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MONETARY EXACTIONS: NOT JUST COMPENSATION?
THE EXPANSION OF NOLLAN AND DOLAN IN KOONTZ V.
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

I. INTRODUCTION

The protection of private property embodied in the Takings Clause of the Fifth Amendment to the United States Constitution represents a principle that is fundamental to the rights and freedoms the country’s Founders sought to protect.1 The notion that property receives the utmost protection under the Constitution is a common theme throughout Takings Clause jurisprudence and has driven the United States Supreme Court to broaden the scope of what constitutes property.2 Notably, property has been expanded to include not only physical property, but also monetary property.3

A new era in Takings jurisprudence emerged with the Supreme Court’s recognition in Nollan v. California Coastal Commission4 and Dolan v. City of Tigard5 that takings can arise from the burdens imposed by land use permits.6 The “Nollan-Dolan” test emerging from these cases states that conditions of permits must have an “essential nexus” and “rough proportionality” to the impact of the construction or development project proposed.7 While Nollan and Dolan are “takings cases,” they also involve an application of the unconstitutional conditions doctrine.8 The unconstitutional conditions doctrine provides that “the government may not deny a

6. See id. at 374-75 (holding conditions on permits that have “rough proportionality” to development are not takings); Nollan, 483 U.S. at 842-43 (recognizing taking when government imposed condition on granting land use permit).
7. See Dolan, 512 U.S. at 391 (stating Nollan-Dolan test).
8. See id. at 385 (finding unconstitutional conditions doctrine applies when individual is denied right to receive just compensation for property).
benefit to a person because he exercise[d] a constitutional right." 9
For example, the government must give landowners the opportu-

In a recent expansion of Nollan and Dolan, the United States
Supreme Court held in Koontz v. St. Johns River Water Management
 District 11 that the government’s denial of a land use permit that
would have allowed Coy Koontz to develop his property was an un-

(stating basic principle underlying unconstitutional conditions doctrine).

10. See Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2589
(2013) (stating unconstitutional conditions doctrine applies in situations involving
Takings Clause).

11. 133 S. Ct. 2586 (2013) (holding government’s rejection of land use per-
mit is Takings Clause violation when property owner is denied opportunity to re-
ceive just compensation for property).

12. See id. (holding government demands for money constituted taking).

13. Id. (stating holding of case).

14. See id. at 2593 (discussing government demands during permitting pro-
cess).

15. See Koontz, 133 S. Ct. at 2599 (quoting Enters. v. Apfel, 524 U.S. 498, 540
(1998)) (citation omitted) (explaining how Court finds taking in Koontz).

16. See id. at 2603 (applying unconstitutional conditions doctrine to monetary
exactions).

property owners right to receive just compensation is unconstitutional).
The Supreme Court's determination that a government action that denies a permit, but does not seize physical property, is a taking requires an extreme leap in the logical understanding of Takings Clause jurisprudence.\[^{18}\] Without clear direction from the Court as to how to apply this new and expansive reading of Nollan and Dolan, lower courts may struggle to find a balance between protecting property rights and protecting the community from potentially harmful environmental effects of development.\[^{19}\] The Court's expansion of Nollan and Dolan is particularly relevant to future local governments attempting to mitigate the threat development poses to the environment.\[^{20}\]

This Note examines the Supreme Court's holding in Koontz that monetary exactions added as a condition to approval of a land use permit must satisfy the essential nexus and rough proportionality test and predicts the potential effects of expanding Nollan and Dolan on Takings Clause jurisprudence.\[^{21}\] Part II provides a factual summary of Koontz.\[^{22}\] Part III describes the general background and evolution of regulatory takings, with specific focus on land use permits, the unconstitutional conditions doctrine, and monetary exactions.\[^{23}\] Part IV reviews the Supreme Court's analysis in Koontz.\[^{24}\] Part V presents a critical analysis of the Supreme Court's holding, specifically examining the relationship between outright permit denials and takings, the Court's adoption of Justice Kennedy's opinion in Eastern Enterprises v. Apfel\[^{25}\] regarding takings in the context of monetary confiscations, and the Court's application of lien and interest income confiscations cases.\[^{26}\] Finally, Part VI

\[^{18}\] See Koontz, 133 S. Ct. at 2599-2603 (holding Takings Clause is implicated when government demand is for money and no taking of any kind has occurred).

\[^{19}\] See id. (failing to give direction in applying Court's holding).

\[^{20}\] See id. (purposely failing to acknowledge potential impact on environment).

\[^{21}\] For a narrative analysis of Koontz, see infra notes 125-184 and accompanying text. For a critical analysis of Koontz, see infra notes 185-218 and accompanying text.

\[^{22}\] For a discussion of the relevant facts of Koontz, see infra notes 28-48 and accompanying text.

\[^{23}\] For a discussion of relevant background information regarding Takings Clause jurisprudence and related cases, see infra notes 49-123 and accompanying text.

\[^{24}\] For a narrative analysis of the Court's decision in Koontz, see infra notes 124-184 and accompanying text.


\[^{26}\] For a critical analysis of the Court's holding in Koontz, see infra notes 185-218 and accompanying text.
examines the decision's potential impact on Takings Clause jurisprudence, local governments, and the environment.27

II. FACTS

In 1972, Coy Koontz, Sr. purchased 14.9 acres of undeveloped land located just outside of Orlando, Florida.28 Koontz later sought to develop 3.7 acres of the 14.9-acre tract.29 In order to proceed with the development, in 1994, he applied for a Management and Storage of Surface Water (MSSW) permit and a Wetlands Resource Management permit.30 Florida law required landowners who wished to develop their property to obtain a MSSW permit, which could "impose such reasonable conditions as are necessary to assure that . . . [construction would not be harmful to the water resources of the District]."31 Florida law also required that the proposed construction not be "contrary to the public interest."32 The St. Johns River Management District (the District), the district in which Mr. Koontz's land was located, also "require[d] that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."33

Koontz's plan for development included elevating the northern section of his land to in preparation for the construction of a building.34 The development plan also included "grad[ing] the

27. For an analysis of the potential impact of Koontz, see infra notes 219-259 and accompanying text.
29. Id. at 2591-92 (describing Koontz's property and proposed development). The tract of undeveloped land was located south of Florida State Road 50. Id. Although the state of Florida classified the land as wetlands, the topography of the area is diverse and includes a "small creek, forested uplands, and wetlands." Id. at 2592.
30. Id. (describing steps Koontz took to develop his property).
31. Water Resources Act, Fla. Stat. § 373.413(1) (2012) [hereinafter WRA] (stating specific instances that require permit); see also Koontz, 133 S. Ct. at 2592 (describing applicable Florida statute on permits for construction or alteration). The Water Resources Act (WRA) also created five water management districts in Florida to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state." Koontz, 133 S. Ct. at 2592 (citation omitted). The St. Johns River Water Management District had jurisdiction over Coy Koontz's land. Id.
33. Koontz, 133 S. Ct. at 2592 (stating District requirements for land use permit).
34. Id. (summarizing Koontz's development plan).
land from the southern edge of the building site down to the elevation of the high-voltage electrical lines, and install[ing] a dry-bed pond for retaining and gradually releasing stormwater runoff from the building and its parking lot.” To offset the environmental impact of the development, Koontz proposed deeding the District an eleven-acre section of his property as a conservation easement, which would foreclose any future construction on the land.

The District rejected Koontz’s proposal, conditioning approval on one of two possible options. Under the first option, Koontz could decrease the size of his development to one acre, deed the District the remaining 13.9 acres as a conservation easement, and install a costly “subsurface stormwater management system beneath the building site.” Under the second option, Koontz could develop his property as he proposed, but would be required to hire contractors to enhance and improve District-owned land several miles away. The specific improvements under option two included “replac[ing] culverts on one parcel or fill[ing] in ditches on another” and would have improved roughly fifty acres of District-owned lands. District policy did not require a permit applicant to improve a specific piece of land and allowed the District to require an applicant to simply fund “offsite mitigation work.”

Koontz found the District’s options for offsite environmental mitigation excessive given the limited impact his planned building would impose and filed suit against the District in Florida state court. Koontz sought relief under a Florida statute that “allow[ed] owners to recover ‘monetary damages’ if a state agency’s action [was] ‘an unreasonable exercise of the state’s police power constituting a taking without just compensation.’ The case went

35. *Id.* (providing details of Koontz’s development proposal).
36. *Id.* (discussing proposed mitigation any environmental impact development may have).
37. *Id.* at 2593 (discussing District’s denial of proposed conservation easement).
38. *Koontz*, 133 S. Ct. at 2592 (discussing District’s first proposed concession). The district also proposed that Koontz “install retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of his property to the south.” *Id.*
39. *Id.* (discussing District’s second proposed concession).
40. *Id.* (discussing specifics of District’s second option).
41. *Id.* (making distinction that District never requires permit applicants to undertake specific projects, but simply requires applicants to fund project off-site).
42. *Id.* (discussing Koontz’s actions after refusing to agree to either of District’s proposed concessions).
43. *Fla. Stat.* § 373.617(2) (2013) (stating requirements for relief); see also *Koontz*, 133 S. Ct. at 2592 (citation omitted) (discussing act under which Koontz sought relief). The Florida Supreme Court granted the District’s motion to dis-
to the Florida State Supreme Court, which considered the interpretation of the Nollan-Dolan standard.\textsuperscript{44} The Florida State Supreme Court distinguished this case from Nollan and Dolan, finding that (1) the District denied the permit because of Koontz’s refusal to make concessions rather than approving the permit with conditions and (2) there is no taking when the demand is for money as opposed to real property.\textsuperscript{45}

