The Nollan/Dolan Land-Use Exactions Doctrine and its Role in Taking Jurisprudence: *Koontz v. St. John's River Water Management District*

Emma R. Donahey

Abstract

This case note addresses a long overdue clarification in Takings jurisprudence, specifically dealing with the scope and application of land-use exactions in situations involving a Takings Clause analysis. Part I of this case note discusses the enactment of Florida's most influential sequence of conservation and environmental protection laws. Part II analyzes a recent United States Supreme Court Decision, Koontz v. St. John's River Water Management District*, which refined the scope of the popular* Nollan/Dolan *land-use exactions doctrine. Part III inquires into the history of United States Takings jurisprudence, including the Takings Clause, the unconstitutional conditions doctrine, as well as the* Nollan/Dolan *exactions test and its former application. Finally, Part IV argues why the Supreme Court correctly expanded both the scope and utilization of the* Nollan/Dolan *test as well as the unconstitutional conditions doctrine. In doing so, the Supreme Court not only subjected all land-use permits to the* Nollan/Dolan *test even when such permits were denied, but also clarified* Nollan/Dolan's *application to monetary exactions after decades of inconsistency.*

I. Introduction to Florida's Conservation and Environmental Protection Laws

Florida, like many other states, has long recognized the need for conservation and environmental protection laws.[1] Historically, most of the Florida legislature's early conservation efforts were aimed at encouraging pro-development regulations rather than actually establishing environmental preservation laws.[2] However, in the 1970's, Florida's legislature focused its energy on the enactment of an effective series of environmental regulation laws that remain the backbone of Florida's conservation and environmental protection laws today.

The first act in the series was the Land Conservation Act of 1972,[3] which made it a general state policy to acquire and protect environmentally endangered lands by subjecting such lands to selection and acquisition procedures.[4] In the same year, the legislature passed its second piece of environmental legislation, the Florida Water Resources Act.[5] This Act divided the State into the following five water management districts: (1) Northwest Florida Water Management District, (2) Suwannee River Water Management District, (3) St. Johns River Water Management District, (4) Southwest Florida Water Management District, and (5) South Florida Water Management District.[6] The Act granted each of these districts the authority to regulate and protect the State's water resources.[7] In addition, the Act required individuals to obtain a Management and Storage of Surface Waters ("MSSW") permit from their relevant water management district before performing any type of construction or alteration on protected lands

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[1] Florida's first statutory environmental regulation in 1856 was aimed at promoting environmental commerce and development. Bruce Weiner & David Dagon, *Wetlands Regulation and Mitigation after the Florida Environmental Reorganization Act of 1993*, 8 J. LAND USE & ENVTL. L. 521, 529 (1993).
[2] *Id.* at 528-29.
[3] Land Conservation Act, F.S.A. § 259.032 (2015)
[4] Peter L. Blacklock, *Case Summary: Koontz v. St. Johns River Water Management District*, IN THE ZONE: FOX ROTHSCHILD LLP, February 2013.
[5] Florida Water Resources Act, F.S.A. § 373.016.
[6] Water Management Districts, FL Dep't of Env't Prot., *available at* http://www.dep.state.fl.us/secretary/watman/default.htm.
[7] F.S.A. § 373.016 (4)(a).

under the initial Land Conservation Act.[8] The last Act in the series of conservation and environmental protection regulations was the Environmental Land and Water Management Act,[9] which established procedures to increase the protection of wildlife and wilderness connected with the environmentally endangered lands.[10]

Twelve years later, Florida enacted yet another environmental conservation regulation titled the Warren S. Henderson Wetlands Protection Act of 1986.[11] This Act made it illegal for anyone to "dredge or fill in, on, or over surface waters" without first obtaining a Wetlands Resource Management ("WRM") permit.[12] Pursuant to this Act, the issuance of such permits was couched within the authority of the five water management districts.[13] In order to obtain approval, permit applicants were required to provide the district with "reasonable assurance" that (1) the "state water quality standard . . . will not be violated," and (2) the "activity in, on, or over surface waters or wetlands . . . is not contrary to public interest."[14] Although Florida's enactment of these extensive protection laws has clearly demonstrated strong overall conservation ramifications, the regulations have also substantially impacted property owners' rights to use and develop such lands.

II. Koontz v. St. Johns River Water Management District[15]

In 1972, Coy Koontz ("Koontz") purchased 14.9 acres of undeveloped property in Orange County, Florida.[16] The property runs along the south side of Florida State Road 50, a divided four-lane highway east of Orlando, placing it less than 1,000 feet from the intersection of

[8] F.S.A. § 373.413(1), (2) (2012).
[9] F.S.A. § 380.012.
[10] Blacklock, *supra* note 4.
[11] Warren S. Henderson Wetlands Protection Act, F.S.A. § 403.901(1) (1984).
[12] *Id.*
[13] Blacklock, *supra* note 4.
[14] F.S.A. § 373.414(1) (2012).
[15] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) [Koontz I].
[16] *Id.* at 5291-92.

Road 50 and an Orlando tolled expressway, Florida State Road 408.[17] A high-voltage power line bisects the land, creating a northern and southern section.[18] A 100-foot drainage ditch lines the western edge of the property with the effect of segregating the northern section from any other undeveloped land.[19]

While the northern section of Koontz's property was previously classified by the State of Florida as "wetlands," it drains surprisingly well, forming standing water only in the ruts of the unpaved road used by workers to gain access to the bisecting power line.[20] The southern section of the property is a bit more diverse as it contains a small creek, forested uplands, foot-deep wetlands, and a largely assorted animal population.[21] Due to its location on the tributary of the Econlockhatchee River, nearly all of the 14.9-acre property purchased by Koontz was designated by the St. Johns River Management District (the "District") as part of the designated hydrologic basin within the Riparian Habitat Protection Zone.[22]

After several years, Koontz decided to develop a portion of his land and, accordingly, applied to the District for MSSW and WRM permits in compliance with Florida's conservation and environmental protection laws.[23] In his proposal to the District, Koontz articulated his development plan to (1) raise the elevation of the northern section of his land in order for it to sustain a building (2) grade the land from the southern edge of the building site down to the high voltage electrical lines and (3) install a dry-bed pond for the purposes of retaining and gradually

[17] *Id.* at 5292.
[18] *Id.*
[19] The 100-foot ditch also served as a clearing area for the respective power lines, highways, and other similar construction projects. *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*

releasing storm water runoff from the building and its parking lot.[24] In an effort to mitigate the environmental effects of his proposal, Koontz then offered to deed a conservation easement to the District for the remaining 11-acres of his land.[25] In doing so, Koontz sought to foreclose any potential future development on the residual property.[26]

