-housing-costs-so-high/ (last visited Jan. 14, 2018).

111. *See, e.g.*, BABCOCK & SIEMON, *supra* note 56, at 293 n.4.

share to the public good, there are limits to their largesse. The Constitution does not allow government to take property from individuals—whether that property be interests in land or in money—without justification. Taxes broadly and uniformly imposed is one such justification for separating citizens from their money. Another can be an exaction that serves to ameliorate an adverse impact that a land use development might cause—so long as the exaction is roughly proportional to that impact.

When the doctrine is applied in the context of free speech or other constitutional rights, it does not matter whether the restriction is imposed on an ad hoc basis or pursuant to a legislative mandate. The exaction can burden a constitutionally protected right just the same, and be just as unconstitutional. Neither theory nor practice provides any good reason why exactions in the context of land use permitting should be any different.