When the case reached the United States Supreme Court, the District argued no taking occurred because the government did not take any of Koontz’s property, either physically or through an arduous regulation.\textsuperscript{46} The estate of Coy Koontz, Sr. (Koontz) argued that both the payment of funds to improve land and conceding seventy-five percent of his land to the District were exactions subject to the heightened standard of scrutiny of Nollan and Dolan.\textsuperscript{47} The Supreme Court agreed with Koontz, holding that the requirements of Nollan and Dolan must be satisfied when the government denies a permit, even if the demand is for money, as long as it is connected to an “identifiable property interest.”\textsuperscript{48}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{44} Koontz, 133 S. Ct. at 2593-94 (citation omitted) (discussing Florida Supreme Court decision). For a further discussion of the Nollan-Dolan test, see infra notes 75-92 and accompanying text.
\item\textsuperscript{45} \textit{Id.} (citation omitted) (discussing Florida Supreme Court’s distinction between Nollan and Dolan).
\item\textsuperscript{46} Brief for Respondent, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447), at *23-24 (arguing that Nollan-Dolan test is inapplicable).
\item\textsuperscript{47} Brief for Petitioner, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591 (2013) (No. 11-1447), at *11-15 (arguing that Nollan and Dolan created exception to Takings Clause in that both cases recognize takings when conditions are imposed on land-use permits).
\item\textsuperscript{48} Koontz, 133 S. Ct. at 2603 (stating holding of case). The Court stated that it “expresses no view on the merits of petitioner’s claim that respondent’s actions here failed to comply with the principles set forth in this opinion and those two cases” and remanded the case to the Florida Supreme Court for further action consistent with its opinion in this case. \textit{Id.}
\end{enumerate}
\end{footnotesize}
III. BACKGROUND

The Supreme Court in Koontz considered an application of the unconstitutional conditions doctrine under the Takings Clause analysis and found the government's actions amounted to a taking of Koontz's property.49 This section will discuss the relevant background information necessary to understand the Supreme Court's decision in Koontz.50 Section A will discuss the Takings Clause generally.51 Section B will discuss the Supreme Court's application of the Takings Clause to land use permits.52 Section C will address how monetary exactions have been interpreted as takings under the Fifth Amendment.53

A. Takings Clause under the Fifth Amendment

The Fifth Amendment of the United States Constitution states: "[N]or shall private property be taken for public use, without just compensation."54 This clause, known as the Takings Clause, aims "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole."55 The Takings Clause is most relevant within the context of land use planning; specifically, the ability of state and local governments to engage in land use planning through the power of eminent domain has been recognized as constitutional under their police powers.56

Although the traditional application of the Takings Clause involves the government's physical intrusion or direct appropriation

49. Id. at 2594-2603 (applying unconstitutional conditions doctrine cases, monetary exactions cases, and regulatory takings cases).
50. For a narrative analysis of Koontz, see infra notes 124-184 and accompanying text.
51. For a general background of Takings Clause jurisprudence, see infra notes 54-74 and accompanying text.
52. For a discussion of land permit jurisprudence, see infra notes 75-92 and accompanying text.
53. For a discussion of monetary exactions as takings, see infra notes 93-123 and accompanying text.
55. Armstrong v. United States, 364 U.S. 40, 49 (1960) (discussing Takings Clause's purpose). The Supreme Court has described this particular application of the Takings Clause on various occasions, stating, for example, in Dolan v. City of Tigard: "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)).
56. See, e.g., Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 389-90 (1926) (holding state and local governments may use police power to enact ordinances and regulations for purpose of public welfare).
of private property, the Supreme Court has also recognized government regulations can amount to takings within the meaning of the Fifth Amendment, beginning with its decision in Pennsylvania Coal v. Mahon.\(^5\) Despite the relatively straightforward language of the Takings Clause, its interpretation can be mystifying, especially when applied to government regulations.\(^5\) Regulatory takings are of particular importance in understanding how the Court finds government actions as takings when physical property is not taken \textit{per se}.\(^5\)

Justice Oliver Wendell Holmes’ opinion in Mahon is generally viewed as the foundational case for the Court’s interpretation of regulatory takings and recognizes that property owners must be compensated when a regulation has the effect of a taking that goes “too far.” In Mahon, a state law restricted the mining of coal because it often caused the land above the mine to sink.\(^6\) The Supreme Court held that while the regulation did not physically take the land, “[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating and destroying it.”\(^6\)

Justice Holmes’ opinion laid the framework for regulatory takings, but lacked a workable definition for a regulation that goes “too far.”\(^6\) In Penn Central Transportations Company v. New York


61. Mahon, 260 U.S. at 412-13 (discussing provision of Kohler Act). This included mining coal for which the landowner inherently owned the coal below the land’s surface. \textit{Id.}

62. \textit{Id.} at 415 (recognizing that government regulation can effectuate taking).

City,\textsuperscript{64} decided fifty-six years after Mahon, the Court fashioned what Mahon was missing.\textsuperscript{65} The case began when the New York City Preservation Commission designated Grand Central Terminal (Grand Central) as a historical landmark, thereby limiting the ability of Penn Central Transportation Company (Penn Central), the owner of Grand Central, to build above it.\textsuperscript{66} Penn Central alleged the designation created a regulatory taking because it limited the investment return on the property.\textsuperscript{67} The Supreme Court held that designating Grand Central as a historic landmark did not constitute a taking.\textsuperscript{68} Most significantly, the Court recognized three factors, known as the "multi-factor" test, to consider when evaluating regulatory takings: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the government action."\textsuperscript{69}

In 2005, the Supreme Court attempted to clarify Takings Clause jurisprudence by evaluating two types of takings in Lingle v. Chevron.\textsuperscript{70} In Lingle, the Court determined two categories to be per se takings under the Fifth Amendment that fall outside of the Penn Central framework and require just compensation.\textsuperscript{71} First, permanent injury caused by a government requirement, no matter how


\textsuperscript{64. 438 U.S. 104 (1978) (finding that no taking occurred when owners of Grand Central Terminal were denied right to develop "superadjacent airspace").}

\textsuperscript{65. See id. at 124 (stating Court has not developed formula for regulatory takings, but some significant factors have emerged).}

\textsuperscript{66. Id. at 115-18 (discussing background of case).}

\textsuperscript{67. See id. at 119-20 (reviewing case's procedural history and Penn Central's arguments). Penn Central argued that it was limited from using any portion of Grand Central's airspace. Id. at 136-37. The Court further said that Penn Central had not been deprived of property because "nothing the Commission has said or done suggests an intention to prohibit any construction above the Terminal." Id. at 137 (emphasis in original).}

\textsuperscript{68. Id. at 138 (stating case's holding).}

\textsuperscript{69. Penn Central, 438 U.S. at 124 (discussing relevant factors for finding regulatory takings).}

\textsuperscript{70. 544 U.S. 528, 556 (2005) (holding that substantial advancement of legitimate state interest was incorrect method for evaluating regulatory takings).}

\textsuperscript{71. See id. at 538 (describing Court's jurisprudence on Takings Clause after Mahon).}
slight, must be justly compensated.\textsuperscript{72} Second, in the case of "total regulatory takings", property must be justly compensated, except in cases where "background principles of nuisance and property law" by themselves restrict an owner's use of the property.\textsuperscript{73} The \textit{Lingle} categories, along with the test set forth in \textit{Penn Central}, attempted to fit regulatory takings within the context of traditional takings so as to make regulatory takings the same as traditional takings.\textsuperscript{74}

B. Takings in the Context of Land Use Permits

Together, \textit{Nollan} and \textit{Dolan} are arguably the two most significant cases that address land use permits in the context of the Takings Clause and each laid the groundwork for the Supreme Court's decision in \textit{Koontz}.\textsuperscript{75} The principles articulated in these two cases

\textsuperscript{72} See id. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425-35 (1982)). In \textit{Loretto}, the Court held state law affected a taking when it forced landlords to allow cable companies to install equipment in apartment buildings. \textit{Loretto}, 458 U.S. at 419. The Court noted that "when the 'character of the governmental action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." \textit{Id.} at 435.

\textsuperscript{73} \textit{Lingle}, 544 U.S. at 538 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026-32 (1992)). \textit{Lucas} concerned a state law that prohibited owners from building permanent structures on beachfront property. \textit{Lucas}, 505 U.S. at 1007-09. The Supreme Court held that regulations that preclude the property owner of "all economically viable use of his land" represent a specific category of regulatory takings, otherwise known as "total regulatory takings," which require just compensation without the traditional case-by-case application of whether the regulation advances a public interest. \textit{Id.} at 1013-19.