The District found Koontz's proposition, including his offer to deed a conservation easement, to be inadequate.[27] In return, the District informed Koontz that it would approve his proposal for construction if, and only if, he agreed to one of its two proposed concessions.[28] To receive the District's approval, Koontz was to either: (1) reduce the size of his construction project to 1 acre, while deeding the remaining 13.9 acres to the District as a conservation easement,[29] or (2) proceed with the development as proposed (building on 3.7 acres while deeding a conservation easement to the District for the remaining land) *and* personally hire outside contractors to make nearly $150,000[30] worth of improvements on 50 acres of District-owned land several miles away.[31]

After weighing the District's mitigation stipulations against the environmental effect that his proposed property development would have caused, Koontz filed suit in Florida State court

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[24] *Id.*
[25] *Id.* at 5292-93.
[26] *Id.* at 2592.
[27] *Id.* at 5293.
[28] *Id.*
[29] The District suggested Mr. Koontz reduce the development area by either eliminating the dry-bed pond from his proposal and instead installing a more costly subsurface storm water management system underneath the building site or by installing retaining walls rather than gradually sloping the land from the building site down to the elevation of the rest of the southern property. *Id.*
[30] Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673 WL 34724740 (Fl.Cir.Ct. Oct. 30, 2002) [Koontz IV].
[31] The District requested that Mr. Koontz replace culverts on one parcel of District land or fill in ditches on another parcel of District land, although they mentioned that they would "favorably consider" alternatives to suggested offsite mitigation projects if the effect proposed by Mr. Koontz would be comparable. *Koontz I*, 133 S. Ct. at 5293.

alleging four counts against the District.[32] First, Koontz alleged that sections 373.413(1) and 373.415(4) and (5) of the Florida Statutes unconstitutionally delegated legislative lawmaking powers to the District in violation of the nondelegation doctrine of the Florida State Constitution.[33] Under such delegation, Koontz claimed that the District had no legislative authority to create the Econlockhatchee River Hydrologic Basin.[34] Second, Koontz claimed that section 373.414 of the Florida Statutes unconstitutionally placed the burden of proof on the applicant seeking a land-use permit to prove with, "reasonable assurance," that the property projects were not contrary to public interest.[35] Third, Koontz declared that the District's action of withholding his land-use permit constituted a deprivation of his "economically viable use of [the] property," thus resulting in an unconstitutional taking.[36] Finally, Koontz argued that the District's refusal to approve his permit proposal generated an unconstitutional intrusion into his privacy rights guaranteed by the Florida Constitution.[37] In response, the District filed a motion to dismiss, which was granted by the Ninth Judicial Circuit Court of Florida.[38]

On appeal, the District Court of Appeal of Florida focused on two main parts of Koontz's complaint. First, the court affirmed the circuit court's decision that the delegation of authority to the District per the Florida Statutes was valid.[39] Second, the court reversed the circuit court's determination that Koontz's issue regarding the regulatory taking of his property was not ripe due to the District's denial of his permit application.[40] In its conclusion, the court held that

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[32] *Id.*
[33] Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673 WL 34854535 (Fl.Cir.Ct. Oct. 29, 1997) [Koontz II].
[34] Koontz v. St. Johns River Water Mgmt Dist. 720 So.2d 560, 561 (Fla. 5th DCA 1998) [Koontz III].
[35] *Koontz II*, 1997 WL 34854535.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Koontz III*, 720 So.2d at 561.
[40] *Id.*

"[t]here is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the governing body finally approves one before he can go to court."[41] Furthermore, "if the governing body finally turns down an application and the owner does not desire to make any further concessions in order to possibly obtain an approval, the issue is ripe."[42] The court reversed and remanded the case back to the circuit court.[43]

On remand, the Ninth Judicial Circuit Court of Florida held a hearing to determine whether the District's mitigation demands constituted a regulatory taking of Koontz's property.[44] In doing so, the court looked to the land-use exaction[45] rule established by the United States Supreme Court's decisions in *Nollan v. California Coastal Commission* as well as *Dolan v. City of Tigard* ("*Nollan/Dolan* test").[46] The *Nollan/Dolan* test established that there (1) must be a "nexus between the conditions imposed on the development and the proper government purpose of the building restrictions";[47] and (2) the public agency imposing a restriction must show "rough proportionality between what is being exacted from the owner and the state's interest."[48] After applying the *Nollan/Dolan* test to the case at hand, the circuit court held that the District's conditions of substantial off-site mitigation resulted in a regulatory taking of Koontz's property.[49]

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[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] "In the most general sense, an 'exaction' is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted. Even though the government may have the authority to deny a proposed use outright, under the exactions theory of takings jurisprudence, it may not attach arbitrary conditions to issuance of a permit." *See* St. Johns River Water Mgmt. Dist. v. Koontz, 5 So.3d 8, 9 (Fla. 5th DCA 2009) [Koontz V] (quoting Dolan v. City of Tigard, 512 U.S. 374, 397 (1994).
[46] Koontz v. St. Johns River Water Mgmt. Dist., No. CI-94-5673 WL 34724740 (Fl.Cir.Ct. Oct. 30, 2002) [Koontz IV].
[47] *Id.*
[48] *Id.*
[49] *Id.*

The District appealed the circuit court's final decision granting Koontz compensation for the temporary taking of his property.[50] The District Court of Appeal of Florida recognized the circuit court's use of the *Nollan/Dolan* test and noted that the District did not raise any challenge to the factual findings of evidence supporting the lower court's conclusion.[51] Instead, the District focused its appeal on the contention that section 373.617(2) of the Florida Water Resources Act limited the scope of the circuit court's review to only those cases in which a constitutional taking could be proven.[52] The District further argued that Koontz's claim was more accurately a challenge to the merits of the permit denial, which it claimed could only be pursued in an administrative proceeding.[53] In considering the District's argument, the court of appeals addressed the issue of "whether an exaction claim is cognizable when the landowner refuses to agree to an improper request from the government resulting in the denial of the permit."[54] In light of *Dolan*, the court concluded that the United States Supreme Court had previously decided that an exaction occurs at the moment a requirement is placed upon a developer to do something as a condition to receiving municipal approval.[55]

Next, the court deliberated over the second issue raised by the District: whether a cause of action for a regulatory taking exists when the condition imposed does not involve a physical dedication of land, but rather an expenditure of money for improvements.[56] Again, the court noted that through its decision in *Ehrlich v. City of Culver City*, the United States Supreme Court implicitly held that monetary conditions placed on permit approval were still subject to the

[50] *Koontz V*, 5 So.3d at 8.
[51] *Id.* at 10.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 11.
[55] *Id.* at 11-12.
[56] *Id.* at 12.