\textsuperscript{74} See \textit{Lingle}, 544 U.S. at 538 (discussing \textit{Loretto}, \textit{Lucas}, and \textit{Penn Central} opinions and the cases' common goals). \textit{Lingle} also firmly stated that applying a Due Process analysis to takings is inaccurate, clarifying that if a person wishes to challenge a government regulation as a taking without just compensation, "a plaintiff . . . may proceed under one of the other theories . . . by alleging a 'physical' taking, a \textit{Lucas}-type 'total regulatory taking,' a \textit{Penn Central} taking, or a land-use exaction violating the standards set forth in \textit{Nollan} and \textit{Dolan}.” \textit{Id.} at 548. The Court in \textit{Lingle} was attempting to undo some disparate applications of the Takings Clause caused by its decision in \textit{Agins v. City of Tiburon} and \textit{Agins'} progeny. \textit{See Agins v. City of Tiburon}, 447 U.S. 255, 255 (1980). In \textit{Agins}, the Supreme Court stated that a regulation may be a taking "if [it] does not substantially advance [a] legitimate state interest." \textit{Id.} at 260. This appeared to be a Due Process analysis rather than a Takings test, causing some confusion as to what the proper test should be. \textit{See Lingle}, 544 U.S. at 542-43. The Court held in \textit{Lingle} that in contrast to the \textit{Mahon}, \textit{Lucas}, and \textit{Penn Central} tests, "the 'substantially advances' inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes on private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners.” \textit{Id.} at 542 (emphasis in original).

\textsuperscript{75} See Lauren Reznick, Note, \textit{The Death of Nollan and Dolan? Challenging the Constitutionality of Monetary Exactions in the Wake of Lingle v. Chevron}, 87 B.U. L. Rev.
form what is known as the Nollan-Dolan test for takings analysis; this
test maintains that permit conditions must have an “essential
nexus” and “rough proportionality” to the impact of a construction
or development project.\textsuperscript{76} Nollan and Dolan are of particular im-
portance to the Supreme Court’s decision in Koontz because they es-
established the key link between the unconstitutional conditions
doctrine and the Takings Clause in the land use permit context.\textsuperscript{77}

In Nollan, the Supreme Court considered whether conditions
imposed on a property owner through a land use permit consti-
tuted a taking.\textsuperscript{78} The Nollans applied for a permit to develop their
beachfront property in Ventura, California; the California Coastal
Commission granted the permit on the condition that the Nollans
“allow the public an easement to pass across a portion of their prop-
erty.”\textsuperscript{79} The Court held that granting the permit with the afore-
mentioned condition constituted a taking, and required the
Commission give the Nollans just compensation for their taken
property because of the lack of an “essential nexus” between the
condition of the permit and the building restriction.\textsuperscript{80} The Com-
mmission improperly conditioned the permit in exchange for a pub-

\textsuperscript{725}, 730-31 (2007) (discussing impact of Nollan and Dolan); see also Koontz v. St.
John’s River Water Mgmt. Dist., 133 S. Ct. 2586, 2598-2603 (2013) (incorporating
monetary exactions into framework of Nollan-Dolan); see also Timothy M. Mulvaney,
Exactions for the Future, 64 BAYLOR L. REV. 511, 518 (2012) (discussing exac-
tions jurisprudence in Nollan-Dolan).

\textsuperscript{76} See generally Nollan v. Cal. Coastal Comm’n, 483 U.S. 825 (1987) (requir-
ing an essential nexus); Dolan v. City of Tigard, 512 U.S. 374 (1994) (requiring
rough proportionality).

\textsuperscript{77} See Nollan, 483 U.S. at 837 (finding government’s imposed condition con-
stituted taking because property owners did not have opportunity to receive just
compensation for land); Dolan, 512 U.S. at 385 (discussing applicability of un-
constitutional conditions doctrine to Takings Clause).

\textsuperscript{78} Nollan, 483 U.S. at 834 (stating case’s issues).

\textsuperscript{79} Id. at 827-28 (discussing Commission’s decision to grant Nollans’ permit).
The Nollans’ permit application proposed building a three-bedroom house and
demolishing the existing structure. \textit{Id.} at 828. The Commission reasoned that an
easement was necessary for beachgoers to access the cove more easily. \textit{Id.}
Despite the Nollans’ protestations, the Commission granted the permit with the public
easement condition. \textit{Id.} The Commission’s reasons for requiring the easement
were that residential buildings would block the public from “psychologically,” “re-
alizing a stretch of coastline exists nearby that they have every right to visit,”
thereby burdening the public right to be on the beach. \textit{Id.} at 828-29 (citations
omitted).

\textsuperscript{80} See id. at 835-37 (finding imposition of condition unconstitutional). The
Nollan Court found that the Commission’s condition went too far and thus fell
outside what is a constitutionally permissible exercise of the state’s police powers.
\textit{Id.} at 837. The Supreme Court did not define what “essential nexus” meant until
Dolan, where it specifically stated that it meant to replace the more malleable “rea-
sonable relationship” test in favor of a more difficult test for governments to meet.
lic easement to avoid paying the Nollans just compensation for their land. The Court, therefore, found that a taking occurs when the government conditions a land use permit without establishing an “essential nexus” between the condition and the permitted project, emphasizing the need to protect against government extortion of property owners.

The Supreme Court modified Nollan’s “essential nexus” test in Dolan by further requiring conditions on permits to have a “rough proportionality” to the proposed development, meaning there must be a substantial “degree of connection between the exactions and the protected impact of the proposed development.” In Dolan, a landowner applied for a permit to increase the size of her business and build a parking lot. Because of a nearby creek’s one hundred year floodplain, the City Planning Commission conditioned the permit on the owner dedicating sufficient land for a “greenway,” as well as areas for pedestrian bike paths. The Commission argued that the permit conditions were substantially related to the impact of the proposed development, as the property fell within the planned zone for the Central Business District and the Community Development Code, and thus had sufficient “rough proportionality” to the proposed development. The Court rejected this notion, finding that for an “essential nexus” to exist, there must be a

81. Nollan, 483 U.S. at 835-37 (recognizing that taking occurred and Nollans must be compensated).
82. Id. (establishing essential nexus test when conditioning land permits). The Supreme Court articulated that “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” Id. (citation omitted).
83. Dolan, 512 U.S. at 386, 391 (discussing issue to be decided). The Dolan Court further noted that it was “not required to reach this question in Nollan, because [it] concluded that the connection did not meet even the loosest standard.” Id.
84. Id. at 379 (describing purpose of Dolans’ permit).
85. Id. at 379-80 (describing conditions of permit).
86. Id. at 375, 377-82 (discussing City’s plans for area and requirements of Community Development Code). Tigard, Oregon had adopted a plan to decrease traffic congestion in the Central Business district by building pedestrian pathways and bicycle paths. Id. at 377. In addition, the city adopted a “Master Drainage Plan” to make sure that there were no buildings or structures in the floodplain and to minimize potential flood damage. Id. at 378. The Commission made the following findings regarding the connection between the conditions and the impacts of the Dolans’ project: (1) “[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs,” and (2) “required floodplain dedication would be reasonably related to [Dolan’s] request to intensify the use of the site given the increase in the impervious surface.” Id. at 381-82 (citation omitted).
“rough proportionality . . . that the [easement] is related both in nature and extent to the impact of the proposed development.”

Though an exact mathematical proportion is not necessary, a municipality must make an “individualized determination” of the relatedness of the permit conditions to the development.

The Dolan opinion recognized takings in a land use permit setting as a part of unconstitutional conditions doctrine jurisprudence. The doctrine of unconstitutional conditions is a “well-settled” area of law that maintains “the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government.” In Dolan, for example, had the government taken the Dolans’ land directly, rather than through a condition imposed on a land use permit, there would have been no question that a per se taking occurred. The city, however, imposed a condition on the Dolans’ permit, which was equally unconstitutional because the permit condition effectively took the land and denied just compensation to the Dolans.

C. Monetary Exactions and Takings

The Supreme Court did not establish blanket recognition of monetary confiscations as takings until its decision in Koontz. Prior to Koontz, the Court rarely recognized that the confiscation of

87. Id. at 386, 391 (finding that best term to describe relationship between condition and development is “rough proportionality”).

88. Dolan, 512 U.S. at 391 (discussing what “rough proportionality” inquiry should include).

89. Id. at 385 (discussing applicability of unconstitutional conditions doctrine).

90. Id. (discussing limits placed on government through unconstitutional conditions doctrine); see also Perry v. Snidermann, 408 U.S. 593, 597 (1972) (finding that professor’s First Amendment right would be violated if public college did not renew his contract due to his open criticism of school’s administration); Mem’l Hosp. v. Maricopa Cnty., 415 U.S. 250, 257 (1974) (holding that county’s one-year residency requirement for indigent sick to receive healthcare was burden on right to travel). The Supreme Court has repeatedly held that “the government may not deny a benefit to a person because he exercises a constitutional right.” Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1997). See also Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59 (2006) (recognizing Supreme Court’s jurisprudence on unconstitutional conditions doctrine).

91. See Dolan, 512 U.S. at 379-82 (describing permit condition and process).

92. Id. at 385 (stating reasons for finding application of unconstitutional conditions doctrine).

liens or income accrued in an interest-bearing manner was a taking. Until *Koontz*, moreover, there was little agreement among federal and state courts on whether to apply *Nollan-Dolan* to permits requiring monetary exactions in lieu of a specific property interest.

The most relevant discussion of monetary exactions as takings is in the extremely splintered plurality opinion of *Eastern Enterprises v. Apfel*. In *Eastern Enterprises*, a plurality of the Supreme Court held that the Coal Act, which imposed retroactive financial liability on a former coal company for benefits for retired miners, was arbitrary due to the high payments the government assessed, and found that the act effectuated a taking. The precedential value of *Eastern Enterprises* is limited by the lack of a clear majority, but Justice Kennedy's concurrence holds greater weight than the other opinions. Some scholars see his concurrence as creating a "second

94. For a discussion on takings involving confiscation of liens and income accrued in an interest-bearing account, see infra notes 93-123 and accompanying text.