Dolan "rough proportionality" standard.[57] In sum, the court of appeals affirmed the circuit court's decision that Koontz had been subjected to a regulatory taking of his property, and further certified the issues to the State's Supreme Court.[58]

In 2011, the Florida Supreme Court agreed that the issue presented in the lower courts was of great public importance. As such, the Court phrased the following question for review:

> Do the Fifth Amendment to the United States Constitution and Article X, Section 6(a) of the Florida Constitution recognize an exactions taking under the holdings of *Nolan v. California Coastal Commission* and *Dolan v. City of Tigard*, where there is no compelled dedication of any interest in real property to public use and the alleged exaction is a non-land use monetary condition for permit approval which never occurs and no permit is ever issued?[59]

After an extensive review of the takings clauses of the United States Constitution as well as the Florida Constitution, the Florida Supreme Court held that "the *Nollan/Dolan* rule with regard to 'essential nexus' and 'rough proportionality' is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval."[60] Furthermore, the regulatory agency must have issued the permit sought, "thereby rendering the owner's interest in real property subject to the dedication imposed."[61]

The Court reasoned that such a narrow application of the *Nollan/Dolan* test was both necessary and logical for two specific reasons.[62] First, the Court claimed that regulating land-use, as designated by the United States Supreme Court to be "peculiarly within the province of

[57] *Id.*
[58] *Id.* at 7.
[59] St. Johns River Water Mgmt. Dist. v. Koontz, 77 So.3d 1220, 1222 (Fl. 2011) [Koontz VI].
[60] *Id.* at 1230.
[61] *Id.*
[62] *Id.* at 1231.

state and local legislative authorities," would become excessively expensive.[63] Second, the Court rationalized that as a result of the first consequence, agencies would begin to deny permits outright without engaging in discussions or negotiations with the applicant simply to avoid the risk of litigation.[64] Accordingly, the Court refused to broadly apply such a rule of law that may place Florida land-use restrictions in an unwarranted predicament.[65]

Ultimately, the Florida Supreme Court held that the District Court of Appeal erred in its application of the *Nollan/Dolan* test to the demands proposed by the District because those demands were monetary, rather than the dedication of an interest in real property.[66] The court further stated that even if it had agreed to *Nollan/Dolan*'s application to non-property exactions, Koontz's claim would still have failed due to the District's denial of his land development permit.[67] In all instances, the Court declared that an unconstitutional taking of Koontz's property did not occur and the case was remanded for proceedings consistent with its legal determination.[68]

In June of 2012, Coy Koontz's son, Coy Koontz Jr., petitioned the case to the United States Supreme Court on his father's behalf.[69] The Court granted certiorari and issued its opinion on June 25, 2013,[70] addressing the two main issues that had long been troubling the Florida courts throughout this case: (1) whether an unconstitutional taking claim can succeed if the land-use permit is denied and no property is ever taken, and (2) whether a demand for

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Patrick J. Schneider et al, *U.S. Supreme Court Decision Expands Scope of Takings Clause*, FOSTER PEPPER PLLC, June 26, 2013.
[70] Brian T. Hodges, *Koontz v. St. Johns River Water Management District and Its Implications for Takings Law*, THE FEDERALIST SOCIETY, February 28, 2014.

money, rather than real property, can give rise to an unconstitutional taking claim under the *Nollan/Dolan* test.[71] The Court ruled in favor of Koontz on both issues and held that the government's mitigation demands from a land-use permit applicant must satisfy the *Nollan/Dolan* requirements even when (1) the permit is denied,[72] and (2) the demand is for money.[73]

Acknowledging the notion that the government cannot deny a benefit to an individual exercising a constitutional right, the Supreme Court clarified the applicable rules of law exercised in this case.[74] In its unanimous decision regarding the first issue, the Court noted that the *Nollan/Dolan* test is a "special application" of the unconstitutional conditions doctrine,[75] which was enacted to support the Constitution's enumerated rights[76] by forbidding the government from "coercively withholding benefits from those who exercise them."[77] The Court stated that "[u]nder *Nollan/Dolan* 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."[78] The Court further clarified that the *Nollan/Dolan* principles do not change "depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so."[79] In making such a determination, the Court relied heavily on its past decisions in which

[71] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) [Koontz I].
[72] *Id.*
[73] *Id.* at 2590.
[74] *Id.* at 2594.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 2595.
[78] *Id.*
[79] *Id.*

it concluded that the denial of governmental benefits is impermissible under the unconstitutional conditions doctrine.[80]

In addressing the second issue, the 5-4 majority noted that it is not the specifications of the demand itself that give rise to the unconstitutional conditions doctrine, but rather the government's act of pressuring a person to do something that it does not have the constitutional authority to order them to do.[81] The Court considered the District's argument that an obligation to spend money can never provide the basis for a takings claim,[82] and concluded that an acceptance of this argument would only ease the method under which land-use permitting officials evade the limitations of the *Nollan/Dolan* requirements.[83] In addition, the Court recognized that monetary obligations placed on a landowner significantly burden the ownership in that particular portion of land.[84] In essence, the Court embraced Koontz's argument that "when the government commands the relinquishment of funds linked to a specific identifiable property interest," a *per se* takings analysis should be undertaken.[85] By transferring the interest in property from the landowner to the government, the Court agreed that any demand placed thereon would amount to a *per se* taking and should be analyzed accordingly.[86]

Justice Kagan's dissent, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, focused mainly on the second issue regarding the extension of the *Nollan/Dolan* test to monetary exactions.[87] While agreeing with the majority that the "*Nollan/Dolan* standard applies not only when the government approves a development permit conditioned on the

[80] *Id.*
[81] *Id.* at 2598.
[82] *Id.* at 2599.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 2600.
[86] *Id.*
[87] *Id.* at 2603 (Kagan, J., dissenting).

owner's conveyance of a property interest, but also when the government denies a permit until the owner meets the condition,"[88] the dissent strongly debated the theory that government imposed financial obligations similarly trigger the protection of the Takings Clause.[89]

The dissenting Justices reasoned that the *Nollan/Dolan* test could only apply in the abovementioned instance if the Court had established that requiring an individual to pay money to the government or spend money on its behalf, constituted an unconstitutional taking.[90] However, the dissenters argued that this Court has never previously established such a rule.[91] By recognizing that an order requiring individuals to pay money to repair public wetlands does not affect a "specific and identified property right," but instead imposes an obligation to perform an act, the dissenters could not contend that the situation at hand constituted a taking.[92] In addition, the dissenting opinion found that government's enforcement of a liability to pay money is not an unconstitutional taking and, therefore, does not trigger the use of the *Nollan-Dolan* test.[93]

Moreover, the dissenters believed that by applying the *Nollan/Dolan* test to permit conditions requiring monetary payments, the majority over extended the Takings Clause into the heart of local land-use regulation and service delivery while simultaneously heightening the scrutiny for simple payment demands.[94] Relying on its former decision of *Eastern Enterprises v. Apfel*, the dissenters declared that "[*Nollan* and *Dolan*] have no application when governments impose a general financial obligation as part of the permitting process because under *Apfel* such an action does not otherwise trigger the Takings Clause's protections."[95] By broadening the

[88] *Id.*
[89] *Id.* at 2604.
[90] *Id.* at 2605.
[91] *Id.*
[92] *Id.* at 2606.
[93] *Id.*
[94] *Id.* at 2607.
[95] *Id.* at 2609.