95. See *E. Enters. v. Apfel*, 524 U.S. 498, 518-24 (1998) (plurality opinion) (finding arbitrary financial liability was taking); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 121-22 (1985) (holding that requiring property owner to obtain permit before use is not a taking); *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008), abrogated by *Koontz*, 133 S. Ct. at 2586, (finding *Penn Central* is proper test applied to local ordinance requiring new development to install specific storm pipes, rather than *Nollan-Dolan* test). Making things even more complicated, state courts have come to a variety of decisions on this issue with no clear standard emerging. See *N. Ill. Home Builders Assn. v. County of Du Page*, 649 N.E.2d 384, 390-91 (Ill. 1995) (finding impact fee statute unconstitutional); *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983) (holding legislature's adopted impact fees were involvolved); *Home Builders Ass'n of Dayton and the Miami Valley v. Beavercreek*, 729 N.E.2d 349 (Ohio 1999) (holding "rational nexus test" applicable to decide whether impact fee was taking); *Home Builders Ass'n of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339 (Iowa 2002) (recognizing impact fees as taxes rather than takings); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620 (Tex. 2011) (deciding town's condition of monetary payment attached to permit approval was taking).

96. 524 U.S. 498 (1998) (plurality opinion) (holding that arbitrary retroactive law violated Takings Clause). The plurality, comprised of Justices O'Connor, Rehnquist, Scalia, and Thomas, found that the Coal Act's imposition of financial obligations constituted a taking and was therefore unconstitutional. *Id.* Justice Thomas filed a concurrence. *Id.* Justice Stevens, with whom Justices Souter, Ginsberg and Breyer joined, filed a dissent. *Id.* In addition, Justice Breyer filed another dissenting opinion, with which Stevens, Souter, and Ginsburg joined. *Id.* Justice Kennedy concurred in part and dissented in part, which some suggest is a "cross-cutting majority." Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 216 (2008) (discussing case and various opinions).

97. See *E. Enters.*, 524 U.S. at 537-38 (discussing Takings Clause applicability).

majority," averring "the Takings Clause is implicated by statutory or 'ordinary' obligations to pay money that does not operate on specific identifiable property interests."99

In his concurrence, Justice Kennedy criticized the application of the Takings Clause rather than the Due Process Clause and argued that the Takings Clause should be applied only to financial obligations that "operate upon or alter an identified property interest."100 While Justice Kennedy recognized that the Court's case-by-case application in regulatory takings is open-ended, "one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."101 In the opinion of Justice Kennedy, there must be something more than just a requirement to do some activity or make a payment for a taking to occur, and the character of the government action must be a central focus.102 Several other cases illustrate Justice Kennedy's idea that there must be an "identifiable property interest" to effectuate a taking.103 In Armstrong v. United States,104 for example, the Supreme Court recognized that liens were property interests and were compensable when they have "every possible element of a Fifth Amendment 'taking' and [are]

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99. Reznick, supra note 75, at 729 (discussing second majority created by Justice Kennedy's concurrence); see also Thompson, supra note 98, at 1261 (discussing limited precedent of Eastern Enterprises decision). Some courts and commentators have recognized this second majority in finding that the Takings Clause only applies to identifiable property interests. See, e.g., Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (noting court must follow majority in Eastern Enterprises, which recognized regulatory actions are not takings if requiring payment of funds); see also Thomas W. Merrill, Compensation and the Interconnectedness of Property, 29 Ecology L.Q. 327, 349 n.87 (1998) (affirming Supreme Court's five to four decision in Eastern Enterprises, which recognized application of Takings Clause only to specific property interests); Brian M. Hoffstadt, Retaking the Field: The Constitutional Constraints on Federal Legislation That Displaces Consent Decrees, 77 Wash. U. L.Q. 53, 95-96 (1999) (stating that if contract does not affect property interest, it would fall outside of Takings Clause).

100. E. Enters., 524 U.S. at 539-40 (Kennedy, J., concurring in part and dissenting in part) (stating he would have invalidated Coal Act based on Due Process Clause of Fourteenth Amendment).

101. Id. at 541 (finding that nebulous nature of regulatory takings compels this view).

102. Id. (describing limited circumstances under which takings should be recognized when government demands property that is not physical property).

103. See Armstrong v. United States, 364 U.S. 40, 50 (1960) (holding that government's diminution of value of liens was compensable property interest); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (finding bank deprived of property when government forced it to allow mortgagors to keep property at reappraised rate); Palm Beach Cnty. v. Cove Club Investors Ltd., 734 So.2d 379, 380 (Fla. 1999) (holding that income from land is interest in real property).

not a mere ‘consequential incidence’ of a valid regulatory measure.”  

In City of Monterey v. Del Monte Dunes of Monterey, Ltd., the Court shed some light on how to apply the Nollan-Dolan test to monetary exactions imposed by permits by suggesting that its holdings in Nollan and Dolan did not preclude recognizing monetary exactions and user fees as takings under the Fifth Amendment. The Court noted in dicta that it had “not extended the rough-proportionality test of Dolan beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use.” Del Monte Dunes has become an important precipice for state courts deciding whether to recognize user fees as takings under Nollan and Dolan.  

In addition, the Court recognized in Webb’s Fabulous Pharmacies, Inc. v. Beckwith that the confiscation of money not related to a physical property interest may still constitute a taking when the money is connected to any property interest. In that case, the court clerk in a Florida state court deducted interest on a complaint of interpleader. In addition to deducting a fee “for services ren-

105. Id. at 48 (describing reasons for finding lien to be compensable property interest).  
107. See, e.g., id. at 702-03 (stating in dicta that it has not recognized application of Dolan “rough-proportionality” test beyond land-use exactions and finding that challenge in present case was inapplicable to Nollan-Dolan test); see also 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, 388-90 (2002) (discussing application of Nollan and Dolan in state and federal courts and impact of Del Monte Dunes dicta on federal and state court decision-making).  
111. See id. at 164-65 (holding that interest accrued on interpleader fund for county court services, in addition to fee collected for those services, was taken without just compensation, violating Fifth Amendment); see also Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (finding interest income payment confiscation of private property).  
112. Webb’s Fabulous Pharmacies, 449 U.S. at 156-57 (stating facts of case and procedural history). In Webb’s Fabulous Pharmacies, the interpleader contained the purchase price of $1,812,145.77. Id.
ordered,” the clerk also deducted the interest that had accumulated in the account. The Supreme Court found that because the principle amount deposited was private property, the interest accrued was also property because it is an “incident[ ] of ownership.” The Court further explained that “a State . . . may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent.”

The Court subsequently affirmed that interest payments are property interests in Phillips v. Washington Legal Foundation. Phillips dealt with Texas’ Interest on Lawyers Trust Account (IOLTA) program. The Court held that interest accumulated in an account is the “private property” of the client because “any interest that does accrue attaches as a property right incident to the ownership of the underlying principal.” Although the Court remanded the issue of whether a taking occurred, it affirmed the proposition that interest payments are property interests. The Supreme Court and other state courts have relied on the decisions in Webb’s Fabulous Pharmacies and Phillips in recent cases involving similar facts.

113. See id. at 156-58 (stating interest earned while held by clerk exceeded $90,000 and that amount not turned over brought total amount to over $100,000).
114. Id. at 164 (holding interest earned on account is private property because it was generated from original amount). The Court found that the county could not “recharacteriz[e] the [funds] as ‘public money’ because [they are] held temporarily by the court.” Id.
115. Id. at 164 (stating holding of case).
117. Id. at 160 (discussing IOLTA account). The program mandates that an attorney receiving client money must place the funds in an individual, interest-bearing account. Id. This account also needed to be a federally authorized “Negotiable Order of Withdraw,” or NOW account, which allows for “federal insurance banks to pay interest on demand deposits.” Id. at 161 (discussing Negotiable Order of Withdraw accounts). The interest income IOLTA generated is paid to the Texas Equal Access to Justice Foundation (TEAJF) and is not attributed to the individual client if (1) he or she has no choice but to place his or her funds in the account and (2) he or she fails to indicate who will receive the interest payments. Id. at 162-63.
118. Id. at 168 (emphasis in original) (finding that interest income is private property).
119. Id. at 172 (expressing no view on whether state “took” funds or just compensation, but affirming that generated interest was private property of owner of principal).
120. See, e.g., Brown v. Legal Found. of Wash., 538 U.S. 216, 235-39 (2003) (holding confiscation of escrow was taking); Palm Beach Cnty. v. Cove Club Investors Ltd., 734 So.2d 379, 383-84 (Fla. 1999) (finding income received from fee was
The common thread that ties the foregoing cases together is their recognition that monetary exactions are related to property, whether it be physical or not.\textsuperscript{121} This recognition primed the Supreme Court to recognize explicitly that monetary exactions are compensable property interests under the Takings Clause.\textsuperscript{122} The Court used this precedent to form the basis of its opinion in Koontz, expanding the Nollan-Dolan test to apply to monetary exactions imposed as a condition for permit approval.\textsuperscript{123}

V. NARRATIVE ANALYSIS

The Supreme Court’s opinion in Koontz, authored by Justice Alito, is complex and multi-faceted.\textsuperscript{124} The Court first used the unconstitutional conditions doctrine to contextualize why the government’s demands implicate the Takings Clause and why a taking occurs in Koontz even though none of Koontz’s property was physi-


\textsuperscript{122} Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2598-2603 (2013) (holding monetary exactions are compensable property interest when government demanded exactions under Takings Clause and must satisfy Nollan-Dolan test).