exercise of the *Nollan/Dolan* test, the minority affirmed that the majority's decision had "at a minimum," deprived state and local governments of "necessary predictability."[96] Thus, the dissenting Justices concluded "the government commits a taking only when it appropriates a specific property interest, not when it requires a person to pay or spend money."[97]

Outside of their disagreement with the majority's extension of the *Nollan/Dolan* test to monetary exactions, the dissenting Justices asserted an argument that the Takings Clause analysis was inappropriate, as the present case never involved an unconstitutional condition.[98] The dissent reasoned that Koontz's failure in obtaining permit approval was not a consequence of his refusal to accept an extortionate demand or condition.[99] Instead, the Justices opined that the denial was due to legal inadequacies in his application combined with his reluctance to correct them in any way at all.[100] The dissent found that the District offered Koontz several ways in which his permit applications could be amended to succumb to the legal boundaries set forth by the Florida legislature, though Koontz refused to entertain any of those suggestions.[101] As a result, the dissenters took the position that the District did not impose an unconstitutional condition because no condition was ever actually imposed.[102] Thus, the minority deemed the takings jurisprudence analysis inappropriate.[103]

[96] *Id.*
[97] *Id.* at 2612.
[98] *Id.* at 2604.
[99] *Id.* at 2611.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 2612.
[103] *Id.*

III. History of United States Takings Jurisprudence

A. The Takings Clause

Takings jurisprudence continues to play a large role in our constitutional history as the debate over balancing private property rights against conflicting societal needs continues to grow.[104] Embedded into the Fifth Amendment of the United States Constitution, the Takings Clause provides that "[no] private property [shall] be taken for public use, without just compensation."[105] The clause was subsequently incorporated into the due process clause of the Fourteenth Amendment, extending its application to the states.[106] Until the 19th century, the Supreme Court only applied the Takings Clause to cases involving condemnation, or "the formal exercise by government of its eminent domain power to take property coercively, upon payment of just compensation to the property owner."[107] In those instances, the typical issue revolved around what constituted "just compensation," rather than whether or not a taking had occurred.[108]

Having only ever been applied to a complete dismissal of an owner's possession in their property (i.e., a "per se" taking), the application of the Takings Clause was drastically extended by Justice Holmes' decision in the 1922 case of *Pennsylvania Coal Company v. Mahon*.[109] Through the *Mahon* decision, Justice Holmes recognized that if individuals were to be protected against physical appropriations of their private property, a stronger enforcement of constitutional limits on the government's police power was necessary.[110] Holmes declared that if the absolute

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[104] *See generally* ROBERT MELTZ, CONG. RESEARCH SERV., 7-5700 TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 1 (2015).
[105] U.S. CONST. amend. V.
[106] Chicago B. & Q. R. Co. v. City of Chi., 166 U.S. 226, 239 (1897).
[107] Meltz, *supra* note 104 at 1.
[108] *Id.*
[109] *Id.*
[110] Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

protection of private property under the Fifth Amendment continued to be uncompensated and "qualified under the police power," the notion of private property would ultimately cease to exist.[111] For this reason, Holmes expanded the availability of takings actions from mere government appropriations and physical invasions of property, to governmental regulations imposed on property use.[112] Through this expansion, governmental regulatory interferences with property rights were limited in the same manner as governmental appropriations of property.[113] Thus, by stating "while property may be regulated to a certain extent, if a regulation goes too far, it will be recognized as a taking," Justice Holmes established the Regulatory Taking.[114]

While the *Mahon* decision placed a limitation on the governmental regulations implemented against private property, it failed to specify when, and under what circumstances, a regulation would be deemed to have gone "too far."[115] After several years, the United States Supreme Court declared that the ultimate purpose behind the establishment of the Takings Clause was to "bar the government from forcing some people alone to bear public burdens . . . [that] should be borne by the public as a whole."[116] In addition, the clause was not intended to completely limit government interference with property rights, but rather to put a restraint on the exercise of that power (i.e., providing just compensation).[117] Thus, the Supreme Court eventually began to recognize instances in which governmental regulations had exceeded their boundaries, resulting in unconstitutional takings.

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[111] *Id.* at 415.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
[116] Armstrong v. United States, 362 U.S. 40, 49 (1960).
[117] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 314 (1987).

In 1978, the Supreme Court established a three-part test to determine whether or not a governmental regulation had in fact, exceeded its boundaries.[118] In *Penn Central Transportation Company v. City of New York*, New York City responded to the growing concern of historic building preservation by enacting its Landmark Preservation Law in 1965.[119] The Act provided three separate procedures for which landowners who wished to transform landmark sites would be able to obtain proper administrative approval.[120] The first option under the Act for landowners was to file an application with the Landmarks Preservation Commission (the "Commission") for a "certificate of no effect on protected architectural features."[121] Second, the Act stated that a landowner could apply to the Commission for a certificate of "appropriateness," which would be granted if the proposed construction did not obstruct the "protection, enhancement, perpetuation, and use of the landmark."[122] Finally, the Act provided that landowners may seek a certificate of appropriateness on the ground of "insufficient return," under which approval would be given based upon whether or not the landowner enjoyed a tax exemption.[123]

The *Penn Central* case involved the application of New York City's Landmarks Preservation Law to Grand Central Terminal, one of New York City's most famous buildings.[124] The Commission designated the Terminal a landmark,[125] upon which the landowners intended to construct a multistory office building.[126] In compliance with New York City law, the

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[118] Edward J. Sullivan, *A Brief History of the Takings Clause*, Wash. Univ. in St. Louis Land Use Law, *available at* http://landuselaw.wustl.edu/articles/brief_hx_taking.htm.
[119] Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 109 (1978).
[120] *Id.* at 112.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 115.
[125] *Id.*
[126] *Id.* at 116.

landowners applied to the Commission for permission regarding two proposed construction projects for the Terminal.[127] The first was to construct an office building above the Terminal, while the second was to tear down the 42d Street façade and construct a 53-story office building in its place.[128] After deliberation, the Commission denied both proposals.[129]

In addressing whether or not the restrictions placed upon the landowners' "exploitation" of the Terminal constituted a taking of property for public use within the Fifth Amendment, the Supreme Court acknowledged that it had previously failed to develop a set formula for determining "justice and fairness" in Regulatory Takings situations.[130] As such, the Court looked to past decisions identifying factors of particular significance to takings jurisprudence, and compiled a formal three-part test to be used in determining whether or not a Regulatory Taking has occurred.[131] In what would come to be known as the "*Penn Central* balancing test," the Supreme Court concluded that the following factors were to be considered in a potential Regulatory Taking situation: (1) the 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 governmental action (i.e., "adjusting the benefits and burdens of economic life to promote the common good").[132]

In *Penn Central*, the Court applied the three-part test and found that the restrictions imposed by the Commission (1) did not deprive the landowners of all their economic rights in the property,[133] (2) afforded the landowners the opportunity to further enhance the Terminal site