\textsuperscript{123} Id. (relying on precedent to apply Nollan-Dolan test to monetary exactions imposed as permit condition).

\textsuperscript{124} For a discussion of the Court’s analysis in Koontz, see infra notes 125-184 and accompanying text.
cally taken. The Court then applied the Takings Clause jurisprudence of monetary exactions within the context of unconstitutional conditions to expand the scope of Nollan and Dolan, finding that the “essential nexus” and “rough proportionality” test must be met even if a permit is denied or the demand is for money rather than physical property.

A. Unconstitutional Conditions: Building the Framework

The Supreme Court laid the foundation for its decision by recognizing that Nollan and Dolan “involve a special application” of the unconstitutional conditions doctrine that protects property owners from uncompensated takings under the Fifth Amendment. The Court was therefore able to find that Nollan and Dolan apply to both approvals and denials of permits. The importance of the Court’s use of the unconstitutional conditions doctrine cannot be understated, as it was the vehicle for finding that the government’s actions constituted a taking of Koontz’s property because the government did not award Koontz just compensation for his land.

The requirements of an “essential nexus” and a “rough proportionality” balanced the principles of Takings Clause jurisprudence while allowing owners to develop their property. The Court stated that Nollan and Dolan demonstrate two important aspects of the land permit process. First, property owners seeking a land use permit are “especially vulnerable” to intimidation. The unconstitutional conditions doctrine protects against government abuse of its “broad discretion to deny a permit that is worth far more than property it would like to take.”

125. See Koontz, 133 S. Ct. at 2598-2603 (using unconstitutional conditions doctrine as basis for decision).
126. See id. at 2603 (stating case holding).
128. See id. (extending Nollan-Dolan application to permit denials).
129. See id. at 2595-97 (finding Koontz was unable to realize Fifth Amendment benefit that guarantees of receiving just compensation for his land).
130. Koontz, 133 S. Ct. at 2595-97 (discussing Nollan-Dolan test). The Koontz Court further explained that “the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” Id.
131. Id. at 2594 (discussing permitting process).
132. Id. (discussing nature of land permits).
133. Id. (positing that unconstitutional conditions doctrine provides check to government’s discretion to deny permits). The Court went on to say that “[b]y
on the valuable nature of land use permits, which the Court states are worth more than the just compensation an owner would receive through a taking, resulting in "extortionate" demands from the government.\textsuperscript{134} Second, the Court recognized that the permit process is a way to balance the interest of the property owner with the potential threat to the public.\textsuperscript{135}

The Court then found that these two principles of the land permit process do not change when a government approves or denies a permit involving a condition.\textsuperscript{136} The Court reasoned that if the government's denial of a permit were not subject to the \textit{Nollan-Dolan} test, it "would enable the government to evade . . . [its] limitations simply by phrasing its demands for property as conditions precedent to permit approval."\textsuperscript{137} In stating that the Court has never distinguished between "conditions precedent and conditions subsequent," the Court asserted that it has never made a distinction between conditions imposed before and conditions imposed after a permit has been awarded.\textsuperscript{138} Because the Court treats these conditions equally, it rejected the government's contention that an outright denial would not have been subject to the Fifth Amendment.\textsuperscript{139} The Court stated that inflated "demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."\textsuperscript{140}

B. Monetary Exactions and Identifiable Property Interests

After finding that the unconstitutional conditions doctrine applies in \textit{Koontz} and that \textit{Koontz} was denied opportunity to receive conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." \textit{Id.}

\textsuperscript{134} \textit{Id.} at 2594-95 (stating property owners are likely to surrender to demands of government as long as permit is worth more than just compensation for land).

\textsuperscript{135} \textit{Koontz}, 133 S. Ct. at 2595 (stating conditions may be warranted when substantial impact on public occurs due to property development).

\textsuperscript{136} \textit{Id.} (holding \textit{Nollan} and \textit{Dolan} applies even when permit is denied).

\textsuperscript{137} \textit{Id.} (discussing issues that would arise if \textit{Nollan} and \textit{Dolan} was inapplicable to permit denials).

\textsuperscript{138} \textit{Id.} at 2596 (discussing past cases on unconstitutional conditions doctrine).

\textsuperscript{139} \textit{Id.} (stating government's assertion that outright denial would not be subject to Takings Clause is problematic).

\textsuperscript{140} \textit{Koontz}, 133 S. Ct. at 2596 (discussing why government cannot outright deny permit without being subject to Takings Clause).
just compensation for his property, the Court next turned to the issue of the government's demand for money rather than for a portion of the property for an easement. The Court found that monetary payments as conditions for land use permits were "functionally equivalent to other types of land use exactions." The Court drew particular attention to Justice Kennedy's assertion in Eastern Enterprises that "the Takings Clause does not apply to government-imposed financial obligations that 'd[o] not operate upon or alter an identified property interest.'" Despite the fact that the demand was for money rather than property, the Supreme Court found there was an identifiable connection to property in the payment of that money. Here, the Court affirmatively applied Justice Kennedy's "identifiable property interest" analysis from Eastern Enterprises to monetary exactions. The incorporation of Justice Kennedy's analysis was based on the inseparable relationship between the government's demand for money and the property at stake in Koontz. The Court reasoned that regardless of whether the government is demanding money or property, the same concerns underlying Nollan and Dolan are present. It noted:

[T]he risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

The Supreme Court thus held that a monetary demand results in a per se taking "similar to the taking of an easement or lien." The Court relied on Takings Clause jurisprudence that involve

141. Id. at 2598 (discussing government's demand for money).
142. Id. at 2599 (holding that monetary exactions are subject to Nollan and Dolan essential nexus and rough proportionality test).
144. Id. (applying case to Justice Kennedy concurrence).
145. See Koontz, 133 S. Ct. at 2599-2600 (incorporating Eastern Enterprises into Fifth Amendment monetary exactions analysis).
146. Id. at 2600 (stating pivotal part of case is connection between funds and property).
147. Id. (justifying Nollan and Dolan application).
148. Id. (discussing risk of government abuse if Nollan and Dolan not applied).
149. Id. (finding that transfer of property interest from owner to government in Koontz is similar to takings that in occurred Nollan and Dolan).
monetary exactions to support its holding, specifically citing to Armstrong, Webb’s Fabulous Pharmacies, Phillips, and Palm Beach, as well as state court decisions that have come to a similar conclusion. The Nollan and Dolan tests, therefore, now apply to monetary exactions the government demands where there is an identifiable property interest sufficiently connected to that monetary exaction.

C. Takings, Not Taxes

The Court further addressed the dissent’s concern that land use exactions and property taxes would be indistinguishable. The Court clearly stated that takings are not taxes and that lower courts should not confuse the two concepts. The Court rejected viewing taxes as takings and clarified that Koontz does not affect the ability of local governments to collect taxes. First, the court noted takings should be distinguished from taxes because of the “long-settled view that property the government could constitutionally demand through its taxing power can also be taken by eminent domain.” Second, the Court cited to precedent and stated that takings and taxes are clearly distinguishable in practice.

D. The Dissent: Show Me the Property

Justice Kagan’s dissenting opinion rejected the application of Nollan and Dolan to conditions demanding money rather than physical property, reasoning an “ordinary obligation to pay money” is not a taking because it does not impact a specific and identifiable

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150. See Koontz, 133 S. Ct. at 2599-2601 (relying on precedent to conclude that demands for money can result in taking just as demands for property resulted in taking in Nollan and Dolan).
151. Id. at 2600 (stating that regardless of government policy consideration, there is still property interest transferred when government demands money).
152. Id. (discussing concerns of lower court and dissent). The dissent posed the question, “[O]nce the majority finds decides that a simple demand to pay money – the sort of thing often viewed as a tax – can count as an impermissible ‘exaction,’ how is anyone to tell the two apart?” Id. at 2607 (Kagan, J., dissenting).
153. Id. at 2601 (relying on Brown to show that it would be implausible to argue government was exercising power to levy taxes when taking property, as legislatures impose taxes, not courts).
154. Id. (discussing prior case law on taxes and takings).
155. Koontz, 133 S. Ct. at 2601 (stating that Koontz Court’s holding is consistent with prior cases).
156. Id. at 2600-01 (explaining that need to differentiate between takings and tax cases is problem in Court’s assertion that government could constitutionally demand property through taxes or eminent domain).
property interest.\textsuperscript{157} The dissent recognized that the permit process was an essential part of local governance and community development; however, by applying monetary exactions to Takings Clause jurisprudence, the \textit{Nollan-Dolan} test would need to be applied in every permit approval or denial.\textsuperscript{158} The subject of disagreement came from the majority's extension of \textit{Nollan} and \textit{Dolan} to include conditions demanding money rather than just physical property.\textsuperscript{159}

The dissent's primary concern was the majority's application of Justice Kennedy's opinion in \textit{Eastern Enterprises}.\textsuperscript{160} The dissent did not agree that an "ordinary liability to pay money" is a taking because monetary obligations do not impact a "specific and identified" property interest.\textsuperscript{161} Relying on Justice Breyer's dissent in \textit{Eastern Enterprises}, the \textit{Koontz} dissent found that while the demand for funds will certainly decrease Koontz's net worth, it is no different than any other government demand for money that has an "adverse economic effect."\textsuperscript{162} Accordingly, the dissent argued the order to pay money to repair the wetlands in \textit{Koontz}, taken separately from the permit, was not a taking, and therefore did not implicate the \textit{Nollan-Dolan} test because there was no surrender of a constitutional right.\textsuperscript{163}

The dissent criticized the majority's reliance on cases characterizing liens or seizures of interest income as takings; it found these cases inapplicable because Koontz had no identifiable property interest similar to the property interests implicated with respect to a lien or a confiscation of money.\textsuperscript{164} Koontz, the dissent argued, was only ordered to \textit{spend} money; therefore, this could not be considered a taking given that his "liability would have been the same..."
whether his property produced income or not."