[127] *Id.*
[128] *Id.* at 116-17.
[129] *Id.* at 117.
[130] *Id.* at 123-24.
[131] *Id.* at 124.
[132] *Id.*
[133] *Id.* at 136.

and other properties,[134] and (3) were substantially related to the promotion of the general welfare and permitted "reasonable beneficial use of the landmark site."[135] Therefore, the Court concluded that the application of New York City's Landmarks Law did not affect a Regulatory Taking of the landowners' property.[136]

Several years later in 1992, the Supreme Court again expanded the application of the Takings Clause.[137] This time, the Court acknowledged that "per se" takings occur not only through the appropriation or physical invasion of property, but through the deprivation of all economic benefit of property as well.[138] In *Lucas v. South Carolina Coastal Council*, a landowner purchased two plots of land on the South Carolina barrier island, upon which he intended to build residential homes.[139] Two years after the landowner purchased the property lots, the state legislature enacted the Beachfront Management Act (the "Act"),[140] barring permanent structures from being erected on beachfront property that was subject to substantial erosion.[141] In response to the legislation, the landowner brought suit alleging that while the Act was a valid exercise of the state's police power, the ban "deprived him of all economically viable use of his property and therefore effected a 'taking' under the Fifth and Fourteenth Amendments" without just compensation.[142]

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[134] *Id.* at 137.
[135] *Id.* at 138.
[136] *Id.*
[137] Prior to this expansion, the Supreme Court decided *Agins v. City of Tiburon*, 447 U.S. 225 (1980), which created the "substantially advances a legitimate state interest" requirement for determining whether or not a regulation amounts to a taking. This requirement was later eliminated by the Supreme Court's decisions in *Nollan* and *Dolan*, where it clarified that "substantially advances a legitimate state interest" is not a constitutional test for the purpose of the Takings Clause. Sullivan, *supra* note 118.
[138] *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[139] *Id.* at 1006-07.
[140] Beachfront Management Act, S.C.Code Ann. § 48-39-250.
[141] *Lucas*, 505 U.S. at 1008.
[142] *Id.* at 1009.

The Court considered whether the Act's effect on the economic value of the landowner's lots constituted an unconstitutional taking under the Fifth and Fourteenth Amendments requiring the payment of just compensation.[143] In its analysis, the Court described two "discrete categories of regulatory actions" that required restraint even though they could not technically be classified as Regulatory Takings under the *Penn Central* balancing test.[144] The first category encompassed regulations that "compel the property owner to suffer a [permanent] physical 'invasion' of his or her property."[145] The second category involved instances where regulatory action "denies all economically beneficial or productive use of land."[146] In the first instance, the Court recognized that, generally, it has always required compensation no matter how minute the intrusion or how heavy the public purpose behind it.[147] However, the Court found that under the second category, a total deprivation of the beneficial use of the parcel of land is seemingly equivalent to a physical appropriation of that land, and should equally be compensated and treated as such.[148] Furthermore, the Court stated, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[149] Accordingly, the Court acknowledged these two categories of regulatory actions as Categorical Takings.[150]

In addition, the Court ruled that if a state seeks to avoid paying just compensation for a regulation that deprives a landowner of all economic benefit of his land, it must show that the

[143] *Id.* at 1006.
[144] *Id.* at 1015.
[145] *Id.*
[146] *Id.*
[147] *Id.*; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982).
[148] *Lucas*, 505 U.S. at 1017.
[149] *Id.* at 1019.
[150] Also known as "per se" takings. Meltz, *supra* note 107 at 3.

"proscribed use interests were not part of the title to begin with."[151] Particularly in *Lucas*, the Supreme Court specified that if South Carolina were to claim that the Beachfront Management Act did not amount to a taking, it would have to show necessary nuisance and property law that prohibits the use of the landowners land in the way he intends to improve it and the way the property is found.[152] Because no such law was introduced, and the state had deprived the landowner of all economically beneficial use of his property, the Court held that an unconstitutional taking had transpired.[153]

Though the well-established Regulatory and Categorical Takings analyses have since played a consistent part in takings jurisprudence, the Supreme Court continues to clarify certain ambiguities of the Takings Clause that remain. Specifically, the Court now recognizes an individual's right to assert a takings claim after the passage of title,[154] and has also recognized the concept of Temporary Takings.[155] First, in its 2001 decision of *Palazzolo v. Rhode Island,* the Supreme Court held that a purchaser or successive titleholder who is deemed to have notice of a prior-enacted land restriction is not barred from claiming that such restriction affects a taking.[156] Thus, "a regulation that otherwise would be unconstitutional absent just compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[157] Additionally, in 2002 the Court established the concept of Temporary Takings through the *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* decision.[158] Per

[151] *Id.* at 1027.
[152] *Id.* at 1031.
[153] *Id.* at 1032.
[154] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).
[155] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency 535 U.S. 302 (2002).
[156] *Palazzolo*, 533 U.S. at 626, 630.
[157] *Id.* at 629-30.
[158] *Tahoe-Sierra*, 535 U.S. 302.

Justice Stevens, the Court held that (1) moratoria[159] do not constitute a "per se" taking,[160] and (2) the issue of whether the Takings Clause requires compensation for a temporary regulation denying a property owner of all economic use of his property is to be decided as a Regulatory Taking under the *Penn Central* balancing test rather than under the Categorical Taking analysis.[161]

Thus, while many may perceive the Takings Clause as an end-all be-all doctrine, its consistent need for clarification of its application proves otherwise. Demanding such a high level of attention from the Supreme Court, takings jurisprudence continues to transform in order to maintain the necessary balance between private property rights and societal needs.

B. Unconstitutional Conditions Doctrine

Although the unconstitutional conditions doctrine did not begin as a factor to be considered in a Takings Clause analysis, it has since evolved into a significant component of historical takings jurisprudence.[162] The doctrine was initially established for the purpose of liberating individuals' constitutional rights by "preventing the government from coercing people into giving them up."[163] In broad terms, the doctrine provides that "the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government has the discretion to withhold the benefit altogether."[164] Over time, courts expanded

[159] *Moratorium*, BLACK'S LAW DICTIONARY 1101 (9th ed. 2009) (defining moratorium as the suspension of a specific activity).
[160] *Tahoe-Sierra*, 535 U.S. at 302.
[161] *Id.* at 342.
[162] ROBERT MELTZ, DWIGHT MERRIAM, RICK FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATIONS 143 (1998).
[163] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013) [Koontz I].
[164] St. Johns River Water Mgmt. Dist. v. Koontz, 5 So.3d 8, 14 (Fla. 5th DCA 2009) [Koontz V] (citing 16A AM. JUR. 2D *Constitutional Law* § 395 (2008)).

the doctrine's application to gratuitous benefits, or other benefits that individuals may not have initially been entitled to.[165]

The history of the doctrine can be traced as far back as 1874.[166] For centuries, the doctrine has protected individuals from having their benefits conditioned upon the surrender of an enumerated right.[167] The Supreme Court first used the term, "unconstitutional condition" in its 1876 decision of *Doyle v. Continental Insurance Company*.[168] There, the Court stated "[t]hough a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."[169]