For these reasons, the dissent found that there was no "specific and identifiable" property interest.

Moreover, the dissent argued that the majority's decision extends the Takings Clause too far. The dissent asserted that the majority allowed for too much federal supervision of local activities: "The Federal Constitution thus will decide whether one town is overcharging for sewage, or another is setting the price to sell liquor too high. And the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly." Further, the Court's failure to explain how local and state governments should apply Koontz could be potentially problematic in future cases.

In her dissent, Justice Kagan stated that she would have affirmed the Florida Supreme Court's judgment on two grounds: First, "the District never demanded that Koontz give up anything (including money) as a condition for granting him a permit." After a recitation of Koontz's permitting process, the dissent found that the government made no monetary demand as a condition to an approved permit. Rather, the government gave Koontz a variety of options to adhere to state law. Despite the opportunity to abide by state law, Koontz chose not to obtain the permits and the government's denial "therefore did not result [in a taking due to] his refusal to accede to an allegedly extortionate demand or condition." The dissent concluded that after this decision, the only option for local governments to avoid litigation will be to "deny...

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165. Koontz, 133 S. Ct. at 2606 (pointing out proposed development did not affect order demanding monetary payment).

166. Id. (citation omitted) (finding no property interest at stake in case).

167. Id. at 2607 (citations omitted) (arguing that with no limits Takings Clause will become unnecessarily overbroad).

168. Id. (positing that decision will have detrimental effects).

169. Id. at 2608 (pointing out majority refusal to set forth clear standards to analyze user fees).

170. Koontz, 133 S. Ct. at 2609 (stating why dissent would affirm Florida Supreme Court's decision).

171. Id. (stating one reason Justices dissented).

172. Id. at 2610-11 (discussing how government made no specific demand or condition).

173. Id. (discussing Koontz's options to adhere to state law).

174. Id. at 2611 (noting new limitations on government in evaluating permit applications). The dissent articulated that Koontz's "unwillingness to correct [his permits applications] by any means" coupled with the "legal deficiencies" of the application resulted in permit denial. Id. at 2611 (emphasis omitted).
the permits outright’” and refuse to give advice as to how to conform to the law.175

Second, the dissent reasoned that “no actual taking occurred, [and therefore] Koontz [could not] claim just compensation even had the District made a demand.”176 The dissent argued that although it understood the majority’s decision to remand damage considerations to the state court, it was perplexed that the majority found a taking in this case.177 The dissent was puzzled as to how “a law authorizing damages only for a ‘taking’ [could] also provide damages when . . . no taking has occurred” and was doubtful that the state of Florida would recognize such a remedy.178

The majority opinion in Koontz squarely addressed each of the dissent’s concerns.179 First, the majority cited to multiple state court decisions that applied the Nollan-Dolan test to monetary exactions.180 In these jurisdictions, local governments had not been precluded from assessing reasonable fees for permits.181 Second, the majority highlighted the inconsistency of the dissent’s view that the Federal Constitution will now need to be applied in every local governmental decision regarding land permits and will not apply any “meaningful limits” on the land permit process.182 The majority articulated how, despite this purported lack of constitutional limits, the dissent noted several limitations the federal Constitution imposes on land permit fees and rejected the notion that “other constitutional doctrines leave no room for the nexus and rough proportionality requirements of Nollan and Dolan.”183 According to the majority, to say that land permit applicants need no more pro-

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176. Id. at 2609 (stating second reason for dissenting from majority).
177. Id. at 2611-12 (asserting its confusion as to how majority found a taking).
178. Id. (arguing Koontz should not have been able to seek damages for taking when no taking occurred).
179. See id. at 2602-03 (majority opinion) (describing shortcomings of dissent).
180. Koontz, 133 S. Ct. at 2602 (citations omitted) (stating that local governments have already been applying Nollan and Dolan to monetary exactions).
181. Id. (disagreeing with dissent’s argument that local governments will be unable to assess user fees).
182. Id. (identifying inconsistency of dissent’s opinion).
183. Id. at 2602-03 (rebutter dissent’s argument that Nollan and Dolan are not required to takings in land permit context).
VI. CRITICAL ANALYSIS

Koontz represents a significant turning point for Takings Clause jurisprudence because it recognized that monetary exactions may be considered takings if they are sufficiently tied to a property interest. The Supreme Court, however, may have been inconsistent in its application of the unconstitutional conditions doctrine, specifically when addressing the government’s argument that Koontz’s permit could have been denied outright. Moreover, the Court’s adoption of Justice Kennedy’s concurrence in Eastern Enterprises and broad expansion of the Nollan-Dolan test may have a serious precedential impact on the future of Takings Clause jurisprudence. Finally, and perhaps most importantly, the Court’s application of cases involving lien and income interest confiscation to those involving user impact fees is of great concern, as it may negatively impact the way local governments exercise discretion in approving or denying development plans.

A. Expansion of the Unconstitutional Conditions Doctrine in the Context of Outright Permit Denials

The Court’s unanimous agreement that the Nollan-Dolan test applies to conditions on approvals and denials of permits is particularly significant. The question as to whether conditions on permit denials should receive the same level of scrutiny as conditions on permit approvals remained unanswered until the Koontz decision.

184. Id. at 2602 (rejecting dissent’s suggestion that regulatory takings doctrines provide limits on Federal Constitution, as there would be no need for Nollan-Dolan test).

185. Koontz, 133 S. Ct. at 2599-2600 (finding that Nollan-Dolan applies to land use permits requiring money). For an analysis of the Court’s application of the Nollan-Dolan test to government demands for money, see supra notes 127-140 and accompanying text.

186. Id. at 2597 (discussing unconstitutional conditions doctrine). For an analysis of the Court’s application of the unconstitutional conditions doctrine to user impact fees, see supra notes 127-135 and accompanying text.

187. Id. at 2599-2600 (applying Justice Kennedy’s “specific property interest” framework to land use permits). For an analysis of the Court’s broad application of Justice Kennedy’s concurrence in Eastern Enterprises, see supra notes 141-148 and accompanying text.

188. Id. at 2600-02 (applying analysis from monetary exactions to user impact fees). For an analysis of the Court’s application of monetary exactions to user impact fees, see supra notes 145-151 and accompanying text.

189. For a discussion of the significance of Koontz in the context of outright permit denials, see infra notes 190-200 and accompanying text.
sion.\textsuperscript{190} The \textit{Koontz} analysis suggests that outright denials of permits receive the same scrutiny under the \textit{Nollan-Dolan} test, despite the fact that no conditions would be imposed in those situations.\textsuperscript{191}

The majority accepted the proposition that an outright denial of a permit would be a taking without considering that such a denial does not impose any conditions on the property owner.\textsuperscript{192} While the majority saw an outright denial as analogous to other unconstitutional conditions cases, the dissent suggested that outright denials may be different.\textsuperscript{193} The majority’s failure to explain why an outright denial fits into the framework of \textit{Nollan-Dolan} is problematic: if a local government or planning board denies a permit without any mention as to why the permit was denied or what could be done for the permit application’s approval, then there is arguably no condition imposed and therefore no taking.\textsuperscript{194} As such, the outright denial does not necessarily fit into the majority’s “government extortion” analysis because there is no condition imposed that forces the property owner to do anything.\textsuperscript{195} The dissent’s argument, however, that the District’s permit denial in \textit{Koontz} did not impose any such conditions on the property owner does not fit within the context of unconstitutional conditions because conditions were explicitly imposed, pending the denial of the permit.\textsuperscript{196} Conditions were, in fact, imposed because Koontz’s permit denial was conditioned on choosing one of two mitigation proposals.\textsuperscript{197}

The Court affirmatively stated that \textit{Nollan} and \textit{Dolan} apply to permit denials as well as approvals.\textsuperscript{198} It failed, however, to fully explain how this framework includes outright denials.\textsuperscript{199} Thus, the Court’s wide expansion of \textit{Nollan-Dolan} without a proper explana-

\textsuperscript{190} See \textit{Koontz}, 133 S. Ct. at 2591 (holding that \textit{Nollan-Dolan} test must be applied to conditions of permit denials as well as conditions on permit approvals).
\textsuperscript{191} See \textit{id}. at 2611 (Kagan, J., dissenting) (warning against dangers of expansion of \textit{Nollan and Dolan}).
\textsuperscript{192} See \textit{id}. at 2596 (majority opinion) (dismissing claim that District could have denied permit outright).
\textsuperscript{193} See \textit{id}. at 2610 (Kagan, J., dissenting) (finding that had District denied applications, \textit{Penn Central} test would have been appropriate to determine whether taking occurred).
\textsuperscript{194} See \textit{id}. (discussing outright denials of permits).
\textsuperscript{195} See \textit{Koontz}, 133 S. Ct. at 2594-95 (majority opinion) (stating conditions on land use permits may lead to government’s extortionate demands).
\textsuperscript{196} \textit{Id}. at 2610-11 (Kagan, J., dissenting) (finding no conditions were imposed on Koontz in this case).
\textsuperscript{197} See \textit{id}. at 2592-93 (majority opinion) (explaining two possible proposals Koontz could agree to in order to develop property).
\textsuperscript{198} See \textit{id}. at 2594-96 (applying \textit{Nollan-Dolan} test to permit denials).
\textsuperscript{199} See \textit{id}. (failing to explain how outright permit denial would constitute taking).
tion of how outright denials fit into Takings Clause jurisprudence is a key shortcoming of the majority opinion and may be a difficult hurdle for lower courts applying this case.  

B. Recognition of the Kennedy Concurrency in *Eastern Enterprises*

One of the essential parts of the Court’s holding that monetary fees assessed in a land use permit are takings is the majority’s application of Justice Kennedy’s “specific and identified property interest” analysis from *Eastern Enterprises*. In finding that the demands for money in this case were connected to an “identified property interest,” the Court recognized this language as a standard for evaluating whether monetary exactions can be considered takings. The Court appropriately used Justice Kennedy’s analysis from *Eastern Enterprises* in *Koontz*.

The dissent’s criticism that the majority misapplied Justice Kennedy’s test from *Eastern Enterprises* in *Koontz* runs contrary to the Court’s previous recognition of such takings with respect to liens and interest income. The majority’s finding that a user fee requirement serves the same purpose as a relinquishment of real property dispels the dissent’s assertion that monetary exactions cannot be considered an “identifiable property interest.” The Court has held in numerous circumstances that types of monetary interests are indeed takings; by extending that logic to monetary exactions, a user fee that is sufficiently connected to the property is deemed to be something affecting that property. The Court’s

200. See *Koontz*, 133 S. Ct. at 2595 (stating outright denials fall into unconstitutional conditions doctrine without explanation).

201. Id. at 2599-2600 (applying Justice Kennedy’s concurrence in *Eastern Enterprises*).

202. Id. (finding monetary obligations had sufficient connection to property interest and was a taking).

203. See id. 2599-2602 (analogizing liens and interest income to monetary exactions).


205. *Koontz*, 133 S. Ct. at 2599-2600 (finding that requiring money in lieu of relinquishment of physical property is “functionally equivalent”).

206. See id. at 2599-2600 (holding demands for money amount to *per se* taking); Brown v. Legal Found. of Wash., 538 U.S. 216, 255-39 (2003) (holding mone-
application of Justice Kennedy's concurrence in Eastern Enterprises, therefore, is consistent with the Court's prior holdings and appropriately incorporates Justice Kennedy's concurrence into modern Takings Clause jurisprudence.\textsuperscript{207}

C. The Key Question Left Unanswered: Was Koontz's Property Taken?

The crux of the disagreement between the majority and the dissent is whether Koontz's property was taken.\textsuperscript{208} The Court used the "identified property interest" test in Eastern Enterprises as the basis for finding that the monetary takings in Armstrong and Palm Beach are sufficiently similar to Florida's demand for money in Koontz.\textsuperscript{209} While this approach allowed the Court to find that there was a "direct link" between the government's demand and the property, it confused the difference between the demands in Eastern Enterprises and those in Armstrong, Webb's Fabulous Pharmacies, Phillips, and Palm Beach.\textsuperscript{210} Eastern Enterprises concerned a demand for money with no reference to any physical property interest, whereas Armstrong, Webb's Fabulous Pharmacies, Phillips, and Palm Beach all concerned a recognizable property interest, such as a lien or earned interest from a sum of money – arguably different interests.\textsuperscript{211} Justice Kennedy's concurrence stated that the government-imposed financial obligations "[d]o not operate upon or alter an

\textsuperscript{207} See Koontz, 133 S. Ct. at 2599-2602 (finding liens and interest income are analogous to monetary exactions).

\textsuperscript{208} See id. 2610-11 (Kagan, J., dissenting) (arguing no taking occurred).

\textsuperscript{209} See id. at 2599-2600 (majority opinion) (finding Justice Kennedy's Eastern Enterprises holding similar to government taking liens or interest income).


\textsuperscript{211} Compare E. Enters., 524 U.S. at 540 (Kennedy, J., concurring) (stating government-imposed financial obligations is not taking unless it affects property interest), with Armstrong, 364 U.S. at 46 (finding lien is compensable property interest), Webb's Fabulous Pharmacies, 449 U.S. at 164 (holding property interest is implicated when government confiscated income interest), Phillips, 524 U.S. at 172 (finding
identified property interest," not that the obligation must be the identified property interest.\textsuperscript{212} The differences between these cases are readily apparent.\textsuperscript{213} The Court's application of \textit{Eastern Enterprises} to other cases involving monetary confiscations blurs the line between monetary confiscations that are tied to a property interest with those that are not, thereby creating a broad new standard that only requires that a monetary confiscation have a "direct link" to a property interest.\textsuperscript{214}

Moreover, the dissent's assertion that no property interest was taken or identified in \textit{Koontz} further frustrates the Court's analysis.\textsuperscript{215} In the cases the majority relied upon, the property interest was what was being taken.\textsuperscript{216} In \textit{Koontz}, however, the Court finds that the government's demand for money must be sufficiently related to a property interest, not that the government's demand for money is the property interest at issue.\textsuperscript{217} While the government's demand is tied to a property interest, the Court confuses what the property interest is in \textit{Koontz} by redefining what is a "property interest."\textsuperscript{218}

\section{VII. IMPACT}

\textit{Koontz} affects not only Takings Clause jurisprudence, but also state and local governments' decision-making and the environment.\textsuperscript{219} The Court's broad interpretation of \textit{Nollan} and \textit{Dolan} leads to an application of the Takings Clause for both monetary confiscations, as well as physical property.\textsuperscript{220} Additionally, the

\begin{itemize}
  \item interest earned on principal is property), and \textit{Palm Beach}, 734 So.2d at 389 (holding income from property is sufficient property interest).
  \item See \textit{E. Enters.}, 524 U.S. at 540 (Kennedy, J., concurring) (stating Takings Clause should be applied when government demand is for money).
  \item \textit{Koontz}, 133 S. Ct. at 2599-2600 (discussing monetary confiscation takings cases).
  \item See id. at 2600 (finding \textit{Nollan-Dolan} must apply because of "direct link" between property interest and government demand).
  \item Id. at 2606 (Kagan, J., dissenting) (finding no government demand connected to property interest in this case, only order to spend money).
  \item Id. at 2599-2601 (majority opinion) (stating property at issue here is physical property, but finding government demand for money is violation of Takings Clause).
  \item Id. at 2600 (finding Takings Clause is applied when there is direct connection between government's demand and real property).
  \item \textit{Koontz}, 133 S. Ct. at 2599-2601 (discussing application of \textit{Eastern Enterprises} to other takings cases involving confiscation of money or liens).
  \item See id. at 2594-2603 (discussing applicable Takings Clause jurisprudence, recognizing monetary exactions as takings, and addressing concerns of environmental impact and decision's effect on state and local government).
  \item Id. (holding monetary fees can be considered takings).
\end{itemize}
Court's incorporation of *Eastern Enterprises* into this context may have negative implications for state and local governments applying *Koontz* to land use permit applications.\(^{221}\) Moreover, *Koontz* may have a lasting environmental impact, especially with regard to wetlands.\(^{222}\)

### A. Impact on Takings Jurisprudence

The significance of *Koontz* in the context of Takings Clause jurisprudence is its broad application of the *Nollan-Dolan* test to monetary exactions required for land use permits.\(^{223}\) By requiring monetary exactions to pass the *Nollan-Dolan* "essential nexus" and "rough proportionality" test, *Koontz* definitively incorporated monetary exactions into Takings Clause jurisprudence.\(^{224}\) While the Court attempted to narrow its holding by stating that the government-demanded monetary exaction must have a "direct link" to a physical parcel of land, it begins a new discussion of what constitutes a justly compensable taking under the Fifth Amendment.\(^{225}\)

Although the Supreme Court ruling was needed to address the growing concern of how to apply monetary exactions to takings, the broad ruling in *Koontz* may have foreclosed other types of analysis for these types of claims.\(^{226}\) Some commentators have suggested that because monetary exactions in a Takings Clause context touch on many different areas of the law, the most appropriate application would be a hybrid framework using the *Nollan-Dolan* "essential nexus" and "rough proportionality" test in concert with the multi-factor balancing test of *Penn Central*.\(^{227}\) In contrast, there are also strong arguments in favor of recognizing monetary exactions within the sole context of *Nollan* and *Dolan*.\(^{228}\) First, monetary exactions

\(^{221}\) *Id.* at 2598-2601 (applying *Nollan-Dolan* test to land permits requiring financial obligation and using Justice Kennedy's concurrence in *Eastern Enterprises* for support). For a discussion as to how *Koontz* will impact Takings Clause jurisprudence, see *infra* notes 223-232. For a discussion on the potential effects of *Koontz* on state and local governments, see *infra* notes 233-251.

\(^{222}\) For a discussion on the environmental side effects of the *Koontz* decision, see *infra* notes 252-259.

\(^{223}\) See *Koontz*, 133 S. Ct. at 2599-2601 (applying *Nollan-Dolan* test).

\(^{224}\) See generally *id.* (discussing application of *Nollan-Dolan* test).

\(^{225}\) See, e.g., *id.* at 2600 (stating Court's holding in *Koontz* rests on "direct link" between government demand and real property interest).