Perhaps one of the most historic cases recognizing and effectuating the unconstitutional conditions doctrine was *Frost v. Railroad Commission of State of California*, decided by the Supreme Court in 1926.[170] In *Frost*, the Court decided whether the State of California could require a private company to be licensed as a common carrier before allowing the company to use public highways to carry out its transportation contracts.[171] Recognizing that an "unconstitutional requirement was being used as a condition precedent to the enjoyment of a privilege," the Court made the following determination:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the

[165] United States v. American Library Assoc., Inc., 539 U.S. 194, 210 (2003).
[166] Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) (claiming, "[a] man may not barter away his life or his freedom, or his substantial rights").
[167] Ronald B. Standler, *Doctrine of Unconstitutional Conditions in the USA* (March 4, 2005), *available at* www.rbs2.com/duc.pdf.
[168] Doyle v. Continental Ins. Co., 94 U.S. 535, 543 (1876).
[169] *Id.* at 543; *see also* S. Pac. Co. v. Denton, 146 U.S. 202, 207 (1892) (holding that the surrendering of a constitutional right and privilege as a condition precedent to obtaining a permit to do business is unconstitutional and void).
[170] Frost v. R.R. Comm'n of State of California, 271 U.S. 583 (1926).
[171] *Id.* at 589, 592-93.

> citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions, which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition in its favor, it may, in like manner, compel a surrender of all. It is inconvincible that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[172]

Additionally, the Court in *Frost* refused to attach significance to whether the condition imposed was a condition precedent or a condition subsequent.[173] The Court concluded that this limitation on a state's power to impose an unconstitutional condition upon the granting of a privilege is a principle to be construed more broadly than it has been in the past.[174] Over time, the Supreme Court continued to implement the doctrine, and remained consistent in noting, "States cannot use their most characteristic powers to reach unconstitutional results."[175]

While the unconstitutional conditions doctrine is well established, it has been known to contain ambiguities in its application. For example, the doctrine has failed to provide a clear

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[172] *Id.* at 593-94.
[173] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2589 (2013) [Koontz I] (citing *Frost*, 271 U.S. at 592-93).
[174] *Frost*, 271 U.S. at 609.
[175] State of Missouri v. Duncan, 265 U.S. 17, 24 (1924); *see also* Memorial Hospital v. Maricopa County, 415 U.S. 250, 269 (1974) (holding that extending health care benefits only to those who had been residents of the country for at least one year is a burden on the right to travel and therefore, a violation of the unconstitutional conditions doctrine); Perry v. Sindermann, 408 U.S. 593, 592 (1972) (holding that a public college declining to renew a professor's contract due to his outspoken criticism of the administration is a violation of the unconstitutional conditions doctrine); *but see* Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) (holding that a requirement placed on a law school to offer military recruiters the same access to its campus and students as nonmilitary recruiters in order to receive federal funding is not a violation of the unconstitutional conditions doctrine); Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983) (holding that granting tax exemptions for certain nonprofit organizations that do not engage in activities attempting to influence legislation is not a violation of the unconstitutional conditions doctrine).

response as to when, and under what circumstances, the government may ask an individual to waive his or her constitutional right in order to obtain a benefit that the government was not otherwise obligated to provide.[176] Until recently, it was unclear as to when the government could condition discretionary benefits upon the waiver of individuals' rights.[177] Only after two prominent Supreme Court decisions (*Nollan* and *Dolan*) permanently incorporated the unconstitutional conditions doctrine into regulatory takings law, did the doctrine find its official role in takings jurisprudence.[178]

C. Nollan/Dolan Land-Use Exactions Doctrine

The exactions theory of takings jurisprudence has been historically rooted in the unconstitutional conditions doctrine, consequently limiting the manner in which the government exercises its discretionary authority.[179] While courts and scholars alike continue to struggle over a single definition of the term "exaction,"[180] the notion that the government is placing restrictive conditions upon permit approval for property owners is widely consented to.[181] As such, through its decisions in *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*, the Supreme Court established a two-prong test (the "Nollan/Dolan" test) to determine the constitutionality of an exaction demand as a condition precedent to land developmental approval.[182]

[176] St. Johns River Water Mgmt. Dist. v. Koontz, 5 So.3d 8, 14 (Fla. 5th DCA 2009) [Koontz V].
[177] Thomas W. Merill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 859 (1995).
[178] Meltz, *supra* note 162, at 143.
[179] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).
[180] *Koontz V*, 5 So.3d at 13.
[181] *Id.*
[182] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

The first prong of the *Nollan/Dolan* land-use exactions doctrine was founded in the Supreme Court's decision of *Nollan v. California Coastal Commission*.[183] In *Nollan*, the landowners were the lessees of California beachfront property with an option to buy.[184] The property contained a small bungalow, and after several years of renting the bungalow to summer vacationers, the landowners attempted to exercise their option to purchase the property.[185] The purchase option was conditioned upon the demolition of the bungalow with an updated structural replacement.[186] In order to meet this condition, the landowners were required to obtain a coastal development permit from the California Coastal Commission ("Commission").[187] Upon submission of the permit, the Commission informed the landowners that the permit would be granted, "subject to the condition that they allow the public an easement to pass across a portion of the property."[188] The Commission's reasoning behind this condition was that the proposed easement would provide the public with easier access to a nearby park and public beach.[189] The landowners protested the Commission's easement proposal and filed suit arguing that the condition imposed was a violation of the Takings Clause of the Fifth Amendment.[190]

The Supreme Court addressed whether using the uncompensated conveyance of the landowners' property as a condition precedent to receiving a land-use permit violated the Fourteenth Amendment.[191] While the Court acknowledged its long-standing rule that "land-use regulation does not effect a taking if it 'substantially advances legitimate state interest' and does

[183] *Nollan*, 483 U.S. 825.
[184] *Id.* at 827.
[185] *Id.* at 828.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.* at 834.

not 'deny an owner economically viable use of his land,'"[192] it simultaneously recognized that "the right to exclude others is 'one of the most essential sticks in the bundle of rights commonly characterized as property.'"[193] In addition, the majority noted that a permit condition that fulfills the same legitimate police-power purpose as a refusal to issue that permit is not considered an unconstitutional taking if the refusal to issue that permit alone would not also result in a taking.[194] Furthermore, the Court held that "unless the permit condition serves the same governmental purpose as the developmental ban (i.e., there is an "essential nexus" between the two), the restriction is not a valid regulation of land-use."[195] In conclusion, the Court found that an "essential nexus" did not exist between allowing the public easier access to the beach and the property easement imposed by the Commission, and that, therefore, an unconstitutional taking had occurred.[196]