\(^{226}\) See, e.g., Kent, *Theoretical Tension*, *infra* note 63, at 1874-75 (arguing hybrid application of *Nollan-Dolan* test and multi-factor *Penn Central* test would be most appropriate way to analyze development impact fees as takings).

\(^{227}\) *Id.* at 1876-79 (discussing hybrid approach).

\(^{228}\) See, e.g., Jane C. Needleman, *Note, Exactions: Exploring Exactly When Nollan and Dolan Should be Triggered*, 28 CARDOZO L. REV. 1563, 1584 (2006) (arguing *Nollan* and *Dolan* should be applied to monetary exactions); Michael L. Nadler, *The
impose the same risks as physical exactions identified in *Nollan* and *Dolan*: Monetary exactions “leverag[e] and redistribution of wealth.” By applying the heightened scrutiny of *Nollan* and *Dolan*, the rule will apply evenly to both monetary and physical takings by the government. Second, monetary exactions fit within the principal goal of the Takings Clause to ensure that the government does not force individuals to bear losses that the public as a whole should bear. In fact, “monetary exactions, by their very design, force developers [rather than private citizens] to fund public services and infrastructure that may benefit and be used by a broader segment of the population than is injured by their development.”

B. Impact on Local and State Governments

The dissent feared that *Koontz* would negatively impact state and local governments by recalibrating the balance between the rights of the property owner and the needs of a local government. Moreover, the dissent predicted that development might be stymied by the majority’s decision due to its potential to encourage outright denials of permits rather than discussions and negotiations from which both sides can benefit.

Therefore, redefining the “level of the burden” on a property owner’s right to receive just compensation after *Dolan*’s extension of constitutional protection “increases the level of justification

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*Constitutionality of Community Benefits Agreements: Addressing the Exactions Problem, 43 U. *Urb. L.* 587, 600-01 (2011) (arguing monetary exactions should fall within scope of *Nollan* and *Dolan* because monetary exactions have same risks as physical exactions).

229. Nadler, supra note 228, at 600 (citation omitted) (discussing benefits of interpreting monetary exactions within *Nollan-Dolan* context); see also Vicki Been, “Exit as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,” 91 *Colum. L. Rev.* 473, 504 (1991) (arguing municipalities will overcharge developer for harm imposed by developer’s actions for purpose of redistribution of wealth and “over regulate” to raise revenues).

230. Nadler, supra note 228, at 600 (discussing why monetary exactions should be included in *Nollan-Dolan* framework).

231. See id. (arguing monetary exactions fit within one of key goals of Takings Clause); see also Armstrong v. United States, 364 U.S. 40, 49 (1960) (discussing goals of Takings Clause).

232. See Nadler, supra note 228, at 600 (footnote omitted) (explaining how monetary exactions can benefit public in positive way).


234. See id. at 2610 (discussing why governments might choose to deny permits outright after decision).
needed to restrict the use and benefits of property rights." In assessing the impact of the Nollan and Dolan decisions, commentators observed that the Supreme Court was taking a strong position on protecting the rights of property owners. Specifically, the increase in constitutional safeguards for property rights restricts the availability of land use conditions, regulations, and mandates on a variety of real estate developments. This limitation occurs in three ways: "increasing (1) the level of the burden imposed on the right to receive just compensation, (2) the level of constitutional protection accorded property rights, and (3) the level of judicial scrutiny in determining whether sufficient justifications exist for the imposition of land dedication conditions and other land use regulations." Given the impact of Nollan and Dolan on property rights, the Supreme Court's extension of these cases to monetary exactions further increases those protections and may prove to increase the burden on the government to demonstrate that the proposed exactions are within an "essential nexus" of the development and "roughly proportional" to its impact.

Legislators in Florida have reacted to Koontz by introducing legislation that reinforces protection for landowners seeking land use permits. The proposed legislation, House Bill 1077 and Senate Bill 1310, would limit local governments from including additional requirements on permit applicants "beyond those issued by state and federal agencies." One commentator, Robert Thomas,

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235. James E. Holloway & Donald C. Guy, Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development under the Takings Clause, 27 TEX. TECH. L. REV. 78, 135 (1996) (concluding property owners will have more justification when government restricts property rights in land use permits).

236. Id. (discussing heightened constitutional protections for property rights after Nollan and Dolan).

237. Id. (discussing impact on development).

238. Id. (footnotes omitted) (noting three reasons Dolan achieves result of increasing constitutional protections and limiting conditions on development); see also Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1416 (1989) (discussing Warren Court's reemergence of unconstitutional conditions doctrine).

239. See, e.g., Koontz, 133 S. Ct. at 2586 (recognizing monetary exactions within context of Nollan and Dolan).


241. Id. (stating purpose for proposed legislation). The legislature would provide further protection for landowners who are "vulnerable to excessive demands for relinquishment of property or money in exchange for planning and permitting approvals." Fla. SB 1310 § 70.45.
noted that "[this] legislation also would make it less likely, in my opinion, that a local government or municipality will try to test any boundaries that the Koontz decision left open." The legislation, moreover, would further reinforce the burden on local governments to meet the Nollan-Dolan test.

Koontz may also encourage municipalities to deny permits outright, without a discussion of how a property owner can conform his or her development to public needs. These decisions may push local governments to bypass negotiations on permits and simply deny those permits that fail to meet certain standards and, therefore, stifle development that may have a positive impact on a local community. The dissent suggests that potential lawsuits may scare local government officials into either denying a permit outright or allowing developers to build without any restrictions.

Local governments have already begun to feel the impact of Koontz despite its recent inception. In San Diego, for example, the city council considered enacting a five hundred percent increase on a "linkage fee" levied on construction projects that assist low-income workers by subsidizing housing costs. Opposition groups such as the "Jobs Coalition," a local organization comprised of building associations and Chamber of Commerce groups, had retained legal counsel and would have sought to fight this fee, if it had been implemented. A land use attorney in San Diego commented: "[Koontz] raised the bar for what municipalities have to do

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242. Ritchie, supra note 240 (discussing further protections Florida legislation would provide to property owners).
243. See id. (noting that legislation would limit local or municipal governments from pushing the limits of Koontz).
244. See id. at 2590 (stating outright denials would be subject to Nollan-Dolan scrutiny, but failing to explain how this would apply).
249. Id. (examining local organization's reactions to potential fees).
to justify a fee."\textsuperscript{250} Challengers to the measure were victorious in their challenge, but it will remain to be seen how this will affect other municipalities.\textsuperscript{251}

C. Potential Environmental Impact

\textit{Koontz} may have a great impact on the physical environment based on the limitations it puts on local governments.\textsuperscript{252} After \textit{Nollan} and \textit{Dolan}, commentators predicted that local governments would be less likely to impose monetary exactions relating to "recreational, environmental, or natural resource amenities," leading local governments to under-regulate environmental impacts.\textsuperscript{253} The consequences of using these exactions less frequently in the mitigation of environmental impacts "could mean a loss of open space, fewer bike paths and nature trails, and less wetlands and habitat protection."\textsuperscript{254} Ann E. Carlson and Daniel Pollak, two scholars on this subject, point out that although local governments can use the police power to alleviate environmental impacts of proposed development, the precision of the "essential nexus" and "rough proportionality" requirement may make this "difficult to quantify."\textsuperscript{255}

Commentators have warned about the effects of increasing safeguards for property owners and making land use regulations more difficult.\textsuperscript{256} If local governments fail to assess environmental impact fees or exactions on developers due to fears of litigation,

\begin{itemize}
  \item \textsuperscript{250} Id. (quoting San Diego attorney Felix Tinkov on impact of recent Supreme Court decision).
  \item \textsuperscript{251} See Developer Fee Rescinded By San Diego City Council, KPBS, (Mar. 4, 2014), http://www.kpbs.org/news/2014/mar/04/linkage-fee-rescinded-san-diego-city-council/ (discussing San Diego City Council's unanimous rejection of construction fee increase due to concerns for local economy and employment).
  \item \textsuperscript{252} Ann E. Carlson & Daniel Pollak, \textit{Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decision}, 35 U.C. Davis L. Rev. 103, 117-18 (2001) (discussing impact of \textit{Nollan} and \textit{Dolan} on local governments and environmental mitigation); Mark Fenster, \textit{Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity}, 92 Cal. L. Rev. 609, 660 (2004) (finding Takings Clause jurisprudence may adapt to environmental changes inadequately and result in adverse environmental effects).
  \item \textsuperscript{253} See Carlson & Pollak, supra note 252, at 107 (discussing research results relating to local governments' imposition of exactions after \textit{Nollan} and \textit{Dolan}); see also Fenster, supra note 252, at 660 (discussing local and state governments' underregulation).
  \item \textsuperscript{254} Carlson & Pollak, supra note 252, at 156 (predicting consequences of using exactions less frequently).
  \item \textsuperscript{255} Id. at 136 (discussing local governments' difficulty to state environmental impact in context of \textit{Nollan} and \textit{Dolan} test).
  \item \textsuperscript{256} See Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2686 (2013) (holding monetary exactions can be takings if \textit{Nollan-Dolan} test is met).
\end{itemize}
As Mark Fenster explains, "A constitutional logic leading to regulatory formulas that cannot adapt to local, regional, and national environmental changes ultimately provides greater individual property rights than the Constitutional requires, and as a result adversely affects political, social, and environmental values made vulnerable to the entitlements these formulas create." Koontz will certainly give pause to local governments seeking to mitigate the environmental impact of development in their communities.

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