Nearly a decade after deciding *Nollan*, the Supreme Court decided *Dolan v. City of Tigard*, which would later become the second prong of the *Nollan/Dolan* land-use exactions doctrine.[197] In *Dolan*, the owner of a plumbing and electric supply store, complying with Oregon's comprehensive land-use management program, applied for a permit to develop her land.[198] The landowner's permit application expressly contained her intentions of doubling the size of her store, while also constructing a large parking lot.[199] The City Planning Commission ("Commission") agreed to grant the landowner's permit if she dedicated roughly 7,000 square feet (approximately10%) of her property to the city for the improvement of a storm drainage

[192] *Id.*
[193] *Id.* at 831 (citing *Loretto*, 458 U.S. at 433).
[194] *Id.* at 836.
[195] *Id.* at 837.
[196] *Id.*
[197] Dolan v. City of Tigard, 512 U.S. 374 (1994).
[198] *Id.* at 379.
[199] *Id.*

system (i.e., a floodplain easement), as well as the construction of a pedestrian/bicycle pathway adjacent to her property.[200] The landowner brought suit on the ground that the city's requirements were not related to the proposed property development and therefore constituted an unconstitutional taking under the Fifth Amendment.[201]

In evaluating the landowner's claim, the Supreme Court first considered whether the "essential nexus" requirement formally established in *Nollan*, existed between the "legitimate state interest" and the permit condition implemented by the city.[202] In making its determination, the Court conceded that the city's interest in preventing flooding and the reducing traffic congestion were public purposes that the Court has consistently upheld as being legitimate state interests.[203] Therefore, the Court found that an "essential nexus" existed between preventing flooding and limiting development within 100 feet of a creek's floodplain.[204]

Furthering its analysis, the Court next considered "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development.[205] In resolving this issue, the Court established the term "rough proportionality," and explained "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[206] After applying the newly implemented requirement to the facts at hand, the Supreme Court held that no rough proportionality existed between the floodplain easement or the bicycle pathway, and the

[200] *Id.* at 380.
[201] *Id.* at 382.
[202] *Id.* at 386 (citing *Nollan,* 483 U.S. at 837).
[203] *Id,* at 387.
[204] *Id.*
[205] *Id.* at 388.
[206] *Id.* at 391.

landowner's proposed development.[207] Hence, the exaction imposed created an unconstitutional taking.

In essence, the *Nollan/Dolan* test provides heightened scrutiny for land-use exactions under the unconstitutional conditions doctrine.[208] After the establishment of the *Nollan/Dolan* test, municipalities requiring an exaction as a condition to receiving a development permit must show the existence of an "essential nexus" for the reasoning requiring the permit, as well as a "rough proportionality" to the potential impact of the development project.[209] Consequently, if an exaction fails to meet either prong of the *Nollan/Dolan* test, it will likely be deemed an unconstitutional taking under the Fifth Amendment.[210] Although the *Nollan/Dolan* test seems to be conclusive on its face, the ambiguity of the scope and expansion of the test has caused several courts to render inconsistent and conflicting decisions about the test's overall application.

For the first sixteen years following the Supreme Court's decision in *Dolan*, only two Supreme Court decisions expressly provided that the scope of the *Nollan/Dolan* test was to be limited to land-use exactions.[211] For instance, in the 1999 decision of *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., the Court expressed "we have 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."[212] Again, in 2005, the Court noted that the *Nollan/Dolan* test distinctly involves "Fifth Amendment takings challenges to adjudicative land-use exactions - specifically, government demands that landowners dedicate easements over their land to allow the public access across their property as

[207] *Id.* at 394-95.
[208] Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should be Triggered*, 28 CARDOZO L. REV. 1563, 1564 (2006).
[209] Dolan v. City of Tigard, 512 U.S. 374, 386 (1994).
[210] Needleman, *supra* note 208, at 1564.
[211] St. Johns River Water Mgmt. Dist. v. Koontz, 77 So.3d 1220, 1228 (Fl. 2011) [Koontz VI].
[212] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S., 687, 702 (1999).

a condition of obtaining development permits."[213] Although both of the Supreme Court's decisions in *City of Monterey* as well as *Lingle* clearly restricted the scope of the *Nollan/Dolan* test to only those cases involving land use dedication exactions, the lower courts remained inconsistent with their interpretations of such.[214]

Subsequent to the *City of Monterey* and *Lingle* cases, an entire line of lower court cases interpreted the scope of *Nollan/Dolan* consistently with the Supreme Court's decisions. *See McClung v. City of Sumner*[215] (holding monetary conditions are distinguishable from land conditions); *Clajon Production Corporation v. Petera*[216] (holding *Nollan/Dolan* is understood as extending its analysis to complete physical occupation cases in which the government achieves possession of one's property); *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*[217] (holding *Nollan/Dolan* only applies to physical conditions imposed upon land).

However, several other cases being concurrently decided held that the *Nollan/Dolan* test extended beyond the scope of the real property conditions.[218] *See e.g., Ehrlich v. City of Culver City*[219] (rejecting the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions); *Town of Flower Mound v. Stafford Estates Limited Partnership*[220] (holding that the *Nollan/Dolan* test should be expanded to include certain non-real property conditions that arise from generally applicable regulations).

Although the *Nollan/Dolan* test seems to be conclusive and well understood, the history of its use and application suggests otherwise. While the Supreme Court had clearly determined

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[213] Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005).
[214] St. Johns River Water Mgmt. Dist. v. Koontz, 77 So.3d 1220, 1229 (Fl. 2011) [Koontz VI].
[215] McClung v. City of Sumner, 548 F.3d 1219, 1228 (9th Cir. 2008).
[216] Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995).
[217] Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach, 345 S.C. 418 (2001).
[218] *Koontz VI*, 77 So.3d at 1229.
[219] Ehrlich v. City of Culver City, 911 P.2d 429, 444 (1996).
[220] Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

the scope of the *Nollan/Dolan* test through its decisions in *City of Monterey* and *Lingle*, its most recent decision regarding the issue, *Koontz*, rendered an opposing conclusion. The inconsistencies shown by the Supreme Court through not only the application of the *Nollan/Dolan* test but also though several other issues involving the constitutional Takings Clause,[221] has proven that takings jurisprudence is an area of the law to be consistently altered to fit the ever-changing needs of society.

IV. The Effects of *Koontz* on the Scope of the *Nollan/Dolan* Land Use Exactions Doctrine

The Supreme Court's decision in *Koontz* has been claimed as "one of the most significant and far reaching property rights decisions in decades" by scholars, authors, and commentators on both sides of the historical property debate.[222] Although most of that praise is due to *Koontz*'s almost immediate impact on the land use permitting process, its concise conclusion on two highly relevant legal issues will likely make it long-lasting precedent for future situations involving property issues.[223]

First, the Supreme Court resolved *Koontz* under an unconstitutional conditions doctrine and *Nollan/Dolan* exactions analysis.[224] While such an analysis remains embedded in Takings jurisprudence, it provided a special application for land use permitting situations.[225]

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[221] In 2012, the Supreme Court struggled with the issue of where to draw the line between a tort and a taking. In *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), the U.S. Army Corps of Engineers authorized temporary flooding that caused damage and destruction to a substantial amount of forest land owned by the Arkansas Game and Fish Commission. The Court held that the damage from the flooding, while only temporary, gave rise to negligence claims as well as takings claims.
[222] Brian T. Hodges, *Koontz v. St. Johns River Water Management District and its Implications for Takings Law*, 14 The Federalist Society, no.3, October 2013 at 7.
[223] *Id.*
[224] *Id.*
[225] *Id.*

Consequently, the Supreme Court's use of the unconstitutional conditions doctrine analysis equipped injured property owners with a cause of action that is recognizably different, both procedurally as well as substantively, from a Regulatory Takings claim.[226]

As previously discussed, the Regulatory Takings theory is centered on a showing of the degree of actual governmental interference with an owner's rights in his or her property. In contrast, the unconstitutional conditions doctrine, subject to the *Nollan/Dolan* test, requires a showing that a mere governmental demand on an individual's property would require just compensation to the landowner. More specifically, through *Nollan/Dolan*, the unconstitutional conditions doctrine protects private actors by requiring the government to show both "an essential nexus" to "the end advanced as the justification for" the condition,[227] and that the condition is "roughly proportional" to the "impact of the proposed development."[228] By deciding *Koontz* under such an analysis, the Court subjected all land-use permits to the *Nollan/Dolan* test "even when the government *denies* the permit."[229] Therefore, the government does not need to exercise actual control over the demanded property for a violation of the unconstitutional conditions doctrine to occur.[230] Instead, pursuant to *Koontz*, a violation of the doctrine occurs at the exact moment the demand is made.[231] This analytical path, correctly chosen by the Supreme Court, has proven to be highly beneficial to the affected landowners.

The second legal conclusion made by the Supreme Court's decision in *Koontz*, and perhaps the most important, is that money is private property deserving of Takings Clause protection. While that conclusion may seem apparent to many, courts around the nation have

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[226] *Id.*
[227] Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).
[228] Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
[229] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013) [Koontz I].
[230] Hodges, *supra* note 218, at 8.
[231] *Id.* at 9.

struggled with the notion that money is private property and should be protected the same as land.[232] Due to the fact that real property had consistently been the only item constitutionally protected as private property, some courts were reluctant to recognize money as private property too. During this time, agencies often imposed monetary demands on individuals, as opposed to property demands, as a means of avoiding the heightened scrutiny of the *Nollan/Dolan* test. While many jurisdictions allowed this, there were equally as many that did not, eventually giving rise to inconsistent case law on the scope of the *Nollan/Dolan* test.

For example, when the Supreme Court decided the *City of Monterey* and *Lingle* cases, the *Nollan/Dolan* test was still relatively new. Clearly, the Supreme Court did not anticipate governmental agencies formulating methods to avoid a Takings Clause analysis by imposing monetary exactions on their landowners. Through *Koontz*, the Supreme Court remedied the jurisdictional inconsistencies by correctly holding that the *Nollan/Dolan* test expanded to monetary demands made on property owners. Due to the simple fact that money, like land, is private property warranting constitutional protection, the decision should not have taken the Supreme Court decades after deciding *Nollan/Dolan*.

Unfortunately, it seems as though *Koontz* has not completely closed the "loophole" of agencies imposing monetary demands on individuals seeking permit approval. Several courts have lingered on the Court's language in *Koontz* that states, "it is beyond dispute that taxes and user fees ... are not takings," as well as, "[t]his case does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[233] As such, courts have been evading a Takings Clause analysis by simply labeling such monetary demands as "required assessments" or "monetary obligations"

[232] *See supra*, notes 113-14.
[233] *Koontz I,* 133 S. Ct. at 2600-01.

to receiving certain permits or licenses.[234] Additionally, a number of courts have limited their interpretation of the *Koontz* holding to a very narrow land-use permitting scenario.[235]

Throughout the history of our country, property has been consistently viewed as a sign of status, wealth, and power. Long before the existence of formal currency, property was most often the item used for bargaining power and trade. Being so, the protection of individual property was incorporated into the United States Constitution upon its enactment. In fact, individual's viewed the ownership of property to be of such prime importance, that its Constitutional protection did not just cover the notion that individuals have a right to own land. Instead, the protection further declared that the government cannot interfere with, take, or condition the use of that land for a beneficial public purpose without paying an individual just compensation for it (hence, the Takings Clause). Moreover, the government cannot place unconstitutional demands upon the use of that individually held property. From just a simple reading of the Constitutional safeguards for individual property, it is clear that the standard at which individuals place their private property rights is undoubtedly high.

Why then, is money viewed any differently? Certainly, there are things we *have* to do with our money, such as pay bills and taxes. And it is clear that money, unlike property, comes and goes in regularity. But is the government's placement of a monetary demand upon receiving a land use permit *really* any different than the government's placement of a property demand made for the same reason? It seems rather obvious that if the government cannot unconstitutionally condition the use of your individually held property in granting a land use

[234] *See* U.S. v. King Mountain Tobacco Co. Inc., No. 1:14–CV–3162–RMP, 2015 WL 5476520, at *4 (E.D. Wash 2015); BEG Investments, LLC v. Alberti, 85 F.Supp.3d 54, 61-62 (D.D.C. 2015).
[235] *See* ABC Holdings, Inc. v. Kittitas County, 348 P.3d 1222, 1229 (Wash. Ct. App. 2015) (refusing to extend *Koontz* to regulatory permit enforcement that does not compel a landowner to give up property); Koontz Coalition v. City of Seattle, No. C14–0218JLR, 2014 WL 5384434, at*1 (W.D. Wash 2014) (claiming that *Koontz* only applies to particular exactions and the impact of those exactions on a specific parcel of land).

permit, then they should not otherwise be able to condition the use of your individually held money just the same. Regardless of its characterization, either land or money, all forms of private property should be equally protected from unconstitutional conditions placed upon it by the government.

The Supreme Court's decision in *Koontz* did finally recognize that strict limitations needed to be implemented on the "all too-common municipal practice of exacting money from land-use applicants to fund unrelated public projects."[236] Moving forward, *Koontz* promises to furnish strict ramifications for jurisdictions that have historically allowed its governmental agencies to rely on "impact fees" to fund public projects. Most significantly, the Takings Clause now protects a person's money to the same extent that it protects their land.

History has evidenced that it is not only necessary, but also *paramount* for Takings jurisprudence to continue changing and redefining itself to maintain the balance between individual property rights and societal needs. The Supreme Court's decision in *Koontz* is confirmation of the need for continuous readjustment in the application of our constitutional provisions. While the decision has a revolutionary and profound meaning for many landowners, its clarification of already existing privileges held by persons nationwide is rather simplistic in nature. By considering the ultimate underlying purpose behind our individual constitutional rights, the Supreme Court's decision in *Koontz* has redefined the overall outlook of those constitutionally held rights for landowners across the nation.

[236] Hodges, *supra* note 222, at 2.